UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **CYNTHIA BALLENGER and CHRISTOPHER PRICE,** **Defendants.**	**Case No. 1:21-cr-00719 (JEB)**

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' SECOND MOTION TO DISMISS COUNT IV OF THE SUPERSEDING INFORMATION BASED ON A FACIAL CHALLENGE TO 40 U.S.C. §§5104(e)(2)(G) AND MOTION FOR DECLARATORY JUDGMENT UNDER 28 U.S.C § 2201 BASED ON THE FACIAL CHALLENGE

BACKGROUND

There are two motions that address40 U.S.C. § 5104(e)(2)(G). The Prices, separately, filed a motion to dismiss the Superseding Information, including with respect to Count Four regarding 40 U.S.C. § 5104(e)(2)(G) on numerous grounds. [ECF 54]. One of those grounds is that application of 40 U.S.C. § 5104(e)(2)(G) to the alleged conduct of the Prices violates the First and Fifth Amendment of the U.S. Constitution. The instant motion [ECF 55 and memorandum ECF55-1] challenges 40 U.S.C. § 5104(e)(2)(G) on the face of the provision (also in the context of related provisions) as failing the First and Fifth Amendment. In addition to seeking such a finding from the Court the Prices request that Count IV of the Information be dismissed on the basis of such finding.

ARGUMENT

I. The Government Statement of Legal Standards Is Largely Irrelevant to the Instant Motion and The Prices Properly Bring a Facial Challenge At this Time

The Government addresses a strawman and not the Prices' motion and memorandum. This motion is a facial challenge to a statutory provision. A facial challenge is a challenge to a statute which argues that no reasonable narrowing construct can save the provision from being Constitutionally infirm. A facial challenge is contrasted with an as-applied challenge, which alleges that a particular application of a statute is unconstitutional. Right from the top the Government mischaracterizes the motion as "Count Four" violates the First and Fifth Amendment. Gov. Opp. at 1. The Prices state:

> The instant motion challenges 40 U.S.C § 5104 (e)(2)(G) on the face of the provision (also in the context of related provisions) as failing the First and Fifth Amendment. In addition to seek such a finding from the Court, the Prices request that Count IV of the [Superseding] Information be dismissed on the basis of such finding. Defendants Memo at 1.

The fact that the Prices are charged with Count IV gives the Prices standing, but the challenge, in the instant motion, is to the statute. Moreover, "the Prices also seek a declaration under the 28 U.S.C. § 2201 that 40 U.S.C § 5104(e)(2)(G) does not survive muster under the First and Fifth Amendments to the U.S. Constitution." *Id* at 4. If 40 U.S.C § 5104(e)(2)(G) is facially invalid it is completely appropriate to bring up the issue at this stage of the proceeding as a basis. It is true that

invalidating a statute is not preferred and that narrowing constructions are preferred where available. However, the Prices have a particular argument about particular language and the Government fails to address that argument.

For a facial challenge, the Governments legal standard section is irrelevant beyond the first sentence. Gov. Opp. at 4. All of section I.A. of the Argument [Gov. Opp. at 5-8] in the Government Opposition is irrelevant or incorrect. The Government argues that no evidence of Defendants' precise conduct is before the Court and that the record consists of the allegations in the Superseding Information. *See* Gov. Opp. at 6. The instant motion is not challenging sufficiency of evidence and that argument is not relevant to a facial challenge.

It is reasonable to highlight multiple fact pattern, including the fact pattern of the allegations against the Prices, with respect to a facial challenge. However, the Prices need not wait for a trial to assert a First Amendment facial challenge. Indeed, 12(b)(3)(v) is under a section styled motions that must be made before trial. The basis for the Prices facial challenge is "reasonably available" and "the motion can be determined without a trial on the merits." The Government argues in various places that other cases were not based on a motion to dismiss, but the Government has provided no case that specifically states it is improper to assert a facial challenge at the stage of a motion to dismiss. Moreover, under Federal Rule of Criminal Procedure 12(d) the court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The Government's failure to properly address arguments that are based on the statutory language is not good cause.

The Prices have standing to facially challenge the statute simply because they are charged with offenses under the statute. The Prices are charged with allegedly criminal First Amendment conduct in the Capitol by being charged with parading, demonstrating or picketing.

Even if the Court disagrees with the Prices' argument in the instant facial challenge, the Court may separately agree with the Prices with respect to the as-applied challenge. The two analyses are different.

II. The Government Misses the Central Argument That 40 U.S.C. § 5104(e)(2)(G) Needlessly Penalizes Conduct Based on First Amendment Terms

A. 40 USC §5104(e)(2)(G) Directly and Solely Addresses First Amendment Protected Conduct

The Government seems to claim the provision does not address First Amendment modes of expression. Gov. Opp. at 5-6. The terms under 40 USC §5104(e)(2)(G) are pure First Amendment modes of expression and the Prices provide plenty of case law to support the contention that these terms are covered under the First Amendment. It is surprising the Government cannot cleanly concede this point.

B. The Prices Facial Challenge Remains Valid Even If the Entire Capitol Is a Non-Public Forum and Not A Public Forum

The Prices specifically state "The Prices argue 40 U.S.C § 5104 (e)(2)(G) that does not survive constitutional muster regardless of whether all areas of Capitol Buildings are non-public forms or whether certain areas of the Capitol Buildings are public forums." ECF 55-1 at 10. The Prices directly follow this with a section

IV. D which states "Regardless of Which First Amendment Standards Apply 40 USC Facially Fails Constitutional Muster Under the First and Fifth Amendments". [ECF 55-1 at 12].

The Prices do argue that the hallways, foyers and other publicly accessible areas of the Capitol Buildings are traditionally robust with First Amendment activity and any prohibitions or enforcement should be reviewed under the public forum standards. ECF 55-1 at 9-12. However, the Prices also argue that even under the non-public forum standard § 5104(e)(G) is infirm. Also note, the Prices did not claim that all parts of the Capitol building should be considered a public forum as stated by the Government. *See* Gov. Opp. at 8.

C. The Court Should Not Adopt and Should, Instead, Revisit Certain Findings in Bynum Concerning 40 USC §5104(e)(2)(G)

The Prices had taken the step to acknowledge that while *Bynum v. U.S. Capitol Police Bd.,* 93 F. Supp. 2d 50, 53 (D.D.C. 2000) was overturning regulations promulgated under *40 USC §5104(e)(2)(G)* the Court stated the statute itself was not a problem. The Prices' argument is that this Court should take a fresh look from a Constitutional perspective, including based on new assertions concerning the relationship of the provision to social media and smart phones. Moreover, the Prices make a fundamental set of arguments not presented in *Bynum*. Also, as a district court case, that element of *Bynum* is not controlling.

D. Government Fails to Address the Central Argument that There is No Valid Reason for First Amendment Modes of Expression to Be Criminally Punished Ahead of Similar Non-First Amendment Activity That Poses the Same Risk

The Prices set out a central argument in IV (D)(1). ECF 55-1 at 13-14. The Government has no response to this critical argument. The basic point is that it is not reasonable to restrict First Amendment modes that are not disruptive and the Congressional concerns can be addressed with language that does not address First Amendment modes of expression. 40 U.S.C § 5104 (e)(2)(D) is an example, and the Government has given no example where the Prices analysis is incorrect.

The Government appears to ignore this argument and instead says:

> But Defendants identify 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. Gov. Opp. at 9.

The passage misses and mischaracterizes the Prices argument. First, the Prices are not necessarily arguing any additional regulation is required in light of 40 USC § 5104(e)(2)(D). That provision operates by not flatly banning peaceful First Amendment modes of expression. First and Fifth Amendment muster is not about more government rules. First and Fifth Amendment muster is about not having Government regulations trample the First and Fifth Amendment.

The most deferential non-public forum standard at least asks if a regulation is "reasonable in light of the purpose served by the forum" given the First and Fifth Amendment issues. *See Bynum* 93 F. Supp. 2d at 56 (citing *Cornelius v. NAACP Legal Defense Ed. Fund*, 473 U.S. 788, 806 (1985)). "Reasonable" is about the trade-offs between the reasons for restricting First Amendment activity and the loss from

1) restricting First Amendment Activities, 2) overbreadth under the First Amendment, 3) overbreadth problems under the Fifth, 4) Vagueness and Fair Notice issues under the Fifth Amendment, 5) selective enforcement issues under the Fifth Amendment. Even if one does not apply the strict scrutiny tests, the First and Fifth Amendment issues are fully at stake. *Bynum* applies this deferential test and still overturned regulations purporting to implement 40 USC § 5104(e)(2)(G). The Prices argue a fresh review of the application of the test to 40 USC § 5104(e)(2)(G the statutory language in light of a broad range of new facts, circumstances about technology in communication, and other issues is that review is warranted. The Prices are particularly identifying the crux of the problem—there is no difficulty for Congress to just focus on terms consistent with the security objectives instead of the words that specifically call out 3 First Amendment modes of conduct. This is fully outlined in the original memorandum and the Government fails to address the points.

The direct use of First Amendment modes of expression without qualifiers IS the problem with the statute. The statute needlessly and improperly focuses on First Amendment terms as the crime. Such an approach is not reasonable when the actual conduct of concern should be and can be described in non-First Amendment terms. Consider what the Government states:

> The statute requires that a defendant, acting willfully and knowingly, parades, pickets, or demonstrates—<u>in short, engages in disruptive conduct</u>—inside the Capitol building. (emphasis added) Gov. Opp. at 16.

This is the Government's slight of hand. The statute does not say "in short, engages in disruptive conduct". § 5104(e)(2)(D) uses the term "disruptive conduct". § 5104(e)(2)(G) does not. The text of § 5104(e)(2)(G) fails to distinguish between disruptive conduct as a basis of demonstration versus peaceful, non-disruptive demonstration. Why not just use that term—disruptive conduct? There are demonstrations which are not disruptive. That was the holding in Bynum when reviewing the regulations Bynum found violated the First Amendment. A peaceful demonstration, like walking around with messages on t-shirts, is not disruptive.

The Government tries the same slight of hand in another passage.

> Defendant's own prosecution –which involves 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. Gov. Opp. at 11.

Note how the elements in the sentence are not described in §5104(e)(2)(G). §5104(e)(2)(G) does not prohibit trespassing. "Trespassing" and "demonstration" are not the same thing. Trespassing is not a First Amendment mode of expression. Demonstration is. Trespassing can be described in terms that do not prohibit first Amendment modes of expression. The Prices are not in the instant motion contesting a trespassing statute.

E. The Government Overlooks the Substantial Problems of Overbreadth and Vagueness All of Which Could be Avoided by Using Terms That are Not First Amendment Modes of Expression

The Government addresses overbreadth and Vagueness by citing case law. Gov. Opp. at 9-16. The Prices want to highlight some statements. The Government states:

> The prohibition presents "no ambiguity"; it "tells the citizen that that it is unlawful for him" to parade, demonstrate, or picket inside the Capitol Building. [Citing *Jeanette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583 (D.D.C. 1972). Gov. Opp. at 11.

Here is what the *Jeanette Rankin Brigade* passage actually says:

> There is no ambiguity about the language of Section 193g. It tells that citizen that it is unlawful for him "to parade, stand or move in processions or assemblages" in the Capitol Grounds…. *Jeanette Rankin Brigade* at 583.

These are not the same provisions or language. The *Jeanette Rankin Brigade* Rankin court is looking at a different provision which does not contain the ambiguous word "demonstrate." The Prices hope the court is not confused by this language in the Governments memorandum.

The *Jeanette Rankin Brigade* Court the goes on to say that "[t]he Capitol Grounds (excluding such places as the Senate and House floors, committee rooms, etc.) have traditionally been open to the public; indeed, thousands of people visit them each year." *Id* at 584. Earlier the court states this is part of an overbreadth analysis-- "We think that is the case here, although the result we reach would also be compelled by due process considerations of overbreadth." [Footnote omitted]. *Id* at 582-583.

The Government also states:

> Defendants' reliance (Mot. 15) *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. Gov. Opp. at 12-13.

There is no distinction between prohibitions in regulations or statutes for purpose of First and Fifth Amendment analysis. It should not go unnoticed in the original memorandum that two courts overturned regulations purporting to define and regulate demonstrations as violating the First and Fifth Amendment. One case was used reasonableness review and the other case strict scrutiny but both cases were regulations were implementing 40 USC § 5104 and the courts found certain interpretations of the statute were not Constitutional.

F. The Government Fails to Counter the Prices' Analysis of That the Provision is Not Reasonable in the Face of First and Fifth Amendment Concerns and Claims Clarity in the Face of Incredible Vagueness In Defining Expressive Conduct in the Modern World

By its own terms 40 USC §5104(e)(2)(G) addresses three modes of First Amendment Activity -- parading, demonstrating and picketing. The Court in *Bynum v. United States Capitol Police Board*, 93 F. Supp. 2d 50 (D.D.C. 2000) found regulations purporting to implement 40 USC §5104(e)(2)(G) to violate the First Amendment and Due Process. With respect to the First Amendment the *Bynum* Court states:

> The Court, however, cannot conclude that the regulation is reasonable in light of the purposes it could legitimately serve. While the regulation is justified by the need expressed in the statute to prevent disruptive conduct in the Capitol, it sweeps too broadly by inviting the Capitol Police to restrict behavior that is in no way disruptive…*Id*. at 57 (Citations omitted)

With respect to Due Process and unconstitutional vagueness, the *Bynum* Court states, in part:

> In fact, the definition of "demonstration" in the regulation encompassing all expressive conduct, whether disruptive or not …. *Id.* at 58.

See also Lederman v. U.S., 291 F.3d 36 (D.C. Cir. 2002) (reviewing facial First Amendment challenge to a regulatory prohibition on demonstration activities outside Capitol building). As stated in *Lederman*,

> We hold only that, as currently written, the demonstration ban imposes "a serious loss to speech . . . for a disproportionately small governmental gain," *Citing White House Vigil for the ERA Comm. v. Clark,* 746 F.2d 1518, 1544 (D.C. Cir. 1984)(Wald, J. concurring in the judgement in part and dissenting in part on other grounds). *Lederman* at 46.

This is the problem. There is no reason to use of First Amendment terms and the Government identifies no gain whatsoever by doing so. The point of the Prices' analysis is not that the Government should not regulate individuals or groups through rules for purposes of security and visitor or crowd management.

For decades 40 USC §5104(e)(2)(G) was not invoked except for a few cases. In each of those cases, the police first ask people to stop their conduct before charging under 40 USC §5104(e)(2)(G). Then comes January 6, 2021 and a flood of 40 USC §5104(e)(2)(G) charges in exact parallel with 40 USC §5104(e)(2)(D). The latter provision addresses disorderly or disruptive conduct in the Capitol without prohibiting First Amendment modes of expression.

Consider the Government's response to the *Rivera* Opinion:

> 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.

The Government explains the simplicity by stating:

> In an opinion following a recent trial, Judge Kollar-Kotelly explained some of the statute's operative terms, with no apparent difficulty:
>
> ….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….taking the form of a procession and mass-meeting." "Demonstration," Oxford English Dictionary (2nd ed. 1989); see also "Demonstration," Merriam- Webster.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))

So, the Government agrees that those definitions, if they occurred in the Capitol Building should trigger criminal sanctions. The Government focuses on the simple and easy and not the vague, soft and all-encompassing language.

The Prices highlight some the terms the Government argues are not vague in the dictionary definition approach:

--"a public display of group feelings towards a person or cause…"

--"Peaceful demonstrations against the government."

Yet, the Prices do not believe these terms are clear and not per se necessary to address disruptive conduct.

The Prices in their argument had presented other issues from *Rivera* as the opinion states:

> Defendant primarily argues that because he was "recording" as a "videographer," he was not "parading or "demonstrating." The two, however,

> are not mutually exclusive. In truth, Defendant acted more as a social media influencer might, frequently urging his followers to "share, share, share."[citation omitted] Sharing, Rivera may have hoped, could have helped him "get [his][addition in original] name out there," one of Rivera's stated reasons for going to the Capitol on January 6, 2021. [citation omitted]. Indeed just before he joined the crowd, he was primarily concerned that no one appeared to be watching his Facebook Live [citation omitted]

As noted, camera's, smart phones and recording are all allowed in the Capitol Buildings in most places. So, would the relationship to social media turn recording and commenting on a smart phone into conduct that is "demonstrating?" This was apparently relevant to one U.S. district court judge.

The Government then says:

> 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.

The Prices disagree and note the Government is simply not looking at the permutations from the language that are now coming to pass. Or the Government does not care. It is not just *Rivera*. *Bynum* and other cases cited in the original memorandum all struggle to make the issue about disruptive conduct and not really the expressive part of demonstrative conduct.

The Price do not argue that the First or Fifth Amendments require exceptions to general rules of crowd management in the Capitol Buildings. Rather, The Prices argue that the Constitution does not permit Congress to criminally

punish First Amendment conduct simply because it is First Amendment conduct – which is exactly how 40 USC §5104(e)(2)(G) is written.

People come to the Capitol Buildings all the time. They come in groups. They wear t-shirts with messages. They lobby in groups. The Capitol Buildings have political or other celebrations, and some go into the hallways. Reporters broadcast from the buildings. They bring material to look at. They are allowed to access Facebook and have an opinion. People participate in demonstrations outside and on the same day come to talk to people in the Capitol. People bring media, smart phones and tablets. Young people walk in groups connected by smart phones. These standards are certainly are vague. The Government simply ignores the obvious problems and permutations. This includes First Amendment rights like recording and presenting material to people in real time. Why would that be an indicator or factor that makes conduct criminal activity. Could one not walk around with a podcast and talk to people about the debt or war? What if someone broadcasts from his or her smart phone and criticizes the government on that broadcast? That action poses no security issue yet could arguably be viewed as "demonstrating". Or is that reporting? If people gather in the Capitol to celebrate a political victory is that a demonstration or parade? What if people walked in a group carrying signs in a hallway. How is this a different security or operational risk for Congress? Groups of students and others may walk in single or double file all where tee-shirts celebrating America or a school. Is that a "parade?"

Of course, Congressman and Senators and related staff are allowed to do exactly the same thing with no threat of criminal sanctions. And that is regardless of whether an action is disorderly or disruptive. The Government protects the Government.

Again, the Capitol Police and those in charge of security and visitors can restrict areas, size of groups, duration of stay, volume, and items that might pose a risk, all without referring to whether the conduct is also a First Amendment mode of conduct like a demonstration. Again, if those rules effectively prevent a large gathering then it does. The Prices are not arguing the First Amendment trumps crowd management rules in the Capitol. The Prices are arguing that it violates the First and Fifth Amendment to punish people only because of First Amendment modes of communication with no qualifier on whether such mode is disruptive. People commonly communicate political ideas in the Capitol Buildings and that expression is protected under First Amendment. People frequently assemble in the Capitol. That is protected. People attend hearings who are protesting. Many have been removed from a hearing room.

The Government does not see or acknowledge any of this as First and Fifth Amendment issues. The needless application of 40 USC §5104(e)(2)(G) will degrade the First and Fifth Amendment and be unreasonable. There is a balancing test. Here, simply asking Congress to hew more closely to 40 USC §5104(e)(2)(D) solves the issue.

There is simply no reason for the vagueness and First Amendment problems at all. There is not a single activity that poses a security or disruption problem that cannot be stated in a different manner and that does not focus solely on First Amendment modes of conduct. It should not matter whether a group of students are disruptive but have no intent to "demonstrate." The Capitol Police or whoever else is responsible for groups and individuals walking in the Capitol Buildings can limit the size of groups, the length of stay in any location, the location of passage, the volume of noise, and whether potentially dangerous items are carried, all without threatening criminal sanctions for completely vague statements of First Amendment terms and modes of expression.

The recent opinion of U.S. District Judge Colleen Kollar-Kotelly, shows the immediacy and importance of the issues the Prices raise in the facial challenge. The opinion states:

> Defendant primarily argues that because he was "recording" as a "videographer," he was not "parading or "demonstrating." The two, however, are not mutually exclusive. In truth, Defendant acted more as a social media influencer might, frequently urging his followers to "share, share, share."[citation omitted] Sharing, Rivera may have hoped, could have helped him "get [his][addition in original] name out there," one of Rivera's stated reasons for going to the Capitol on January 6, 2021. [citation omitted]. Indeed just before he joined the crowd, he was primarily concerned that no one appeared to be watching his Facebook Live [citation omitted]

As noted above, camera's, smart phones and recording are all allowed in the Capitol Buildings in most places. So, would the relationship to social media turn recording and commenting on a smart phone into conduct that is "demonstrating?" This was apparently relevant to one U.S. district court judge.

The *Rivera* opinion shows the direct problem. The broad and ambiguous definition of "demonstration" is synonymous with the term that is Constitutionally protected and provides no other qualifier other than the *mens rea* requirements. The *Rivera* opinion equates the breadth of the criminal *actus reus* in 40 USC §5104(e)(2)(G) to the breadth of the Constitutional protection. A peaceful demonstration, meaning complaining in a smartphone to an audience not at the Capitol, somehow becomes a criminal violation.

The First Amendment mode of demonstration is particularly useful to the general citizenry. Corporations and certain other interest groups do not participate in demonstrations. Such groups meet to lobby—not something as easily available to citizens with a simple message. Such groups can also get Congressional staff and members to meet outside of Congress and, thus, outside the restrictions of 40 USC §5104(e)(2)(G). Peaceful "demonstration" can be a means to communicate by media and to a broader group of people without getting appointments. No one should be under any illusion that certain groups do not care about the right to peacefully demonstrate as a means of getting to Representatives, Senators, or staff. People button-hole people all the time. The Government has yet to explain the harm. Full consideration must be given to any mode of First Amendment expression, however defined, to petition the government for grievances and to provide First Amendment communication. 40 U.S.C. § 5104(e)(2)(G) was never wise as something since something 40 U.S.C. § 5104(e)(2)(D) would suffice without directly taking on First Amendment terms. No one is saying there is a right to the kind of large, loud

demonstration the authors may have thought about. However, large and loud can be describe by controlling large and loud. The expressiveness—political, social or otherwise-- of conduct should not be relevant. Yet, the law as drafted depends on conduct being modes of expression.

It is impermissible to ignore the First and Fifth Amendment issues the Prices raise in their facial attack on 40 U.S.C. § 5104(e)(2)(G). Nor is it permissible to ignore that Congress can avoid dragging First and Fifth Amendment protections down the swamp by simply focusing on provisions using First Amendment neutral language to accomplish the objectives already stated. Fixing the issue is easy. Other rules can control riots. 40 U.S.C. § 5104(e)(2)(G) needlessly threatens First and Fifth Amendment Rights.

G. The Government Shows No Reason Why 40 USC §5104(e)(2)(G) Should Discriminates Against Citizens Versus Congressional Employees with Respect to Singling Out Modes of First Amendment Expression

The Prices point to the exception for government officials in 40 USC §5104(e)(3). AT 19-20. 0-The Governments response to the point that 40 USC §5104(e) discriminates against citizens versus Congressional Employees is:

> ….to the extent Vo is returning to his First Amendment forum challenge, an exemption for Members of Congress and other congressional officers and employees is an entirely reasonable and viewpoint neutral restriction within the Capitol building.

Thus, the Government argues that differential treatment of Congressional staff while threatening criminal sanctions for the same First Amendment modes of expression is reasonable and business as usual. The Prices argue the provision

needlessly creates a class allowed to engage in the 3 forms of First Amendment with impunity and another class subject to criminal sanctions.

H. The Government Fails to Address the Prices' Points That Additional Provisions That Modify the Application Of 40 USC §5104(e)(2)(G) Make the Problems Worse

The Prices argue the provision tramples on peaceful and orderly activities that could, nonetheless, fall under the three modes of First Amendment expression set out under 40 USC §5104(e)(2)(G). The Prices argue the additional problems created by the confusing connection of 40 USC §5104(e)(2)(G) to the provision stating that "attempting" to parade, demonstrate or picket in any of the Capitol Buildings is a crime. The Prices argue the connection of 40 USC §5104(e)(2)(G) to the aiding and abetting statute to this range of First Amendment activity and circumstances further exacerbates the constitutional issues. The Prices further argue the connection of 40 USC §5104(e)(2)(G) to the exclusion in 40 USC §5104(e)(3) creating a two-tiered set of circumstances for First Amendment purposes. The Prices claim all of these permutations under criminal law amplify the fundamental problems of overbreadth under the First Amendment and constitutional overbreadth, vagueness, under the Fifth Amendment. The Government addressed none of these points in its analysis.

CONCLUSION

For the forgoing reasons, the Prices respectfully request that the Court enter an order finding 40 U.S.C. § 5104(e)(2)(G) fails the First and Fifth Amendments of

the U.S. Constitution for the reasons stated above and also dismissing Count IV of the Information based on such a finding.

Dated: September 14, 2022

Respectfully submitted,

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