UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

vs. CRIMINAL NO. 1:21-CR-458(RJL)

RICHARD CROSBY, JR. June 23, 2023

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

Richard Crosby, the defendant in the above-captioned matter respectfully moves to dismiss Count One of the *Indictment*. He does so pursuant to the Fourteenth Amendment to the United States Constitution and Federal Rule of Criminal Procedure 12(b)(3)(A)(iv). The basis for this motion is that Mr. Crosby is subject to selective prosecution with respect to Count One of the Indictment. The unique nature of this case demonstrates this reality and defies traditional interests in judicial restraint. More than 1,000 people have been charged in connection with the January 6, 2021 insurrection; those defendants fall into distinct classes. The most high-profile class are those, such as the Oath Keepers and Proud Boys, who have been charged with acts of sedition and violence. The next class are those charged with felonies including discrete acts of violence against law enforcement. The third class are those who were charged with felony Obstruction of Congress, as Mr. Crosby is in Count One, in violation of 18 U.S.C. §§ 1512(c)(2). The final class are those who are charged solely with misdemeanors rooted in trespass or disorderly conduct. *See e.g. United States v. Connolly*, 1:23-cr-31(JMC); *see also Indictment*, Counts Two, Three, Five, and, Six. Those charged with misdemeanors entered the building for a period-of-time, chanted, passed through and exited. Mr. Crosby is charged with these offenses, *id.*, and misdemeanor Entry on the Floor of Congress in violation of 40 U.S.C. §5104(e)(2)(A). (Count Four). The *only thing* distinguishing Mr. Crosby from the misdemeanor class of defendants is his presence on the Senate floor. This fact may have symbolic value and make the

trespass more offensive—legitimately so. As a matter of law, however, it is an arbitrary and capricious basis for charging a felony case where similarly situated persons are charged with misdemeanors. Accordingly, Mr. Crosby respectfully moves to dismiss Count One of the indictment, only, on this theory.

Additionally, Mr. Crosby moves to dismiss on the grounds articulated in *United States v. Garrett Miller*, 1:21-cr-119(CJN), Doc. No. 72. However, he does so only for the purposes of preservation as this Court is clearly bound by the Court of Appeals decision in *United States v. Fischer*, 2023 U.S.App.LEXIS 8284, 2023 WL 2817988 (D.C. Cir., 2023). While this Court must deny the motion on that basis, he nonetheless asks to have it lodged for the record. The factual and legal grounds for each portion of the motion are set forth in this memorandum.

I. FACTUAL BASIS.

Mr. Crosby briefly addresses the general facts surrounding January 6, 2021 followed by the specific facts of his case. The defense presumes that between the extensive press coverage and extensive litigation in this District, the Court is generally familiar with the circumstances of January 6, 2021.[1] Critical to this case is that timeline of the beginning and ending of that day.

A. Events of January 6, 2021.

As noted in the *Complaint*, Doc. 1-1, and accompanying statement of facts, Congress convened at approximately 1:00 pm to certify the results of the 2020 presidential election. Upon

[1] The defense's view at this point is that an evidentiary hearing is not necessary as the defense has endeavored not to rely upon any disputed facts. To the extent the government takes a position that may vary, on factual grounds, from Mr. Crosby, he respectfully requests permission to amend that view in his reply. At present, this appears largely a question of law based upon the well recorded universe of facts. To the extent the Court may disagree, the defense has no objection to a hearing on discrete issues.

information and belief, members of certain militia groups fighting with Capitol Police and guards as early as 12:53 to 1:03 p.m. L. Leatherby *et al*., "*How A Presidential Rally Turned Into a Capital Rampage*," Jan. 12, 2021, N.Y. Times, available at . https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html. "Shortly [after] 2:00 p.m., individuals in the crowd forced entry into the U.S. Captitol, including by breaking windows and by assaulting members of the U.S. Capitol Police, as others in the crowd encouraged and assisted those acts." *Complaint*, 1. At approximately 2:20 p.m., the House and Senate chambers were adjourned and evacuated. *Id*. That continued until approximately 8:00 p.m. when the building was cleared of rioters and the chambers resumed their business. During the intervening time period, innumerable people passed through and at least 1,030 have been charged.

B. Facts Specific to Mr. Crosby.

There is no evidence that Mr. Crosby was a member of the crowd that broke down Capitol barriers nor fought with police. According to the statement Mr. Crosby gave to the FBI, he approached the Capitol on the west side and "freely walked up the steps to the left of the main staircase and entered through an open doorway to the left of the main entrance." Based upon the tours that the government has been gracious enough to organize for defense counsels, this appears to lead directly into the Senate wing of the building. Once inside, there was a crowd of approximately 300 people and more were flowing in the through the same door through which Mr. Crosby entered. According to Crosby's statement to the FBI, the flow of the crowd led him to the Senate chambers. A photo from the government's discovery depicts Mr. Crosby outside

Parliamentarian's door to the Senate chamber; it is time stamped at 2:54 pm.[2] He passed through this door to the Senate chamber and walked on to the floor of the Senate.[3] In Mr. Crosby's statement to the FBI, he estimated that he was in the Senate for 6 to 8 minutes, video of the event depicts him there for approximately 9 minutes.

While on the Senate floor, Mr. Crosby milled about and took photographs with his cell phone at first. At some point, the very visible Jacob Chansley, better known as the "Q-Shaman", entered from a different door—in the rear of the Senate floor. He walked onto the dais and was followed by Mr. Crosby and several other men. Chansley led a prayer or chant of sorts and Mr. Crosby shouted "Amen" and pumped his fist in the air. Shortly after this, additional police officers entered the chamber and approached the dais from the audience left, dais right side forcing the men to exit down the other side back towards the Parliamentarian's door. Following this, Mr. Crosby exited the Capitol and returned to his hotel. The defendant does not dispute that, while in the building he saw scenes of chaos and officers struggling with other rioters, nor that he walked past scenes that would give a reasonable person pause about entering the building (but that is not unique among January 6 defendants) At no point, however, did Mr. Crosby fight with law enforcement or engage in acts of violence or property destruction.

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[2] The photo is designated "Highly Sensitive" so counsel is only describing it. There are two notations on the slide produced by the government: one indicates 1:53, the other indicates "14h54m." Following conversations with the government and the general timelines of events, the "1:53" appears to be a transcription error as it seems physically impossible for Mr. Crosby and the crowd to have been in this location at 1:53 pm as the building had not been breached at that point and the Senate was in session.

[3] As a point of reference, in a customary television shot of Senate floor where the dais is depicted in the center, the Parliamentarian's door is to the audience's right.

Finally, Mr. Crosby neither wore nor possessed anything that suggested he planned to enter the Capitol nor do anything while there. He wore blue jeans, a simple black jacket, and the now ubiquitous "Make America Great Again" hat that has become a feature of Republican political rallies.

C. Classification Of Charges Brought Against January 6 Defendants.

According to reporting, the District of Columbia's docket, and Justice Department publications, more than 1,000 people have been charged in connection with January 6 and more charges are expected. In the most high-profile instances, militia groups have been charged with sedition, conspiracy, assault, and obstruction based upon clearly organized plans to attack the Capitol and stop the certification of the vote. *See e.g. United States v. Nordean et al*, 1:21-cr-175(TJK). In less high profile but notable instances, individuals have been charged with assaulting officers and discrete acts of violence and property destruction. A substantial class of defendants have been charged, including Mr. Crosby, with Obstruction of Congress in violation of 18 U.S.C. §1502(c). Customarily, something in the class suggests preparation or the intent to accomplish a discrete act in furtherance of obstruction once in the Capitol. *See United States v. Brock*, 1:21-cr-140(JDB)(former Air Force officer wore combat helmet and gear into Capitol, gathered zip ties while there).

Seemingly, the largest class of defendants are those charged with misdemeanors. Those customarily include violations of 18 U.S.C. § 1752(a)(1)(Entering and Remaining in a Restricted Building; 18 U.S.C. § 1752(a)(2)(Disorderly and Disruptive Conduct in a Restricted Building or Grounds); 40 U.S.C. 5104(e)(2)(A)(Entering and Remaining on the Floor of Congress); 40 U.S.C. § 5104(e)(2)(D); 40 U.S.C. § 5104(e)(2)(G) Parading, Demonstrating, or Picketing in a Capitol Buidling. Mr. Crosby is charged with each of these counts, Counts Two, Three, Five and Six, in addition to felony obstruction in §1502. The prototypical misdemeanor defendant entered the

Capitol for some period of time, paraded, chanted, picketed, or milled about the Rotunda, Crypt, or other areas of the Capitol not including the Senate or House floors.[4] While the total number of these

[4] *United States v. Cotton*, 1:22-mj-265(RMM) (entered through an open door, remained in the Senate Wing Door and Crypt areas for approximately 26 minutes, and chanted "traitor" with the crowd); *United States v. Cruz*, 1:22-cr-64(RBW) (entered through the Senate Wing Door and walked around the Crypt for about seven minutes);*United States v. Barron*, 1:22-mj-57(GMH) (moved throughout the Rotunda South, Statuary Hall, and House Chamber areas and joined the crowd in a "Our house. This is our house." chant); *United States v. Connolly*, 1:23-cr-31(JMC) (entered through an open door on the Upper West Terrace and wandered throughout the building including the Rotunda, the Crypt, and the Hall of Columns for approximately 11 minutes); *United States v. Cameron*, 1:21-mj-690(RMM) (entered through the Senate Wing Door, made his way to the Crypt, and remained for about 22 minutes); *United States v. Castle*, 1:22-mj-121(RMM) (entered through the Senate Wing Door and wandered around the lobby of the Visitor's Center and the Crypt for 38 minutes); *United States v. Christmann*, 1:21-cr-502(CKK) (entered the Capitol through a broken window and took pictures throughout the building including within interior rooms); *United States v. Cohen*, 1:22-mj-256(GMH) (entered through the Senate Wing door and wandered around the Crypt and the Capitol Visitor's Center for about 24 minutes); *United States v. Conover*, 1:21-mj-677(GMH) (Entered the Capitol through the East Rotunda doors and remained in the Rotunda for approximately 22 minutes taking pictures with the paintings); *United States v. Baouche*, 1:21-cr-733(CRC) (moved throughout the Capitol building for approximately 17 minutes at times leading a "Whose house?" chant); *Unites States v. Abate*, 1:23-mj-14 (entered building through open door and remained within the building for 52 minutes taking pictures within the Rotunda and surrounding hallways); *United States v. Alford*, 1:21-cr-263(TSC) (entered through open door and wandered the hallways for approximately 11 minutes); *United States v. Ambrose*, 1:22-cr-302(DLF) (entered through open Senate Wing door, walked through the Rotunda and Speaker's Lobby, and left after witnessing the shooting)*; United States v. Archer*, 1:22-cr-102 (walked around the Rotunda and West Corridor for approximately 12 minutes); *United States v. Ardolino*, 1:22-mj-257(ZMF) (wandered around the Crypt and various hallways); *United States v. Avirett*, 1:22-mj-257 (entered multiple offices); *United States v. Ballesteros*, 1:21-mj-132(RMM) (entered building and recorded videos from within the Crypt); *United States v. Bartow*, 1:22-mj-226(RMM) (Entered through open Senate Wing Door and walked around the Crypt and Orientation Lobby areas picking up trash); *United States v. Belger*, 1:22-mj-207(GMH) (Entered an office through a broken window and remained for several minutes); *United States v. Bishai*, 1:21-cr-282(TSC) (Entered the Capitol through a broken window and remained in building for approximately 27 minutes wandering around the Rotunda taking pictures with statues); *United States v. Bokoski*, 1:22-mj-108(RMM) (Entered through an open door and moved with the crowd towards the corridor until they encountered a police line at which point, they turned around and left after being in the building for approximately five minutes); *United States v. Bonenberger*, 1:22-mj-59 (Entered through an open door and wandered around the Rotunda and West Corridor); *United States v. Bostic*, 1:21-cr-643(CKK) (Entered through open door and moved with crowd through the hallway); *United States v. Box*, 1:22-mj-273(RMM) (Entered through Senate Wing door and remained in the building for approximately 15 minutes wandering around the Senate Rotunda, House Rotunda, and the Crypt; is part of mob that overwhelms law enforcement in the Crypt); *United States v. Brooks*, 1:21-mj-544 (Entered the Capitol through a broken window and remained for approximately seven minutes taking pictures on his phone); *United States v. Brooks*, 1:22-cr-18 (Entered through open door; wore military style vest and carried a radio); *United States v. Buckler*, 1:22-cr-162(TNM) (Entered Capitol through a broken window, moved through the Senate Wing area and the Crypt, and joined the crowd in a "stop the steal" chant); *United States v. Burress*, 1:21-mj-569(ZMF) (Entered the Capitol through an open door and walked around the Rotunda); *United States v. Bustos*, 1:22-cr-16(CJN) (Entered through Columbus door and remained within the building for approximately 11 minutes carrying a flag); *United States v. Camper*, 1:21-mj-298(GMH) (Walked around the Rotunda and the Rotunda Door Interior hallway); *United States v. Cantrell*, 1:22-mj-51(ZMF) (Entered through an open door and wandered throughout the building); *United States v. Carico*, 1:21-cr-696(TJK) (Entered the Capitol through the Senate Wing Door and spent approximately 52 minutes inside walking around the Rotunda); *United States v. Carollo*, 1:22-mj-14(GMH) (Entered through an open door and

prosecutions is not stated in any public document counsel is aware of, this is clearly represented in the public record. *See* Department of Justice, *Sentences Handed Down In Capitol Breach Cases*, available at https://www.justice.gov/usao-dc/capitol-breach-cases.[5] Moreover, counsel has reviewed a table the government routinely files in a January 6 sentencing, *see e.g. United States v. Baouche*, 1:21-cr-733(CRC), Doc No. 30-1 (Supplemental Table to Government's Sentencing Memorandum), and counted 374 such cases as of the April 18 draft. *See e.g. United States v. Morgan Lloyd*, 1:21-cr-164(RCL); *United States v. Erkhe*, 1:21-cr-97(PLF); *United States v. Hiles*, 1:21-cr-155(ABJ). There is an abundance of comparator cases.

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walked around the Rotunda); *United States v. Cavanaugh*, 1:22-mj-183(RMM) (Remained in building for approximately 13 minutes carrying a flag); *United States v. Chan*, 1:21-mj-591(RMM) (Entered the Capitol through the Upper West Terrace Doors and wandered around the Rotunda for approximately 28 minutes); *United States v. Chang*, 1:21-mj-613(GMH) (Entered through the rotunda doors and wandered around the Rotunda);*United States v. Chiguer*, 1:22-cr-25(APM) (Entered through an open door and moved through various hallways and the Rotunda);*United States v. Christensen*, 1:22-mj-259 (Remained inside the Capitol for over an hour moving through the Rotunda Doors area, the Rotunda, the Memorial doors, the second-floor hallway on the Senate side, and a remote hallway on the fourth floor); *United States v. Chwiesiuk*, 1:22-cr-182 (Entered building through the Senate Wing door and walked around the Crypt); *United States v. Clifton*, 1:22-mj-109(RMM) (Present within the Crypt and hallways); *United States v. Colbath*, 1:21-cr-650(RDM) (Entered through the Senate fire door and remained in the hallway helping people who were teargassed); *United States v. Colgan*, 1:22-mj-88(GMH) (Entered through Senate Wing Door and remained in hallway); *United States v. Comeau*, 1:21-cr-629(EGS) (Followed crowd into the building, walked around Statuary Hall and the Statuary Hall connector, was part of group advancing toward the doors leading to the House Chamber); *United States v. Conlon*, 1:22-cr-171(JMC) (Entered through a broken window, wandered around the lobby/hallway area and left out the Senate Wing door after approximately three minutes); *United States v. Coomer*, 1:23-mj-14 (Entered through the Senate Wing Door and wandered around the building taking pictures with statues); *United States v. Dennison*, 1:23-cr-32(TNM) (Entered through Senate Wing Door and remained inside the building for approximately three minutes before exiting through the same door).

[5] The defense's position is that the existence of these cases and there characterization is judicially noticeable pursuant to Federal Rule of Criminal Procedure 201. The Justice Department list includes the universe of cases and the supporting documentation is all filed with the District of Columbia's clerk's office. It is offered only for the purpose of showing who was charged, with what offense, and the government's characterization of each case. Accordingly, this is well known within this Court's territorial jurisdiction and can be readily and accurately determined from sources whose accuracy cannot be reasonably questioned. Should the government disagree with this, Mr. Crosby would request the opportunity to present a further selection of cases.

II. LAW AND ARGUMENT.

Count One falls outside the customarily broad scope of prosecutorial discretion. The only fact that distinguishes Mr. Crosby from the hundreds of January 6 defendants charged with misdemeanors is his presence on the Senate floor. Indeed, prosecutors customarily have wide discretion to select charges and it is *near* totally insulated from review. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *United States v. Armstrong*, 517 U.S. 456 (1996); *Whren v. United States*, 517 U.S. 806 (1996). But this case is *sui generis* in a our history: never before has there been in excess of 1,000 defendants charged with similar or connected offenses, all committed in the same 8 hour span, in the same 175,150 square foot building. *See* Architect of the Capitol, "*U.S. Capitol Building*," available at https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitolbuilding#:~:text=Today%2C%20the%20U.S.%20Capitol%20covers,including%20approaches%2C%20is%20350%20feet (accessed 6/14/23)(stating dimensions and layout of Capitol). The interests that customarily justify judicial reluctance to compare charging decisions are not present in this case. Accordingly, Mr. Crosby contends that the government's decision to charge him with felony obstruction based only upon his geographic location and its attendant symbolic significance is not only arbitrary and capricious but selective prosecution in violation of the Fourteenth Amendment.

Additionally, Mr. Crosby moves to dismiss on the grounds articulated by Judge Nicolls of this district in *United States v. Garrett Miller*, 1:21-cr-119(CJN), Doc. No. 72. Mr. Crosby concedes that this Court is currently bound by the District of Columbia's decision in *United States v. Fischer*, 2023 U.S.App.LEXIS 8284, 2023 WL 2817988 (D.C. Cir., 2023) and must deny this portion of the motion. He moves on these grounds for the purposes of preservation only given continuing litigation of this issue. *See United States v. Fischer*, 2023 U.S.App.LEXIS 14714 (D.C. Cir.,

6/13/23)(staying judgment mandate pending adjudication of petition for certiorari to Supreme Court).

A. Legal Standards.

Mr. Crosby does not dispute the fact that the government customarily has broad discretion to select charges nor that judicial review of that prerogative is exceedingly rare. However, "even in the area of criminal prosecutions, prosecutorial discretion is not subject to a 'presumption of unreviewability.'" *Heckler v. Chaney*, 470 U.S. 821, 847 (1985) *Brennan, J.*, concurring; *see also Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978)(There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise."). If the largest series of criminal prosecutions in the nation's history does not raise questions about those limitations, what will?

> A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a 'background presumption, that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.
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> A selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive. The Attorney General and United States Attorneys retain "'broad discretion'" to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. As a result, "the presumption of regularity supports" their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.' In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'

United States v. Armstrong, supra, 517 U.S. 456, 464 (1996)(cleaned up). The government has frequently stated in Court that this is the largest criminal prosecution in the history of the country: it is far from the ordinary case.

The rule is rooted in the "relative competence" of the two branches of government. *Armstrong*, supra, 517 U.S. at 465.

> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. 'Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.' It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. 'Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionnmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.'

Id. citing *Wayte v. United States*, 470 U.S. 598, 607-08 (1985). The rule of prosecutorial discretion may be potent and enduring. However, the biggest prosecution in the history of the country presents circumstances raising questions about the rule's limitations. Accordingly, the defense examines the government's theory of obstruction; the existence of classifications; and the arbitrary distinction between the classes.

B. Obstructive Acts.

The defense does not dispute that Congress was obstructed in its certification of the election results on January 6, 2021. The issue, however, is determining the precise way Congress was obstructed. It appears that the event precipitating adjournment at 2:20 p.m. that day was the breach of the building. Moreover, the reason Congress did not resume until 8:00 p.m. was the continuing presence of rioters in the building. Mr. Crosby is not connected to either group of people. He was one of the many who, however improvidently and wrongfully, entered the building with the crowd

once it had been breached. The government's theory of the case is that he obstructed by "entering and remaining in the United States Capitol." *Indictment*, at 1. It may be true as a general matter that, but for the number of people who entered the Capitol, Congress would not have been obstructed. But this is just as true of misdemeanor defendants who entered the Rotunda and the Crypt as it is for Mr. Crosby. Nothing suggests that the decision to enter the building by way of the Senate wing entrance rather than the main entrance was anything other than unwitting, if not determined entirely by the flow of the crowd. Surely, there is a more meaningful distinction between felony and misdemeanor conduct than door number one and door number two.

Nothing about Mr. Crosby's presence on the Senate floor distinguishes his contribution to the obstruction of Congress from those others who were merely present in the building. Notably, there is no allegation nor evidence that he was in possession of any items or garments indicative of preparation. *C.f. United States v. Chansley*, 1:21-cr-3(RCL)(in addition to eccentric garb, defendant had flag with blade or spear on the tip); *United States v. Brock*, 1:21-cr-140(JDB)(former Air Force officer wore combat helmet and gear into Capitol, gathered zip ties while there). He was not among the violent vanguard who broke through security barriers prompting Congress's adjournment, nor was he there at 7:45 p.m. attempting to occupy the building. To the extent that everyone who passed through between these times is responsible for delaying the resumption of certification, he is no different from any other misdemeanor defendant. Were there some evidence that that Senate floor was the object of Mr. Crosby's entry into the Capitol, on the theory political leadership was still there and could be threatened or attacked, that would be one thing. But there is no such evidence.

The evidence is that Congress had adjourned and politicians had left. While there is evidence that some defendants were targeting the Speaker and Majority leaders' office, Mr. Crosby is not among that cohort. The fact of that matter is that unpermitted entry onto either floor of

Congress is a separate crime, 40 U.S.C. 5104(e)(2)(A), with which Mr. Crosby is also charged (Count 4). While there are times where geographical location alone can be the basis for a charge, such as illegal reentry, 8 U.S.C. § 1326, or, for example, trespassing on a military installment, 18 U.S.C. § 1382. But using trespass as circumstantial evidence of another more serious crime, selectively, is something entirely different. In this case, the offense is entering the floor of Congress. The government has identified no interest that is furthered by brining additional charges for entry onto the floor. In other words, there is no evidence there was classified information held on the floor of the Senate nor other items that might compromise the government's security interests beyond those interests § 5104(e)(2)(A) already governs.

C. A System Of Classifications Clearly And Convincingly Exists.

"Defendant's are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *United States v. Hastings*, 126 F.3d 310, 315 (4th Cir., 1997). Unlike the *Armstrong*, supra, case, Mr. Crosby is not seeking discovery in support of a selective prosecution claim pursuant to Federal Rule of Criminal Procedure 12. There are clearly similarly situated individuals and the information is clearly available: it is judicially noticeable and warrants a merits decision—not further discovery. As reflected in this motion, there were 374 similarly situated cases that had gone to sentencing as of April 18, 2023. Presumably, more are in the judicial pipeline and more could easily have been charged since.

This constitutes a discrete class of individuals generated by government action. That class is people who entered the Capitol unlawfully but committed no assaults, property damage, nor preplanned acts in furtherance of a conspiracy or obstruction, but who, nonetheless, contributed to the obstruction of Congress and are charged with misdemeanors. This is separate from the class of

people charged with felony obstruction. Mr. Crosby does not dispute that there is a basis for charging those for whom there is evidence of assault, preplanning, or intentional orchestration with other rioters. He simply does not fit into that group. As stated, the only thing distinguishing him from the misdemeanor class is his presence on the Senate floor rather than the Rotunda, Crypt, or other more public area.

At least two classifications of rioters clearly exist. "[I]f … there was no one to whom defendant could be compared in order to resolve the question of [prosecutorial] selection, then it follows that defendant has failed to make out one of the elements of its case. Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Branch Ministries v. Rossotti*, 211 F.3d 137, 144-46 (D.C. Cir., 2000) quoting *Attorney Gen. v. Irish People*, *Inc*., 221 U.S. App. D.C. 406, (D.C. Cir., 1982). Mr. Crosby is similarly situated to the misdemeanor class but for irrational and arbitrary government action. The evidence in support is ample and available.

D. The Only Basis For The Classifications The Government Has Created Are Arbitrary And Capricious And Burden Speech Interests.

This charging decision is unlawful in two ways. First, it is simply arbitrary and capricious for the reasons articulated. Second, it unlawfully targets the speech element of the offense and is arbitrary and capricious for that reason. Mr. Crosby addresses each theory herein.

This decision is arbitrary and capricious and falls outside of the interests noted in *Armstrong* and *Waite*. There is no legitimate law enforcement interest in targeting those on the Senate floor differently than those elsewhere in the building: the additional act of trespass is already captured in

Count Four. The interests that customarily justify judicial restraint are not present in this case.[6] First, assessing the strength of the case requires little to no specialized knowledge. Mr. Crosby is on video inside the Capitol and on the Senate floor on January 6. This is also true of the many misdemeanor defendants in the Rotunda, Crypt, and elsewhere. Notably, many of those defendants are also on video encouraging violence or greater incursions into the building. Second, the government's overall enforcement plan is abundantly obvious to any student of this event. While domestic terror and fringe political groups may be a long-term concern to the government, this was a one day event that is temporally and geographically confined: it does not require a sophisticated or enduring strategy to address overtime, across the country. Finally, nothing about the issues raised in this motion would chill a core executive function. Mr. Crosby would still be prosecuted on the five other counts of the indictment, the hundreds of other convictions would still stand, and it would have little to no effect on the remaining prosecutions of the 1,030 defendants charged. Few to no other defendants have this argument available to them.

Second, this charging decision does burden First Amendment interests. As a preliminary matter, *Mr. Crosby does not contend that his entry into the Capitol and the Senate Floor was protected First Amendment speech*. It was clearly prohibited by 18 U.S.C. § 1752(a)(1)(Entering and Remaining In A Restricted Building) and 40 U.S.C. § 5104(e)(2)(A)(Entering and Remaining

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[6] Notably, many other January 6 defendants have filed Rule 12 motions based upon the alleged variations in treatment between they and purportedly liberal protesters in Portland, Oregon. Courts have uniformly rejected this claim. *See e.g. United States v. Padilla*, 2023 U.S.Dist.LEXIS 23451 (D.C., 2023); *United States v. McHugh*, 2023 U.S.Dist.LEXIS, 36320 (D.C., 2023); *United States v. Judd*, 579 F.Supp.3d 1 (D.C., 2021). This motion is entirely distinct from those. First, they were discovery motions where this is a merits motion to dismiss. Second, this is a wholly different theory of selection and the comparator cases are limited to January 6 defendants alone—not other prosecutions elsewhere in the country.

on the Floor of Congress). *See e.g. United States v. Obrien*, 391 U.S. 327 (1968)(burning draft card not protected speech). The issue is: when an offense has a political dimension, can the government bring more serious charges based on the message inherent in the crime on a circumstantial theory? In other words, where the lesser included offense is content neutral, may the government bring a more serious charge because of the highly offensive symbolic value of the lesser offense. The answer cannot be yes for it would be a wholesale circumvention of the First Amendment.

Consider a hypothetical. It is illegal to burn a draft card in protest of a war, *O'Brien*, supra, but legal to burn a flag in protest of that way. *Texas v. Johnson*, 491 U.S. 397 (1989). Suppose a group of protesters placed their draft cards on the ground and burned them, but one placed his draft card atop an American flag and burned them both; the government charged all protesters with burning the draft cards; but it *also* charged the flag burning protester with espionage or obstruction—on a circumstantial theory—because the flag burning was so detrimental to the war effort. Clearly, in such a case the government would be selecting that person for prosecution based on exercise of his First Amendment rights *even where* he was legitimately prosecuted for the draft card offense. This is no different than what is happening to Mr. Crosby. Moreover, these circumstances are distinct from the "passive enforcement policy" in *Wayte*, supra, 470 U.S. 598. The issue is not charging versus not charging; the issue is bringing *more* serious charges based upon the vileness of the message included in the lesser offense. Therefore, where the government, in *Wayte*, only prosecuted those who affirmatively and in writing stated their intent not to register with Selective Service, because that message was essentially a confession of a crime and statement of intent to keep committing it, Mr. Crosby's entry onto the Senate floor is distinct. First, it is already covered by Count Four. Second, it is a far more symbolic message and less susceptible to an interpretation of criminal intent beyond what he had already accomplished. Accordingly, this

charging decision does burden speech because it brings more charges than are necessary to further the government's legitimate interest in keeping unauthorized persons off the Senate floor.

This is an arbitrary and capricious classification that punishes Mr. Crosby for the symbolically offensive dimension of his misdemeanor offenses.

E. The Government Cannot Identify A Legitimate Basis For The Disparate Treatment Between Mr. Crosby And The Misdemeanor Class Of Defendants.

The government has clearly treated Mr. Crosby differently from similarly situated misdemeanor January 6 defendants. While the law is not entirely settled on the merits standards for selective prosecutions claims, Mr. Crosby points the court to *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny. While it pertains to peremptory strikes during jury selection, it is perhaps the only clearly established application of the equal protection clause to criminal procedure. It teaches that that where disparate treatment of similarly situated persons is identified, the government must articulate a lawful reason for its decision and the Court is permitted to challenge its credibility on the contention.

> "[O]nce a prima facie case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The trial Court must consider the prosecutor's race neutral explanations in light of all the relevant facts and circumstances, and in light of the arguments of the parties."

Flowers v. Mississippi, _ U.S. _, 139 S.Ct. 2228 (2019). While not a jury selection issue, the government should cite some legitimate, non-arbitrary basis for the distinct charging differences between similarly situated defendants. Mr. Crosby contends that the government should be held to that standard here and cannot meet it.

F. Mr. Crosby Wishes To Preserve His Objections That Count One Should Be Dismissed On Theories Articulated In *United States v. Miller* and Judge Katsa's Dissent In *United States v. Fischer*.

This Court is bound the Court of Appeals decision in *United States v. Fischer*, 2023 U.S.App.LEXIS 8284, 2023 WL 2817988 (D.C. Cir., 2023). However, the defendants in that consolidated case are currently petitioning the United States Supreme Court for certiorari. Accordingly, Mr. Crosby wishes to lodge his motion to dismiss on the theories articulated by Judge Nichols in the *United States v. Garrett Miller*, 1:21-cr-119(CJN), Doc. No. 72 and Judge's Katsa's dissent in *Fischer* on the grounds that the statute does not capture these events as a corrupt act or an official proceeding. *See also United States v. Homol*, 1:23-cr-50(JMC), Doc. No. 66 (defendant's motion to dismiss and memorandum in support on based on Judge Katsa's dissent). He concedes this claim must be denied and reserves it only in the event of subsequent appellate changes.

III. CONCLUSION.

The defense does not dispute the legitimacy of the January 6 prosecutions nor Counts 2 through 6 as they apply to Mr. Crosby. There is little doubt about the lawlessness of that day. But the distinguishing feature between democratic rule of law and mobs—making the former superior to the latter—is measure, restraint, and reason in the face of fear and passion. There are ample reasons to be angry and scared by these events. But the government has clearly developed a policy of charging people similarly situated to Mr. Crosby with misdemeanor offenses. It has selected Mr. Crosby for felony prosecution based on his geographic location in the building and its symbolic value. Indeed, this undoubtedly makes his crimes more offensive: not only did he trespass in the Cathedral of democracy, he climbed onto the rectory. Odious though that may be, it is an event without legal significance—beyond Count _--in the greater context of this case and legal the

particulars of Count I. For that reason, Count One constitutes selective prosecution within the meaning of the Fourteenth Amendment and dismissal of that count is warranted.

Respectfully Submitted,

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CERTIFICATION OF SERVICE

This is to certify that on June 23, 2023, a copy of the forgoing was filed electronically via the Court's CM/ECF system, and by that system, counsel for the Government has been provided with a copy of the forgoing.

/s/Daniel M. Erwin/s/
Daniel M. Erwin