Appendix

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **JOHN MARON NASSIF,** **Defendant.**	**Criminal Action No. 21-421 (JDB)**

MEMORANDUM OPINION

Defendant John Nassif is charged by information with four offenses related to his alleged participation in the riot at the U.S. Capitol on January 6, 2021. See generally Information [ECF No. 12]. In advance of the jury trial scheduled to begin on December 5, 2022, Nassif moves to dismiss Count Four of the information, which charges that he "willfully and knowingly paraded, demonstrated, and picketed in a Capitol Building" in violation of 40 U.S.C. § 5104(e)(2)(G). See generally Def.'s Mot. to Dismiss Count Four of the Information [ECF No. 30] ("Mot. to Dismiss"). Nassif also seeks a change of venue or, in the alternative, expanded examination of potential jurors. See generally Def.'s Mot. for Transfer of Venue or, in the Alternative, to Allow Expanded Examination of Prospective Jurors Before & During Voir Dire [ECF No. 31] ("Venue Mot."). For the reasons explained below, the Court will deny both of Nassif's motions.

Background[1]

At 1:00 p.m. on January 6, 2021, a joint session of Congress assembled to certify the Electoral College vote of the 2020 Presidential Election. Opp'n to Mot. to Dismiss at 1. A crowd

[1] The following factual background draws in part from the government's brief in opposition to Nassif's motion to dismiss, see Gov't's Opp'n to Mot. to Dismiss [ECF No. 34] ("Opp'n to Mot. to Dismiss") at 1–3, and the affidavit in support of the criminal complaint against Nassif, see Aff. in Supp. of Criminal Compl. & Arrest Warrant

began to gather outside the U.S. Capitol. Id. "The mob . . . scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol," with the first rioters entering shortly after 2:00 p.m. Trump v. Thompson, 20 F.4th 10, 18 (D.C. Cir. 2021); Opp'n to Mot. to Dismiss at 1. Members of the House and Senate evacuated at around 2:20 p.m. Opp'n to Mot. to Dismiss at 2. "All told, the riot caused millions of dollars of damage to the Capitol, and approximately 140 law enforcement officers were injured in the fighting—the January 6th riot was, in short, 'the most significant assault on the Capitol since the War of 1812." McHugh I, 2022 WL 296304, at *2 (quoting Trump, 20 F.4th at 18–19).

On January 9 and January 20, 2021, the Federal Bureau of Investigation ("FBI") received two separate tips that Nassif had posted videos and pictures of himself inside the Capitol building on January 6. Aff. in Supp. of Compl. ¶¶ 11, 14. In subsequent interviews with the FBI, the tipsters identified Nassif in photos taken from closed-circuit surveillance video footage from within the Capitol. Aff. in Supp. of Compl. ¶¶ 17–18; Opp'n to Mot. to Dismiss at 2. That surveillance footage, and video from other individuals inside the Capitol on January 6, shows "Nassif chanting outside the East Rotunda doors" at around 3:00 p.m. before entering the Capitol through those doors at 3:13 p.m. Opp'n to Mot. to Dismiss at 2. Officers prevented Nassif from moving further into the building, turning him back as he approached the Rotunda; Nassif exited at 3:23 p.m. Id.

On April 29, 2021, Nassif was charged by complaint with entering and remaining in a restricting building or grounds and violent and disorderly conduct on Capitol grounds. See Compl.

[ECF No. 1-1] ("Aff. in Supp. of Compl."), which may be accepted as true for present purposes, United States v. Ballestas, 795 F.3d 138, 149 (D.C. Cir. 2015); cf. United States v. McHugh (McHugh I), Crim. A. No. 21-453 (JDB), 2022 WL 296304, at *2 n.2 (D.D.C. Feb. 1, 2022); United States v. Mostofsky, 579 F. Supp. 3d 9, 13 (D.D.C. 2021) (noting that the court "glean[ed] its understanding of the case by assuming as true the facts set forth in the Indictment and associated filings").

[ECF No. 1]. He was arrested and, after an initial appearance on May 17, 2021, released on personal recognizance. Min. Entry, May 17, 2021. On June 22, the government filed an information charging Nassif with four counts, including parading, demonstrating, or picketing in a Capitol building in violation of 40 U.S.C. § 5104(e)(2)(G). Information at 1–3. Nassif has pleaded not guilty to all four charges. See Min. Entry, June 30, 2021. Nassif now moves to dismiss Count Four, charging him with parading, demonstrating, or picketing in a Capitol building, see Mot. to Dismiss at 1, and for a transfer of venue or for the expanded examination of potential jurors, see Venue Mot. at 1. The government opposes both requests. See Opp'n to Mot. to Dismiss at 1; Gov't's Opp'n to Venue Mot. [ECF No. 35] ("Opp'n to Venue Mot.") at 1. Nassif's motions are fully briefed and ripe for decision. See generally Def.'s Reply to Opp'n to Mot. to Dismiss [ECF No. 39] ("Reply").[2]

Analysis

I. Motion to Dismiss Count Four of the Information

Before trial, a criminal defendant may move to dismiss the information against him for, among other reasons, "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). Because the main purpose of a charging document is to inform the defendant of the nature of the accusation against him, Ballestas, 795 F.3d at 148–49, an information need contain only "a plain, concise, and definite written statement of the essential facts constituting the offense charged," Fed. R. Crim. P. 7(c)(1). An information may fail to state an offense in two relevant ways: if the charged statutory provision is unconstitutional, McHugh I, 2022 WL 296304, at *3, or the if the offense charged does not apply to the defendant's conduct, United States v. Montgomery, 578 F. Supp. 3d

[2] Nassif did not file a reply in support of his motion for transfer of venue.

54, 58–59 (D.D.C. 2021). In considering Nassif's motion to dismiss, "the sole question before the court is the legal sufficiency of the" information. Montgomery, 578 F. Supp. 3d at 58.

Nassif moves to dismiss Count Four, which charges that he "paraded, demonstrated, and picketed in a Capitol Building" in violation of 40 U.S.C. § 5104(e)(2)(G). Information at 3. He argues that § 5104(e)(2)(G) is "unconstitutional on its face" because it is "both overbroad and unconstitutionally vague" in violation of the First Amendment. Mot. to Dismiss at 2.[3] He also contends that Count Four does not apply to his alleged conduct and so "fails to state an offense" against him. Id. at 11. The Court will address Nassif's arguments in turn.

A. Overbreadth

Under the First Amendment, "a statute is facially invalid if it prohibits a substantial amount of protected speech." United States v. Williams, 553 U.S. 285, 292 (2008). A statute may be "facially invalid even if [it] also ha[s] legitimate application," City of Houston v. Hill, 482 U.S. 451, 459 (1987), but the overbreadth must be "substantial": "the mere fact that one can conceive of some impermissible applications of a statute is not enough to render it susceptible to an overbreadth challenge," Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984). "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Taxpayers for Vincent, 466 U.S. at 801. To maintain the appropriate balance between protecting free speech and avoiding the "harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional," courts have "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." Williams, 553 U.S. at

[3] Nassif raises only facial challenges to § 5104(e)(2)(G); he does not argue that the statute is unconstitutional as applied. Mot. to Dismiss at 2 n.1; Reply at 2 n.2.

292. Thus, "[i]nvalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" Id. at 293 (cleaned up) (quoting L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999)); accord Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) (noting that, in the First Amendment context, "[f]acial challenges are disfavored").

Because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers," a court's "first step in overbreadth analysis is to construe the challenged statute." Williams, 553 U.S. at 293. Section 5104(e)(2)(G) provides that "[a]n individual . . . may not willfully and knowingly . . . parade, demonstrate, or picket in any of the Capitol Buildings." Focusing first on the operative verbs—parade, demonstrate, and picket—Nassif argues that this "plain language itself is strikingly broad, covering enormous swaths of protected First Amendment activity," and that the statute is not limited to "disruptive speech, protests, gatherings, or even audible oral expressions of ideas." Mot. to Dismiss at 3.[4]

When considering a statute's constitutionality under the First Amendment, the forum to which the statute applies is of great importance. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805–06 (1985). The Supreme Court has identified three types of public property for First Amendment analysis: (1) the traditional public forum, (2) the designated public forum, and (3) the nonpublic forum. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983). Traditional public forums include locations like "streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used

[4] The government notes that the operative verbs in § 5104(e)(2)(G) "principally target conduct rather than speech," Opp'n to Mot. to Dismiss at 5, but this distinction means little because the operative verbs—parade, demonstrate, and picket—cover expressive conduct, see, e.g., Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam) (concluding that displaying an American flag with a peace symbol affixed to it was protected First Amendment activity because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it"); Texas v. Johnson, 491 U.S. 397, 404 (1989) (applying the same standard to conclude that burning a flag was protected First Amendment activity).

for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Id. at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). In a public forum, "the rights of the state to limit expressive activity are sharply circumscribed," limited to regulations "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." Id.[5] A designated public forum "consists of public property which the state has opened for use by the public as a place for expressive activity." Id. In a designated public forum, the government "is not required to indefinitely retain the open character of the facility," but while it does, "it is bound by the same standards as apply in a traditional public forum." Id. at 46. Finally, a nonpublic forum consists of "[p]ublic property which is not by tradition or designation a forum for public communication," id.; here, the government "has far more leeway to regulate speech," and restrictions are "examined only for reasonableness," Price v. Garland, No. 21-5073, 2022 WL 3589188, at *4 (D.C. Cir. Aug. 23, 2022) (quoting United States v. Kokinda, 497 U.S. 720, 727 (1990)). The government "may reserve" a nonpublic forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view." Perry, 460 U.S. at 46.

Forum analysis is important in assessing statutory overbreadth because, as is clear from the varying tests the Supreme Court has articulated, a statute applied in a traditional public forum could be unconstitutional, but the same statute, as applied in a nonpublic forum, could pass constitutional muster. Thus, though Nassif would have the Court focus only on the operative verbs in § 5104(e)(2)(G)—parade, demonstrate, and picket—this argument ignores the six words following those verbs: "in any of the Capitol Buildings." Section 5014(e)(2)(G) thus bars

[5] The government may also impose "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry, 460 U.S. at 45.

parading, picketing, or demonstrating only within the Capitol buildings themselves, rather than on the Capitol grounds. Armed with a decision from another court in this District—Judge Friedman's decision in Bynum v. U.S. Capitol Police Board, 93 F. Supp. 2d 50 (D.D.C. 2000), which classified the interior of the Capitol as a nonpublic forum—the government urges that this distinction cabins the overbreadth of which Nassif complains. See Opp'n at 6–7.

In Bynum, Judge Friedman considered a constitutional challenge to a U.S. Capitol Police regulation implementing a prior version of § 5104(e)(2)(G) (then codified at 40 U.S.C. § 193f(b)(7)). See 93 F. Supp. 2d at 53–54. The plaintiff in that case sought an injunction against enforcement of the regulation, which he argued was "an impermissible restriction on speech in a public place." Id. at 54. But Judge Friedman assessed "the nature of the forum"—the Capitol buildings—and concluded that "the inside of the United States Capitol is a nonpublic forum for First Amendment forum analysis purposes." Id. at 54, 56. Thus, under Supreme Court precedent, restrictions on speech within the Capitol buildings are permissible so long as they "are 'viewpoint neutral' and 'reasonable in light of the purpose served by the forum.'" Id. at 56 (quoting Cornelius, 473 U.S. at 806). Nonetheless, Judge Friedman went on to reject the challenged Capitol Police regulation as an unreasonable restraint on free speech because "the regulation's proscriptions [we]re not limited to the legitimate purposes set forth in the statute"—"the need . . . to prevent disruptive conduct in the Capitol." Id. at 57. The government now contends that, at least in dictum, Judge Friedman concluded that § 5104(e)(2)(G) itself was not substantially overbroad, both because it applies within a nonpublic forum and because it prohibits only "disruptive" conduct. See Opp'n at 6–7.

In reply, Nassif argues that the Court should not rely on the dictum from Bynum restricting § 5104(e)(2)(G) to "disruptive conduct," pointing instead to a more recent decision from another

court in this District that defined the elements of the offense as "t[aking] part in a 'public manifestation' in furtherance of 'some political or other cause.'" Reply at 4 (quoting United States v. Rivera, Crim. A. No. 21-060 (CKK), 2022 WL 2187851, at *7 (D.D.C. June 17, 2022)). But this Court need not decide whether § 5104(e)(2)(G) bars only disruptive conduct to conclude that it is not overbroad; instead, it is enough that the statute is limited to the interior of the Capitol buildings, is viewpoint-neutral, and is reasonable in light of the statute's purposes.

First, this Court concludes that the interior of the Capitol building is a nonpublic forum where the government may limit First Amendment activities so long as the restrictions "are reasonable in light of the purpose of the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806. As Judge Friedman explained in Bynum, the Capitol, "[a]s the seat of the legislative branch of the federal government, . . . might well be considered to be the heart of the nation's expressive activity and ideas," but it has long been recognized that "the expression of ideas inside the Capitol may be regulated in order to permit Congress peaceably to carry out its lawmaking responsibilities and to permit citizens to bring their concerns to their legislators." 93 F. Supp. 2d at 55. Congress thus enacted § 5104 "so that citizens would be 'assured of the rights of freedom of expression and of assembly and the right to petition their Government,' without extending to a minority 'a license . . . to delay, impede, or otherwise disrupt the orderly processes of the legislature which represents all Americans." Id. at 55–56 (alteration in original) (quoting H.R. Rep. No. 90-745, at 2 (1967)). And though Congress "allows the public to observe its proceedings and visit the inside of the Capitol," the government nevertheless "has a legitimate interest in ensuring that the activities of Congress proceed without disruption," so "Congress may enact reasonable statutes . . . to further that interest." Id. at 56. "The government does not create a public forum . . . by permitting limited

discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius, 473 U.S. at 802.

Further, and again as Judge Friedman explained (albeit in dictum) in Bynum, this Court concludes that § 5104(e)(2)(G) is both viewpoint-neutral and reasonable. See 93 F. Supp. 2d at 56 ("The Court finds that [the statute] enacted by Congress is a viewpoint neutral, reasonable regulation of both conduct and expressive activity that satisfies the Supreme Court's test for nonpublic fora."). The statute contains nothing limiting its application to a particular viewpoint—political or otherwise. Indeed, § 5104(e)(2)(G) has been applied to the demonstration activities of a defendant protesting Justice Brett Kavanaugh's nomination to the Supreme Court, see United States v. Barry, No. 18-00111 (RMM), 2019 WL 2396266, at *1 (D.D.C. June 5, 2019), as well as to the participants in the January 6 riot. The statute accordingly satisfies the first prong of the test for permissible restrictions on protected activity in a nonpublic forum.

Second, the Court concludes that § 5104(e)(2)(G) is "reasonable in light of the purpose served by the forum." Cornelius, 473 U.S. at 806. In Bynum, Judge Friedman identified the purpose of the Capitol as permitting "Congress peaceably to carry out its lawmaking responsibilities" and allowing "citizens to bring their concerns to their legislators." 93 F. Supp. 3d at 55. The Court agrees that it is reasonable for Congress to effect this purpose by providing "rules that members of Congress must follow, as well as rules for their constituents," to ensure that the Capitol is used in support of Congress's primary work: legislating. Id. at 55–56. The ban on "parading, demonstrating, and picketing" is one such reasonable rule: it targets activities that Congress reasonably could have concluded would disrupt its legislative process.

This conclusion accords with a long line of cases rejecting challenges to complete bans on otherwise permissible First Amendment activity as reasonable, viewpoint-neutral regulations in

nonpublic fora. See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 674, 685 (1992) (upholding as reasonable a complete ban on solicitation in the interior of an airport terminal in light of "inconveniences to passengers" and "burdens on . . . officials" caused by pedestrian congestion); Kokinda, 497 U.S. at 723–24, 733 (upholding as reasonable a complete ban on solicitation on sidewalks in front of post offices because solicitation was "unquestionably . . . disruptive of business"); Taxpayers for Vincent, 466 U.S. at 808, 817 (upholding as reasonable a complete ban on the posting of signs on utility poles because it advanced the city's "interest in eliminating visual clutter").[6] Given the permissive standard applicable to nonpublic forums, it is reasonable for the Congress to conclude that its interest in peaceful lawmaking requires a limitation on the demonstrative activities of non-legislators.

Instead of addressing the narrowing element of location, Nassif points to legislative history to suggest that § 5104(e)(2)(G) is unconstitutionally overbroad. He points both to floor statements of individual Representatives expressing various concerns about the 1967 version of the statute, see Mot. to Dismiss at 3–4, 5–6, 10 (citing 90 Cong. Rec. 29374, 2388–89, 29392, 29394–95 (daily ed. October 19, 1967) (statements of Reps. O'Neal, Bingham, Edwards, Cramer, and Colmer)), and to the minority view expressed in the House Report on the 1967 bill on a previous version of the statute, id. at 9; Reply at 6 (citing H.R. Rep. No. 90-745 (1967), as reprinted in 1967 U.S.C.C.A.N. 1739, 1746–47). As the government notes, legislative history "is an uneven tool that cannot be used to contravene plain text," Opp'n to Mot. to Dismiss at 8 (quoting United States

[6] Nassif cites Jeanette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C.), aff'd, 409 U.S. 972 (1972), for the proposition that a statute "forbid[ding] all demonstrative assemblages of any size, no matter how peaceful their purpose or orderly their conduct" would be "void on its face on First and Fifth Amendment grounds," Mot. to Dismiss at 10 (quoting 342 F. Supp. at 587). But that case dealt with a previous version of § 5104(e)(2)(G) that prohibited "parad[ing], stand[ing], or mov[ing] in processions or assemblages in the Capitol Grounds," not within the Capitol building itself. Jeanette Rankin Brigade, 342 F. Supp. at 583 (emphasis added) (quoting 40 U.S.C. § 193g (1967)). The court in Jeanette Rankin Brigade explained that "[t]he Capitol Grounds . . . have traditionally been open to the public," id. at 584; but as the Court has explained above, the same is not true of the Capitol building.

v. Bingert, No. 1:21-cr-91-RCL, 2022 WL 1659163, at *11 (D.D.C. May 25, 2022)), and floor statements are "particularly 'unreliable,'" id. (quoting Order at 6, United States v. Powell, Crim. A. No. 21-179 (RCL) (D.D.C. July 8, 2022), ECF No. 73); accord Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921) ("By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body."). This unreliability is especially acute where the legislative history is of a previous version of a statute, and a version that—importantly—forbade "parad[ing], stand[ing], or mov[ing] in processions or assemblages in [the] United States Capitol Grounds." 40 U.S.C. § 193g. The same is not true here. Section § 5104(e)(2)(G) in its current form is narrower—it applies only in the Capitol building and not to the broad terms "standing" or "moving." Accordingly, the Court concludes that the plain text of § 5104(e)(2)(G), which applies to narrower conduct only in the nonpublic forum of the Capitol building, is not unconstitutionally overbroad on its face.

B. Vagueness

The Fifth Amendment ensures that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." A criminal statute violates this fundamental principle if it permits the government to deprive a defendant of his liberty "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 576 U.S. 591, 595 (2015). In the First Amendment context, a defendant may "argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." Williams, 553 U.S. at 304.

"But 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" Williams, 533 U.S. at 305 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)). "[A] statutory term is not rendered unconstitutionally vague because it 'do[es] not mean the same thing to all people, all the time, everywhere.'" United States v. Bronstein, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (second alteration in original) (quoting Roth v. United States, 354 U.S. 476, 491 (1957)). Thus, courts "are not concerned with vagueness in the sense that [a statutory] term 'requires a person to conform his conduct to an imprecise but comprehensible normative standard,' whose satisfaction may vary depending upon whom you ask," id., and instead will find a statute unconstitutionally vague only where, after "applying the rules for interpreting legal texts," a statute's "meaning 'specifies' 'no standard of conduct at all,'" id. (cleaned up) (quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971)); see also United States v. Lanier, 520 U.S. 259, 267 (1997) (explaining that the "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal").

Nassif first contends that § 5104(e)(2)(G) "does not define the offense so as to put ordinary people on notice of what is prohibited." Mot. to Dismiss at 7. He argues that "'demonstrating' is an ambiguous word" that permits selective enforcement. Id. at 8. The Court disagrees. The definition of demonstrate—"to make a public demonstration; esp. to protest against or agitate for something," Oxford English Dictionary (3d ed. 2005), or "to make a public display of sentiment for or against a person or cause," as by "students demonstrating for the ouster of the dictator," Webster's New International Dictionary (3d ed. 1993)—is not so vague as Nassif contends. When

read "in light of its neighbors," McHugh I, 2022 WL 296304, at *12, "parade"[7] and "picket,"[8] it is clear that § 5104(e)(2)(G) prohibits taking part in an organized demonstration or parade that advocates a particular viewpoint—such as, for example, the view that the 2020 U.S. Presidential Election was in some way flawed.

Nassif next contends that § 5104(e)(2)(G) is so "broadly-worded" that it could be "selectively employed to silence those who expressed unpopular ideas," Mot. to Dismiss at 8 (quoting Lederman v. United States, 89 F. Supp. 2d 29, 41 n.11 (D.D.C. 2000)), an argument he claims is supported by the legislative history of the statute, id. at 9–10.[9] As explained above, Nassif's reliance on legislative history is misplaced where the plain text of the statute leaves no need to resort to alternative methods of interpretation. See, e.g., Bingert, 2022 WL 1659163, at *11. More fundamentally, though, Nassif's argument fails because § 5104(e)(2)(G) does not contain the kinds of "wholly subjective" terms, like "annoying" or "indecent," that have no "narrowing context" or "settled legal meanings." Williams, 553 U.S. at 306; see also McHugh I, 2022 WL 296304, at *16 (rejecting vagueness argument because statute did not "condition criminal liability on individualized, subjective judgments" and instead concluding there were "specific fact-based ways to determine whether a defendant's conduct" violated the statute

[7] Parade, Webster's New Int'l 3d Dictionary (3d ed. 1993) ("[T]o assemble (as troops) in formation; cause to maneuver or march ceremoniously[.]"); Parade, Oxford English Dictionary (3d ed. 2005) ("To march in procession or with great display or ostentation; to walk up and down, promenade, etc., in a public place, esp. in order to be seen[.]").

[8] Picket, Webster's New Int'l 3d Dictionary (3d ed. 1993) ("[T]o walk or stand in front of as a picket; to take up the station and duties of a military or labor picket[.]"); Parade, Oxford English Dictionary (3d ed. 2005) ("In an industrial or other dispute: to surround or occupy as a picket; to station pickets at or in (a place); to patrol with pickets," or "To act as a picket in a dispute or demonstration[.]").

[9] Nassif also argues that the word "demonstrate" could be applied to such activities as "a child on a field trip remarking 'We love our Capitol Police' . . . or a staffer cheerfully singing 'Battle Hymn of the Republic.'" Mot. to Dismiss at 8. At bottom, Nassif is arguing that the word "demonstrate" could reach too far and cabin in too much conduct, an argument more relevant to Nassif's overbreadth challenge than to vagueness. As the Court has already explained, read in context, § 5104(e)(2)(G) applies to organized conduct advocating a viewpoint, not to off-handed expressive conduct or remarks.

(citation omitted)). Section 5104(e)(2)(G) requires that an individual willfully and knowingly parade, picket, or demonstrate inside the Capitol building. This language provides sufficient guidance as to what is prohibited. That § 5104(e)(2)(G) may "'require[] a person to conform his conduct to an imprecise but comprehensible normative standard,' whose satisfaction may vary depending upon whom you ask," Bronstein, 849 F.3d at 1107 (citation omitted), does not render the statute constitutionally infirm. Accordingly, the Court concludes that § 5104(e)(2)(G) is not unconstitutionally vague on its face.

C. Statement of an Offense

Federal Rule of Criminal Procedure 7(c)(1) requires that an indictment or information "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Although charging documents "must do more than simply repeat the language of the criminal statute," Russell v. United States, 369 U.S. 749, 764 (1962), even very concise charging documents may "clear[] this low bar," United States v. Sargent, No. 21-cr-00258 (TFH), 2022 WL 1124817, at *1 (D.D.C. Apr. 14, 2022). Thus, a charging document is generally sufficient if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend and . . . enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974). If a charging document "echoes the operative statutory text while also specifying the time and place of the offense," then it is generally sufficient. United States v. Williamson, 903 F.3d 124, 130 (D.C. Cir. 2018).[10] "[T]he validity of an indictment 'is not a question of whether it could have

[10] As the government notes, see Opp'n to Mot. to Dismiss at 12–13, some cases involve a crime "that must be charged with greater specificity," United States v. Resendiz-Ponce, 549 U.S. 102, 109 (2007). For example, in Russell, the Supreme Court concluded that an indictment was deficient because the witness was charged with failing to give testimony "upon any matter under inquiry before either House" of Congress, 369 U.S. at 751 n.2 (quoting 2 U.S.C. § 192), but the indictment stated only that the witnesses failed to answer questions that "were pertinent to the question then under inquiry," without explaining the subject of the investigation, id. at 752, 767–68. Here, as in many other cases where courts have declined to apply Russell, the nature of Nassif's charges does not depend upon a

been more definite and certain,'" United States v. Verrusio, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting United States v. Debrow, 346 U.S. 374, 378 (1953)), and the charging document need not inform the defendant "as to every means by which the prosecution hopes to prove that the crime was committed," United States v. Haldeman, 559 F.2d 31, 124 (D.C. Cir. 1976) (en banc) (per curiam).

Count Four of the Information alleges that, "[o]n or about January 6, 2021, within the District of Columbia, [Nassif] willfully and knowingly paraded, demonstrated, and picketed in a Capitol Building." Information at 3. Nassif argues that any interpretation of the operative verbs—parade, demonstrate, or picket—must "require some form of verbal or symbolic expression of a feeling, belief, or idea" (or in the case of "parading," "some sort of marching or participation in a processional"), and that, because the information provides "no specifics" and does "not allege [that he] engaged in any form of speech or expressive conduct," it fails to state an offense. Mot. to Dismiss at 12. But although the information is pithy, it "contains the elements of the offense charged"—that Nassif "paraded, demonstrated, or picketed" within a Capitol building—and "fairly informs" Nassif of the charge against which he must defend—that he violated the statute on January 6, 2021, in the District of Columbia. Hamling, 418 U.S. at 117. No more is required,[11] and hence the Court concludes that Count Four of the information states an offense.

"specific identification of fact." Resendiz-Ponce, 549 U.S. at 110 (citation omitted); see also United States v. Apodaca, 275 F. Supp. 3d 123, 153–56 (D.D.C. 2017) (not applying Russell to indictment under a statute criminalizing the use of firearms in connection with drug trafficking crimes).

[11] In reply, Nassif asserts that § 5104(e)(2)(G) does not "'expressly' set forth the purportedly required 'disruptive conduct'" element of the offense, so a violation of § 5104(e)(2)(G) "must be charged with greater specificity.'" Reply at 15 (quoting Resendiz-Ponce, 549 U.S. at 109). As explained above, the Court does not conclude that the statute requires a "disruptive" element, so this argument fails.

II. Motion to Transfer Venue or for Expanded Examination of Potential Jurors

A. Motion to Transfer Venue

Criminal trials generally occur in the state and district where the offense was committed. See U.S. Const. art. III, § 2; Fed. R. Crim. P. 18. But a criminal defendant has a due process right to a "fair trial in a fair tribunal," Irwin v. Dowd, 366 U.S. 717, 722 (1961) (citation omitted), and a Sixth Amendment right to an "impartial jury"; neither Article III nor Rule 18 "impede transfer . . . if extraordinary local prejudice will prevent a fair trial," Skilling v. United States, 561 U.S. 358, 378 (2010). Thus, on a defendant's motion, a court "must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21(a). Three important factors to consider when assessing prejudice are (1) "the size and characteristics of the community in which the crime occurred"; (2) whether media coverage of the crime "contained [a] confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; and (3) whether the time between the crime and the trial has "diminished" the "level of media attention." Skilling, 561 U.S. at 382–83.

Where a jury has not yet been empaneled, a defendant may show that jury bias has violated his rights based on a presumption of prejudice, but that "presumption of prejudice . . . attends only the extreme case." Id. at 381. Further, it is "well established procedure" in this Circuit to refuse defendants' "pre-voir dire requests for" transfer of venue except in "extreme circumstances," Haldeman, 559 F.2d at 60, 64. In January 6 prosecutions in particular, every court in this District—including this Court—that has ruled on a motion for a change of venue has denied it, see, e.g.,

United States v. Brock, Crim. A. No. 21-140 (JDB), 2022 WL 3910549, at *5 (collecting cases), and juries have successfully been empaneled in multiple cases.[12]

Nassif argues that all three of the Skilling factors support his motion to transfer. Specifically, he asserts that the Court must transfer his trial for fairness reasons because of the size and characteristics of District of Columbia community, Venue Mot. at 4–7; the pervasiveness and persistence of media coverage of the January 6 riot, id. at 7–10; and the short time between the attack and the scheduled trial date, id. at 10–11. The government opposes on all three points. See Opp'n to Venue Mot. at 4–24. "Given the in-depth treatment afforded to this issue already, the Court will only briefly summarize its reasons for denying [Nassif]'s motion, which are in line with those of other courts in similar cases." Brock, 2022 WL 3910549, at *5.

On the first factor, Nassif contends that D.C.'s jury pool is "unusually small and geographically compact." Venue Mot. at 4. Nassif is correct, of course, that D.C.'s jury pool—comprised of "approximately 700,000 residents[,] about 600,000 of [whom] may be in the jury pool in this case," Garcia, 2022 WL 2904352, at *8 & n.14—is smaller than the pool of "4.5 million" eligible residents the Supreme Court approved in Skilling. But courts have rejected the presumption of prejudice when confronted with similarly sized—and indeed smaller—populations. See, e.g., Skilling, 561 U.S. at 382 (noting that there is a "reduced likelihood of prejudice where the venire was drawn from a pool of over 600,000 individuals" (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1044 (1991) (plurality opinion)); United States v. Taylor, 942

[12] See United States v. Garcia, Crim. A. No. 21-0129 (ABJ), 2022 WL 2904352, at * 10 (D.D.C. July 22, 2022) (collecting cases and concluding that, "[t]o date, courts have had little difficulty qualifying enough jurors to empanel juries, with the requisite number of alternates, in January 6 cases").

F.3d 205, 223 (4th Cir. 2019) (affirming denial of venue transfer motion where local population "was approximately 621,000 residents").

As to the characteristics of D.C.'s jury pool, Nassif contends that "the government's allegations . . . stoke partisan passions that in this District would be overwhelmingly hostile" because the "events of January 6 have affected D.C. residents much more directly than persons outside the District," and because "President Biden received more than 92 percent of the vote in the 2020" presidential election here. Venue Mot. at 5–6. But "political leanings are not, by themselves, evidence that those jurors cannot fairly and impartially consider the evidence presented." Order, Apr. 18, 2022, at 6, United States v. Alford, Crim. A. No. 21-263 (TSC) (D.D.C. Apr. 18, 2022), ECF No. 46 ("Alford Order"); see Haldeman, 559 F.2d at 64 n.43; Brock, 2022 WL 3910549, at *6. And "[t]he master list of available jurors is large enough to include individuals who have paid little or no attention to the January 6 cases," and "several hundred thousand District residents who may not have been involved in policy or politics or the operation of the federal government at all; [and] who travel to and from work or school without coming near the Capitol." Garcia, 2022 WL 2904352, at *8. Accordingly, the Court concludes that the District's size and characteristics do not weigh in favor of granting Nassif's motion and transferring the case.

On the next factor, Nassif describes media coverage of the January 6 riot as "breathtakingly pervasive and persistent," and he contends that it "has focused on collective blame rather than on individual ringleaders." Venue Mot. at 7. Thus, though he acknowledges that the coverage "has not focused significantly" on himself, or indeed any individual, Nassif contends that this is "largely beside the point" because "[w]hat will matter in this case is not individualized prejudice, but prejudice to all." Id. at 7–8. This threat of prejudice is particularly serious, he argues, because

"the most disputed element" in his case "will be mens rea." Id. at 8. In support of these arguments, Nassif relies heavily on a "Federal Public Defender-commissioned survey," attached as an exhibit to his motion. Id. at 8; see generally Ex. A to Venue Mot. [ECF No. 33-1] ("Select Litigation Survey").[13]

"The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity." United States v. Childress, 58 F.3d 693, 706 (D.C. Cir. 1995). And "[i]t is not required . . . that . . . jurors be totally ignorant of the facts and issues involved." Irvin, 366 U.S. at 722–23. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. at 723. The Supreme Court has presumed prejudice based on pretrial publicity only once, in a case where a defendant's unlawfully obtained confession was broadcast three times shortly before his trial to large audiences, in a community of only 150,000 people. Rideau v. Louisiana, 373 U.S. 723, 724–25, 727 (1963). Courts have successfully empaneled juries and conducted trials in the locations of highly publicized crimes. See Brock, 2022 WL 3910549, at *7 (collecting cases); Opp'n to Venue Mot. at 15 (same). And importantly, "[w]hen publicity is about the event, rather than directed at the individual defendants, this may lessen any prejudicial impact." Skilling, 561 U.S. at 384 n.17 (citation omitted).

Nassif has not presented any evidence regarding media focused on himself. It is likely that not a single member of the venire will ever have heard of John Nassif, much less have formed an opinion of his guilt. And although media coverage of the events of January 6, and subsequent

[13] Nassif inadvertently attached only a single appendix from the Select Litigation Survey to his initial submission, but, with the Court's leave, he supplemented his filing. See Unopposed Mot. to Supplement Venue Mot. [ECF No. 33] at 1–2; Min. Order, July 11, 2022. Nassif's supplemental filing contains his memorandum in support of his motion and the Select Litigation Survey in a single document. For convenience, the Court will cite pages of the Select Litigation Survey using electronically generated CM/ECF page numbering.

investigations and prosecutions, has continued since the time of Nassif's alleged crimes, that coverage is neither sufficiently intense nor sufficiently specific to Nassif to require a change of venue. See Brock, 2022 WL 3910459, at *8. Nor does the Select Litigation Survey compel a different conclusion. This Court has previously considered the same survey in both United States v. McHugh, Crim. A. No. 21-453, and United States v. Brock, Crim. A. No. 21-140, and concluded that the results did not warrant a pre-voir dire transfer of venue. Other courts in this District have reached the same conclusion. See, e.g., Garcia, 2022 WL 2904352, at *10–13. Nassif focuses on a few of the survey's specific conclusions, see Venue Mot. at 8–9, but the survey does not—and cannot—answer the essential question: whether an individual juror "can lay aside his impression or opinion and render a verdict based on the evidence presented in court," Irvin, 366 U.S. at 723. Because voir dire is the best process during which to root out those individualized biases that would prevent a juror from rendering a fair verdict, see Garcia, 2022 WL 2904352, at *5, the pretrial media coverage of the events of January 6 does not support Nassif's motion to change venue.

Finally, Nassif contends that the Court should transfer venue because "[t]he events of January 6, 2021[] remain fresh in prospective jurors' minds." Venue Mot. at 10. Although his trial is scheduled to take place almost two years after the riot at the Capitol, Nassif urges that "the reckoning over January 6 continues to generate front-page news," pointing specifically to the House Select Committee investigation and "entertainment media" released since the attack, id. at 10 & n.15,[14] as well as media coverage of other criminal prosecutions in this District, id. at 11. Nassif's argument on this basis fails for much the same reasons as his argument regarding pre-trial

[14] The Court notes that the three media sources Nassif cites—documentaries available on HBO and Hulu, and a video feature produced by the New York Times—were all released in 2021. See Venue Mot. at 10 n.15.

publicity: the news and media coverage of the events of January 6, even if "fresh in prospective jurors' minds," Venue Mot. at 10, is not of the type or tenor requiring a transfer of venue.

Though Nassif contends that "public discourse has shifted away from the raw details of events at the Capitol and toward . . . diagnosing protestors' motives," a subject that he argues is "far more prejudicial," Venue Mot. at 11, he "offers no evidence to support that proposition, nor does he explain why voir dire is ill-suited to determine whether prospective jurors will maintain an open mind about his alleged motives." Alford Order at 13. The passage of time between January 6 and the presumptive date of Nassif's trial, 22 months since the attack on the Capitol, does not weigh in favor of granting Nassif's motion. Accordingly, because Nassif falls short of showing "extraordinary local prejudice," Skilling, 561 U.S. at 378, the Court concludes that transferring venue to another district is inappropriate at this time.

B. Alternative Requests

Should the Court deny his venue transfer motion, Nassif argues that "expanded examination of prospective jurors before and during formal voir dire would be crucial to mitigate actual prejudice." Venue Mot. at 12. He requests three measures: (1) that the Court send a questionnaire, drafted by Nassif and approved by the Court, to summoned prospective jurors; (2) that the parties be permitted to attend any pre-screening questioning before the Court conducts formal voir dire; and (3) that counsel be permitted to question prospective jurors individually during voir dire. Id. The government opposes Nassif's request for a jury questionnaire because Nassif does not suggest that he, in particular, "has received significant, unfavorable pretrial

publicity," so "any potential prejudice due to general media coverage . . . can be adequately probed through in-person voir dire examination." Opp'n to Venue Mot. at 25.

The Court agrees with the government. Nassif's alternate requests fail for fundamentally the same reasons as his motion to transfer venue: the Court is not persuaded that any additional procedural mechanisms will be necessary to ensure the empanelment of a full and impartial jury. Although Judge Chutkan has agreed to employ Nassif's requested procedures in United States v. Alford, Crim. A. No. 21-263, other courts in this District have empaneled juries in January 6 cases without resorting to enhanced protocols, see Garcia, 2022 WL 2904352, at *10 (collecting cases), and this Court is confident that the standard voir dire process will be sufficient here. Accordingly, the Court will deny Nassif's request for expanded examination of prospective jurors before and during voir dire.

Conclusion

In sum, the Court concludes that 40 U.S.C. § 5104(e)(2)(G) is neither overbroad nor vague on its face, and that the statute applies to Nassif's conduct and accordingly Count Four of the Information states an offense. Further, the Court concludes that there is no overwhelming local prejudice that compels transferring venue at this stage of the proceedings, and that Nassif's requests for expanded voir dire are unnecessary for many of the same reasons. Accordingly, the Court will deny Nassif's motion to dismiss and his motion to transfer venue or, in the alternative, for expanded voir dire. A separate Order to that effect shall issue on this date.

/s/

JOHN D. BATES

United States District Judge

Dated: September 12, 2022

APPENDIX B

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA
v.
JOHN MARON NASSIF

JUDGMENT IN A CRIMINAL CASE

Case Number: 21-421 (JDB)

USM Number: 44109-509

James Skuthan
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. 1,2 3, and 4 of the Information filed on June 22, 2021

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:1752(a)(1)	Entering and Remaining in a Restricted Building.	1/6/2021	1
18:1752(a)(2)	Disorderly and Disruptive Conduct in a Restricted Building.	1/6/2021	2

CONT'D NEXT PAGE

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/27/2023
Date of Imposition of Judgment

John D. Bates Digitally signed by John D. Bates Date: 2023.05.05 12:51:39 -04'00'
Signature of Judge

John D. Bates U.S. District Judge
Name and Title of Judge

Date

DEFENDANT:
CASE NUMBER: 21-421 (JDB)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
40:5104(e)(2)(D)	Violent Entry and Disorderly Conduct in a Capitol Building.	1/6/2021	3
40:5104(e)(2)(G)	Parading, Demonstrating, or Picketing in a Capitol Building.	1/6/2021	4

DEFENDANT:
CASE NUMBER: 21-421 (JDB)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

SEVEN (7) MONTHS ON COUNTS ONE (1) AND TWO (2) TO RUN CONCURRENTLY WITH EACH OTHER AND CONCURRENTLY WITH COUNTS THREE (3) AND FOUR (4). SIX (6) MONTHS ON COUNTS THREE (3) AND FOUR (4) TO RUN CONCURRENTLY WITH EACH OTHER AND CONCURRENTLY WITH COUNTS ONE (1) AND TWO (2).

☑ The court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be incarcerated at the Bureau of Prisons' facility at FCI Coleman, FL.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☑ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT:
CASE NUMBER: 21-421 (JDB)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

TWELVE (12) MONTHS ON COUNTS ONE (1) AND TWO (2) TO RUN CONCURRENTLY WITH EACH OTHER. NO PERIOD OF SUPERVISED RELEASE IMPOSED ON COUNTS THREE (3) AND FOUR (4).

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT:
CASE NUMBER: 21-421 (JDB)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT:
CASE NUMBER: 21-421 (JDB)

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant must submit to substance abuse testing to determine if he has used a prohibited substance. The defendant must not attempt to obstruct or tamper with the testing methods.

2. The defendant must provide the probation officer access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the United States Attorney's Office.

3. The defendant must not incur new credit charges or open additional lines of credit without the approval of the probation officer.

4. The defendant must pay the balance of any restitution at a rate of no less than $100 per month.

The Probation Office shall release the presentence investigation report to all appropriate agencies, which includes the United States Probation Office in the approved district of residence, in order to execute the sentence of the Court. Treatment agencies shall return the presentence report to the Probation Office upon the defendant's completion or termination from treatment.

DEFENDANT:
CASE NUMBER: 21-421 (JDB)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 70.00	$ 500.00	$ 1,000.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
Architect of the Capitol Office of the Chief Financial Officer Ford House Office Building, Room H2-205B Washington, DC 20515		$500.00	

TOTALS	$ 0.00	$ 500.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☑ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT:
CASE NUMBER: 21-421 (JDB)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 70.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☑ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal monthly *(e.g., weekly, monthly, quarterly)* installments of $ 100.00 over a period of 15 month *(e.g., months or years)*, to commence 30 days *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The financial obligations are payable to the Clerk of the Court for the U.S. District Court, 333 Constitution Ave NW, Washington, DC 20001. Within 30 days of any change of address, the defendant shall notify the Clerk of the Court of the change until such time as the financial obligation is paid Restitution payments shall be made to the Clerk of the Court for the United States District Court, District of Columbia, for disbursement to the victim.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 29, 2023 Decided April 9, 2024

No. 23-3069

UNITED STATES OF AMERICA,
APPELLEE

v.

JOHN MARON NASSIF,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cr-00421-1)

Melissa Fussell, Assistant Federal Defender, argued the cause for appellant. With her on the briefs were *A. Fitzgerald Hall*, Federal Defender, and *James T. Skuthan*, First Assistant Federal Defender.

Timothy R. Cahill, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Chrisellen R. Kolb* and *John P. Mannarino*, Assistant U.S. Attorneys.

Before: PILLARD, WILKINS and GARCIA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: John Maron Nassif was convicted of four misdemeanor offenses for his role in the January 6, 2021, riot at the United States Capitol. The district court sentenced him to seven months in prison. On appeal, he challenges one of his convictions and, separately, his sentence.

The challenged conviction is for demonstrating in a United States Capitol building. Nassif does not argue that his conviction under 40 U.S.C. § 5104(e)(2)(G) was insufficiently supported by the evidence introduced at trial. But he asserts that the statute's prohibition against parading, demonstrating, or picketing in Capitol buildings is facially overbroad and void for vagueness in violation of the First Amendment and the Due Process Clause. Because Nassif has not shown that the Capitol buildings are a public forum, the challenged provision need only be reasonable in light of the government's interest in undisturbed use of the Capitol buildings for their legislative purposes. We conclude that the prohibition is reasonable and that it clearly applies to Nassif's conduct, so we reject his facial challenges and affirm the conviction.

Nassif challenges his sentence on two distinct grounds. He argues that the district court applied an incorrect Sentencing Guideline to calculate the base offense level. And he contends that, in imposing the sentence, the court unconstitutionally penalized him for exercising his Sixth Amendment right to trial. We reject both challenges and affirm Nassif's sentence.

BACKGROUND

On January 6, 2021, the United States Congress convened to certify the Electoral College vote and declare the winner of the 2020 presidential election. *See* U.S. Const. amend. XII; 3 U.S.C. § 15 (2018), *amended by* Consolidated Appropriations Act, Pub. L. No. 117-328, div. P, tit. I, 136 Stat. 4459, 5238 (2022). As the Senate and House members met, thousands of

supporters of the losing candidate, Donald J. Trump, swarmed the United States Capitol, disrupting the proceedings and overwhelming the law enforcement officers who attempted to prevent the interference. The ensuing mob "scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol," leading security officers to evacuate members of the House and Senate. *United States v. Nassif*, 628 F. Supp. 3d 169, 176 (D.D.C. 2022) (quoting *Trump v. Thompson*, 20 F.4th 10, 18 (D.C. Cir. 2021)). The mob that day caused "millions of dollars of damage to the Capitol," injured "approximately 140 law enforcement officers," *id.* (internal quotation marks omitted), and left multiple people dead, *see Thompson*, 20 F.4th at 15. The chaos forced members of Congress to halt the certification proceedings for more than six hours.

The following summary of the events most relevant to Nassif's appeal is based on the record in this case, including the evidence introduced at trial.

Nassif was among the many people who entered the Capitol on January 6, 2021. He had traveled the previous day from Seminole County, Florida with two friends to "be there to support the [P]resident" in Washington, D.C. Appellant's Appendix (App.) 203-05. On January 6, Nassif and three companions joined President Trump's rally near the Washington Monument, where they heard the President speak. Nassif then brought his friends back to their hotel before going to the Capitol without them. At the Capitol, Nassif joined hundreds of people congregating outside the east front doors of the historic Capitol Building. Glass panes in the doors had been smashed, alarms were ringing, and members of the crowd were cursing the police and shouting to be let in. Nassif joined the crowd and led a call-and-response chant, yelling, "Whose house?" "Our house!" App. 116-17, 294. When, minutes later,

rioters exiting the Capitol pushed open the east front doors from within, Nassif encouraged the people coming out to "keep fighting" and forced his way into the Capitol Rotunda. Once inside, Nassif gestured to rioters outside to join him inside. Approximately ten minutes after entering the Capitol, Nassif left the building.

The government charged Nassif with four misdemeanor offenses in connection with his conduct on January 6, 2021: entering or remaining in a restricted building in violation of 18 U.S.C. § 1752(a)(1) (Count One); disorderly or disruptive conduct in a restricted building in violation of 18 U.S.C. § 1752(a)(2) (Count Two); violent entry or disorderly conduct in a Capitol building in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Three); and parading, demonstrating, or picketing in a Capitol building in violation of 40 U.S.C. § 5104(e)(2)(G) (Count Four).

Before trial, Nassif unsuccessfully moved to dismiss Count Four, challenging the statute's prohibition on demonstrating as unconstitutionally overbroad in violation of the First Amendment and unconstitutionally vague in violation of the Fifth Amendment. *Nassif*, 628 F. Supp. 3d at 176. In rejecting Nassif's overbreadth claim, the district court held that the interior of the Capitol building is a nonpublic forum "where the government may limit First Amendment activities so long as the restrictions 'are reasonable in light of the purpose [served by] the forum and are viewpoint neutral.'" *Id.* at 180 (quoting *Cornelius v. NAACP Leg. Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). The court reasoned that, in enacting section 5104(e)(2)(G), Congress permissibly determined that its institutional interest in peaceful space in which to do its lawmaking work supports the challenged limitation on demonstrating inside the Capitol buildings. *Id.* at 181. In rejecting Nassif's vagueness challenge, the court explained

that, when "demonstrate" is "read in light of its neighbors"—"parade" and "picket"—it is clear that the term prohibits "taking part in an organized demonstration or parade that advocates a particular viewpoint." *Id.* at 183 (internal quotation marks omitted). Because that plain text "provides sufficient guidance as to what is prohibited," the court held that the statute was not unconstitutionally vague. *Id.*

The case proceeded to a bench trial. The district court found Nassif guilty on all four counts and sentenced him to a total of seven months' imprisonment followed by 12 months of supervised release. That sentence was below the guidelines range of 10 to 16 months, which the court calculated based on Nassif's total offense level of 12 and his Category I criminal history. The district court, over Nassif's objection, computed the offense level by reference to the Guideline for "obstructing or impeding officers." U.S.S.G. § 2A2.4. Based on a finding that Nassif gave false testimony at trial, the court then applied a two-point sentencing enhancement for "obstructing or impeding the administration of justice." U.S.S.G. § 3C1.1. "Given Mr. Nassif's active participation" in the riot, "including leading chants, encouraging other rioters to keep fighting[,] and waving people in" to the Capitol building when it was closed to the public, the court determined that "a sentence of incarceration [was] warranted." App. 393. That determination was "consistent with the sentencing guidelines," as well as with Nassif's "lack of remorse and with the less-than-full acceptance of responsibility and the fact that he did not testify truthfully." App. 393. But the district court varied downward from the bottom of the guidelines range because there was "no showing of aggressiveness or violence" while Nassif was in the

Capitol and in recognition of Nassif's military service and the expressions of community support for him. App. 393.

DISCUSSION

Nassif raises three issues on appeal. First, he seeks vacatur of his conviction for demonstrating inside the Capitol, arguing that section 5104(e)(2)(G) is unconstitutional on its face. Second, Nassif asserts that the district court applied the incorrect Sentencing Guideline to his section 1752(a)(2) conviction for disorderly and disruptive conduct in a restricted building. Lastly, Nassif contends that, in determining his sentence, the district court unconstitutionally penalized him for going to trial. We consider each argument in turn.

We review *de novo* Nassif's challenges to the facial constitutionality of 40 U.S.C. § 5104(e)(2)(G) and to the district court's interpretation of the Sentencing Guidelines. *See United States v. Bronstein*, 849 F.3d 1101, 1106 (D.C. Cir. 2017); *see also United States v. Turner*, 21 F.4th 862, 865 (D.C. Cir. 2022). We review the reasonableness of Nassif's sentence for abuse of discretion. *United States v. Otunyo*, 63 F.4th 948, 960 (D.C. Cir. 2023).

I.

First enacted in 1967 to address "a substantial increase in the number of incidents of excessive disruption or disorderly conduct" in the Capitol buildings, H. Rep. 90-745, at 1 (Oct. 9, 1967), section 5104(e)(2)(G) prohibits "individual[s] or group[s] of individuals" from "willfully and knowingly . . . parad[ing], demonstrat[ing], or picket[ing] in any of the Capitol Buildings," 40 U.S.C. § 5104(e)(2)(G). The statute is inapplicable to "any act performed in the lawful discharge of

official duties" by a congressmember or congressional employee. *Id.* § 5104(e)(3).

Nassif challenges section 5104(e)(2)(G)'s prohibition on picketing, parading, and demonstrating inside the Capitol buildings as unconstitutionally overbroad and vague. He does not argue that his own conduct in the Capitol on January 6, 2021, was protected by the First Amendment, nor does he assert that section 5104(e)(2)(G) gave him insufficient notice that his conduct would be prohibited. He contends, rather, that the statute punishes so much protected speech and is so unclear that it is entirely invalid and cannot be applied to anyone, including him. In asking us to declare section 5104(e)(2)(G) unconstitutional in all its applications, Nassif's claim "implicates 'the gravest and most delicate duty that [courts are] called on to perform': invalidation of an Act of Congress." *Hodge v. Talkin*, 799 F.3d 1145, 1157 (D.C. Cir. 2015) (alteration in original) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). For the reasons below, we do not take that step here.

A.

We begin with Nassif's overbreadth challenge. The overbreadth doctrine instructs a court to hold a statute facially unconstitutional if it prohibits a substantial amount of protected speech, even if the statute "has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied." *United States v. Hansen*, 599 U.S. 762, 769 (2023). But "[b]ecause it destroys some good along with the bad, 'invalidation for overbreadth is strong medicine that is not to be casually employed.'" *Id.* at 770 (alterations and quotation marks omitted) (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). Only where the statute's overbreadth is "*substantial*, not only in an absolute sense, but also relative to

the statute's plainly legitimate sweep," should a court invalidate the law on its face. *Williams*, 553 U.S. at 292.

Section 5104(e)(2)(G) regulates expressive conduct in the Capitol buildings, which the statute defines to include "the United States Capitol, the Senate and House Office Buildings and garages, the Capitol Power Plant, . . . all subways and enclosed passages connecting two or more of those structures, and the real property underlying and enclosed by any of those structures." 40 U.S.C. § 5101. Because the Capitol buildings are government property, Congress's power to restrict expression there—and the stringency of our review of any such restriction—turns in part on whether the Capitol buildings are a public forum.

Courts use "forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800. Speech restrictions in a public forum must be "content-neutral" and "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels of communication." *Cmty. for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 387 (D.C. Cir. 1989). In a nonpublic forum, our review is "much more limited." *Int'l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992). There, a restriction on speech "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.*

We therefore assess whether the Capitol buildings are a public forum before considering whether section 5104(e)(2)(G) is justified by the government's interest in

preserving the Capitol buildings as a place conducive to the work of the legislative branch.

1.

Nassif argues that some portion of the Capitol buildings, including the Rotunda at the center of the historic Capitol, is a public forum because it has been "traditionally publicly accessible." Nassif Br. 15.

The quintessential "traditional" public fora are streets, sidewalks, and parks, which, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indust. Org.*, 307 U.S. 496, 515 (1939)). The character of these sites, "without more," supports treating them as public, *United States v. Grace*, 461 U.S. 171, 177 (1983), unless the government can establish that certain streets, sidewalks, or parks have a "specialized use" that "outweigh[s] the attributes that would otherwise mark them as public forums." *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992); *see also Lederman v. United States*, 291 F.3d 36, 46 (D.C. Cir. 2002) ("[S]ome areas within a large public forum may be nonpublic if their 'use' is 'specialized.'" (quoting *Henderson*, 964 F.2d at 1182)).

We have long recognized the Capitol grounds—a series of lawns, only partially walled, surrounding the Capitol buildings—as a traditional public forum. *Lederman*, 291 F.3d at 39, 41-42. Indeed, "[t]here is no doubt that the Capitol Grounds are a public forum." *Cmty. for Creative Non-Violence*, 865 F.2d at 387. The same is true of the sidewalks wrapping around the Capitol, which are "continually open, often uncongested, and . . . a place where people may enjoy the open air or the company of friends and neighbors." *Lederman*,

291 F.3d at 44 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981)).

The Capitol buildings themselves, as defined in 40 U.S.C. § 5101, are not a street, sidewalk, or park to which we apply the "working presumption" of public-forum status. *Oberwetter v. Hilliard*, 639 F.3d 545, 552 (D.C. Cir. 2011) (quoting *Henderson*, 964 F.2d at 1182). A visitor entering a Capitol building crosses a doorway's physical threshold separating exterior from interior—itself a familiar signal that the building's interior "differs from the remainder of the public Grounds in ways that make it uniquely 'nonpublic.'" *Lederman*, 291 F.3d at 42.

Even government property that does not resemble a street, sidewalk, or park may be rendered a public forum by "specific designation (rather than tradition) when 'government property that has not traditionally been regarded as a public forum is intentionally opened up'" as a place for expressive activity. *Hodge*, 799 F.3d at 1157 (quoting *Pleasant Grove v. Summum*, 555 U.S. 460, 469 (2009)). The government need not indefinitely keep a designated public forum open to the public, but "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n*, 460 U.S. at 46.

The "touchstone for determining whether government property is a designated public forum is the government's intent in establishing and maintaining the property." *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1016 (D.C. Cir. 1998). It is not enough that "members of the public are permitted freely to visit" a government building. *Lee*, 505 U.S. at 680 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)). Nor does the government "create a public forum by inaction or by permitting limited discourse" therein. *Cornelius*, 473 U.S. at 802. We

accordingly must "look[] to the policy and practice of the government to ascertain whether it intend[s]" to open the property for assembly and debate by the general public. *Id.*; *see Perry Educ. Ass'n*, 460 U.S. at 47. The Supreme Court has also "examined the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802. It was relevant to the public-forum analysis in *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, that the state university campus had for its students many of the characteristics of a traditional public forum, *id.* at 267 n.5.

In discerning whether a public school district intended to designate its internal mail system as a public forum, the Supreme Court in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), looked for indications in the record that "permission ha[d] been granted as a matter of course to all who s[ought] to distribute material" via that internal mail system. *Id.* at 47. Finding none, the Court held that the school mailboxes and interschool delivery system were not any kind of public forum. *Id.* In *Stewart v. District of Columbia Armory Board*, 863 F.2d 1013 (D.C. Cir. 1988), by contrast, we held that the plaintiffs adequately alleged that RFK Stadium was a designated public forum potentially open to banners of all kinds, not only those related to the games it hosted. In so holding, we recognized that "the question of whether RFK Stadium is a public forum is inherently a factual one," and that the ultimate result might differ depending on whether plaintiffs could adduce evidence to establish that "the government did indeed through its practices and/or policies 'intend' to create a public forum." *Id.* at 1019. We noted that evidence relevant to that inquiry could include "the compatibility of the commercial purposes of the Stadium with expressive activity, a consistent pattern of such activity at the

Stadium, and/or its ultimate reflection in the Armory Board's policies and practices." *Id.*

The record before us contains no evidence that Congress intended to open any portion of the Capitol buildings as a public forum for assembly and discourse. To be sure, expressive activity by people other than members and staff happens every day in the Capitol buildings—in constituent meetings, lobbying sessions, committee hearings, and the like. But the communications that take place in the Capitol are typically "scheduled and controlled by Senators or Representatives, and they may or may not be open to observation or (less frequently) participation by the public." *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 56 (D.D.C. 2000); *cf. City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n*, 429 U.S. 167, 175 (1976) (explaining that, where a state board of education "opened a forum for direct citizen involvement," it could not justify excluding specific teachers based on the concerns they sought to express). Entry to the Capitol buildings is, moreover, strictly regulated: A visitor wishing to tour the historic Capitol Building that encompasses the Capitol Rotunda, for example, must book a tour, enter through the Capitol visitor center between 8:30 a.m. and 4:30 p.m., proceed through security, and subject all carried items to inspection. *See Frequently Asked Questions*, visitthecapitol.gov.[1] Against that backdrop, Nassif has not established that the Capitol buildings are, by policy or practice, generally open for use by members of the public to voice whatever concerns they may have—much less to use for protests, pickets, or demonstrations.

Nassif cites two examples of "historic demonstrations of monumental importance" inside Capitol buildings that he says

[1] https://perma.cc/H6DF-JH4R (last visited Mar. 26, 2024).

evidence their status as a public forum: the 1934 civil rights sit-ins at whites-only restaurants within the Capitol and the 1990 protests inside the Capitol Rotunda in connection with the "Capitol Crawl" in support of the Americans with Disabilities Act. Reply Br. 14-15. Neither protest involved an intentional choice by the government to open the Capitol as a public forum. And two examples over a 90-year period do not establish "a consistent pattern" of authorizing expressive activity that evinces congressional intent to create a public forum. *Stewart*, 863 F.2d at 1019.

Moreover, the congressional work the Capitol buildings are designed to house is not so naturally compatible with the presence of parades, demonstrations, and pickets therein to show, on that basis alone, that Congress intended to designate the Capitol as public forum. *Cornelius*, 473 U.S. at 802-03. We have held that "'the primary purpose for which the Capitol was designed—legislating'—is entirely consistent 'with the existence of all parades, assemblages, or processions which may take place *on the grounds*'" of the Capitol complex. *Lederman*, 291 F.3d at 42 (emphasis added) (quoting *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.D.C.), *aff'd mem.*, 409 U.S. 972 (1972)). But that designation does not extend to the interior of the buildings, which serve as a workplace for Senators, Representatives, and their staffs. The park-like Capitol grounds are uniquely situated to host "the marketplace of ideas." *Widmar*, 454 U.S. at 269 n.5. But inviting myriad parades, demonstrations, and pickets inside the Capitol buildings would disrupt the very legislative process that the buildings are designed to accommodate.

In a last effort to establish that some portion of the Capitol buildings is a public forum, Nassif cites a decision of the D.C. Court of Appeals for the proposition that "the United States

Capitol Rotunda, which is at the very heart of the United States Capitol Building, is a 'unique situs for demonstration activity' and 'a place traditionally open to the public.'" *Berg v. United States*, 631 A.2d 394, 397-98 (D.C. 1993) (quoting *Wheelock v. United States*, 552 A.2d 503, 506 (D.C. 1988)). The Court of Appeals in *Berg* conducted a time, place, and manner analysis before rejecting a First Amendment challenge to misdemeanor laws as applied to individuals arrested for engaging in a "die-in" demonstration inside the Capitol Rotunda. *Id.* at 398. The court mustered no historical evidence of the Rotunda being "traditionally open" for public discourse, but drew its public-forum characterization from *Wheelock v. United States*, 552 A.2d 503 (D.C. 1988).

The D.C. Court of Appeals in *Wheelock* invalidated misdemeanor convictions of two demonstrators arrested in the Capitol Rotunda, making general reference to the "United States Capitol" as "a place traditionally open to the public." *Id.* at 506. Like *Berg*, however, *Wheelock* did not cite any historical evidence of the Rotunda's openness to public discourse. Instead, *Wheelock* relied on *Kroll v. United States*, 590 F. Supp. 1282 (D.D.C. 1983), *rev'd on other grounds*, 847 F.2d 899 (D.C. Cir. 1988), for the notion that "access" to the Capitol "cannot be denied broadly or absolutely." *See* 552 A.2d at 506. *Kroll*, for its part, considered only the public-forum status of the historic Capitol's exterior steps, without opining on the status of any interior portion of the Capitol, *id.* at 1289-90. The statement Nassif quotes from *Berg*, then, seems to derive more from an imprecise daisy chain of reasoning than from a considered assessment of the Capitol Rotunda's history.

We do not foreclose the possibility that a future case might find that there is a designated public forum somewhere inside the Capitol buildings. The record before us, however, does not support such a characterization. Indeed, in the proceedings

before the district court, Nassif never claimed that any portion of the Capitol buildings was a public forum. The district court properly held, then, that—at least on the present record—the Capitol buildings are a nonpublic forum.

2.

Treating the Capitol buildings as a nonpublic forum, we next assess whether the prohibition on parading, demonstrating, and picketing within those buildings survives the "limited review" governing speech restrictions in a nonpublic forum. *Hodge*, 799 F.3d at 1162 (internal quotation marks omitted). So long as the restrictions on speech are not viewpoint-based, that review requires only that we determine whether the regulation is "reasonable" in light of the purpose of the forum. *Lee*, 505 U.S. at 679; *see also Cornelius*, 473 U.S. at 806.

There is no serious assertion that section 5104(e)(2)(G) discriminates on the basis of viewpoint. Nassif briefly intimates that the statute's prohibition is viewpoint-based because the government's brief says the statute prohibits "picketing or demonstrating 'as a protest *against* a policy of government.'" Reply Br. 18 (emphasis added) (quoting Gov't Br. 13). But the statute's plain text is to the contrary. Section 5104(e)(2)(G) makes it unlawful to "parade, demonstrate, or picket in any of the Capitol Buildings," regardless of any viewpoint the parade, demonstration, or picket may espouse. 40 U.S.C. § 5104(e)(2)(G); *see also McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014) ("[W]hen someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another view was permitted to do so." (internal quotation marks omitted)). An indoor demonstration urging Congress to act on

politically controversial legislation and an indoor cherry blossom parade would be equally banned.

The question, then, is whether the restriction is reasonable in light of the government's interest in preserving the Capitol buildings for "the use to which [they are] lawfully dedicated." *Perry Educ. Ass'n*, 460 U.S. at 46. As the government itself describes the relevant interest, section 5104(e)(2)(G) prevents "interference with or disturbance of the activities of Congress." Gov't Br. 23 (quoting *Markowitz v. United States*, 598 A.2d 398, 408 n.15 (D.C. 1991)). Congress reasonably decided that parades, pickets, or demonstrations inside the Capitol buildings would interfere with those buildings' intended use. After all, congressmembers and their staffs require secure and quiet places to work on legislative proposals and meet with colleagues and constituents. They need to traverse the Capitol halls to attend committee hearings and legislative sessions. And Capitol Police officers must prioritize safeguarding the building and protecting the individuals who work therein—not policing pickets and demonstrations. To be sure, "[t]he fundamental function of a legislature in a democratic society assumes accessibility to [public] opinion." *Lederman*, 291 F.3d at 42 (alteration in original) (quoting *Jeannette Rankin Brigade*, 342 F. Supp. at 584). But the interest in a workplace where legislators and staff may do their jobs undisturbed by parades, pickets, or demonstrations comports with accessibility and is plainly legitimate.

Against that backdrop, Congress reasonably sought to prevent the hundreds of demonstration groups that descend on the nation's capital each year from treating the Capitol buildings as a sheltered extension of the ample public fora provided on the adjacent parklands. *See Lederman*, 291 F.3d at 39 (noting that the grounds immediately surrounding the Capitol alone span approximately sixty acres). Like any

occupant of a government office building, Congress must be free to restrict at least some expressive activity to preserve its buildings as a functional workplace. *Cf. Initiative & Referendum Inst. v. U.S. Postal Serv.*, 685 F.3d 1066, 1073 (D.C. Cir. 2012) (upholding a ban on collecting signatures on postal sidewalks because Postal Service customers and employees "have complained [that doing so] blocks the flow of traffic into and out of the post office building").

3.

The core of Nassif's objection is that, even if Congress may constitutionally restrict some parades, pickets, and demonstrations in the Capitol buildings, section 5104(e)(2)(G)'s blanket prohibition is unconstitutional because it criminalizes a substantial amount of protected speech that would not as a practical matter disrupt Congress's activities.

Nassif's premise that the statute reaches a substantial amount of speech protected by the First Amendment rests on a strained, maximalist reading of the statutory text. He highlights broad definitions of "demonstration" as "an outward expression or display" or "a public display of group feelings toward a person or cause." Nassif Br. 7 (citing an unidentified edition of "Merriam-Webster"). Based on those definitions, he asserts that the statute imposes an "outright ban on expressive activity" that he insists covers expression entirely unlike parades or pickets. Reply Br. 16 (quoting *Lederman*, 89 F. Supp. 2d at 41). He contends, for example, that the statute prohibits lawmakers from wearing red ribbons for AIDS Awareness Week and precludes Capitol visitors from bowing their heads in unison to recognize victims of a tragedy. Nassif Br. 7; Reply Br. 16; *see also* Reply Br. 11-12. Even if that broad prohibition would "incidentally prevent some disruptions," Nassif argues, it sweeps in too much protected

speech and is therefore unconstitutionally overbroad. Nassif Br. 18.

A categorical prohibition on all expressive activity within Capitol buildings would likely not pass constitutional muster even under the relaxed standard applicable to a nonpublic forum. For example, treating open space inside the Los Angeles airport as a public forum, the Supreme Court invalidated a sweeping prohibition on all "First Amendment activities," including talking, reading, or wearing campaign buttons or symbolic clothing. *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Such a ban could not be justified "even if [the airport] were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575.

Contrary to Nassif's characterization, section 5104(e)(2)(G) does not categorically prohibit all speech or expression in the Capitol buildings. The longstanding principle of statutory interpretation that "a word is known by the company it keeps," *Bronstein*, 849 F.3d at 1108 (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)), dictates that "demonstrate" be understood in the context of its neighbors: "picket" and "parade." The latter two terms connote "actions that are purposefully expressive and designed to attract notice." *Hodge*, 799 F.3d at 1168; *see, e.g.*, Parade (v.), *Oxford English Dictionary* (2d ed. 1989) ("To march in procession or with great display or ostentation."); Picket (v.), *Oxford English Dictionary* (2d ed. 1989) (defining the term to include "watch[ing] people going to work during a strike or in non-union workshops, and to endeavor to dissuade or deter them," "conducting a demonstration at particular premises," and "collective sing[ing]"). Read in context, the prohibition on "demonstrat[ing]" reaches people gathering or individually drawing attention to themselves inside the Capitol buildings to

express support for or disapproval of an identified action or viewpoint. It does not apply to the "social, random, or other everyday communications" that incidentally occur within the Capitol buildings. *Hill v. Colorado*, 530 U.S. 703, 721-22 & n.22 (2000) (observing limited character of a prohibition on "picketing" or "demonstrating"). The district court was right, then, to read section 5104(e)(2)(G) to encompass only "organized conduct advocating a viewpoint," not "off-handed expressive conduct or remarks." *Nassif*, 628 F. Supp. 3d at 183 n.9.

In a nonpublic forum, Congress has the latitude to prohibit demonstrations beyond those that are most likely to disrupt the business of Congress; it may legislate to prevent disruptive activity without requiring case-specific proof of actual or imminent disruption. Indeed, "Congress may prophylactically frame prohibitions at a level of generality as long as the lines it draws are reasonable, even if particular applications within those lines would implicate the government's interests to a greater extent than others." *Hodge*, 799 F.3d at 1167; *see also Cornelius*, 473 U.S. at 809. "[R]estrictions of expressive activity in a nonpublic forum need not satisfy any least-restrictive-means threshold, and a 'finding of strict incompatibility between the nature of the speech . . . and the functioning of the nonpublic forum is not mandated.'" *Hodge*, 799 F.3d at 1166 (quoting *Cornelius*, 473 U.S. at 808-09). In this context, Congress was entitled to decide that opening the Capitol doors to parading, demonstrating, or picketing would detract from the efficacy of the Capitol buildings as the workplaces of the legislative branch.

In rejecting Nassif's facial challenge, we do not foreclose future as-applied challenges to section 5104(e)(2)(G). Nor do we purport to hold that every conceivable application of the statute would pass constitutional muster. We hold here only

that the potential unconstitutional applications of section 5104(e)(2)(G) are not so disproportionate "to the statute's plainly legitimate sweep" as to merit facial invalidation. *Williams*, 553 U.S. at 292. On the record Nassif presents, there is no basis to conclude that the prohibition on demonstrating in the Capitol buildings is facially invalid.

B.

Nassif also challenges section 5104(e)(2)(G) as unconstitutionally vague. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *Williams*, 553 U.S. at 304. A law may be vague in violation of due process for failure to give notice to the public or guidance to law enforcement or both: "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Nassif asserts that section 5104(e)(2)(G) fails in both ways.

Significantly, Nassif does not claim the statute is vague as applied to his own conduct at the Capitol on January 6, 2021. Nor could he. Under any plausible definition of the term, Nassif was "demonstrating" when he joined a group of hundreds of people, many carrying signs, banners, or flags, who shouted or chanted as they descended on and entered into the Capitol seeking to halt the certification of the 2020 election. Nassif himself led a series of call-and-response chants and pushed his way into the Capitol Rotunda with a mob that forced open the doors and overwhelmed the police.

Nassif's own conduct forecloses his vagueness challenge, because an individual "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law

as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); *see also Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). That rule "makes no exception for conduct in the form of speech." *Humanitarian Law Project*, 561 U.S. at 20; *see Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48-49 (2017) (rejecting a vagueness claim because it was clear that the statute proscribed the plaintiff's intended speech). "Thus, even to the extent a heightened vagueness standard applies [in the First Amendment context], a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice." *Humanitarian Law Project*, 561 U.S. at 20; *see also Expressions Hair Design*, 581 U.S. at 48-49 (applying the same principle to a vagueness claim challenging the statute for authorizing unguided enforcement discretion). "And he certainly cannot do so based on the speech of others," for whom redress might properly be sought via a First Amendment overbreadth claim. *Humanitarian Law Project*, 561 U.S. at 20.

In sum, Nassif's vagueness claim fails because section 5104(e)(2)(G) clearly proscribed his own conduct. Nassif makes no assertion that he plans any future conduct subjecting him to a "pervasive threat" that the government will "sporadic[ally] abuse its power" against him. *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 410 (D.C. Cir. 2017) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). And *Humanitarian Law Project* and *Expressions Hair Design* bar him from pressing any claim based on threat of future exercises of unguided enforcement discretion against others. 561 U.S. at 20; 581 U.S. at 48-49.

II.

We turn next to Nassif's sentencing challenges.

A.

Nassif first claims that the district court applied the wrong sentencing guideline to his conviction on Count Two.

Count Two charged Nassif with disorderly and disruptive conduct in a restricted building in violation of 18 U.S.C. § 1752(a)(2). That law prohibits "knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engag[ing] in disorderly or disruptive conduct in . . . any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions." *Id.* Nassif does not dispute that the Capitol Rotunda was a restricted building or grounds per section 1752(c)(1) on January 6, 2021, or otherwise challenge his section 1752(a)(2) conviction.

"To arrive at a Guidelines sentence, a district court must first determine," by reference to the Guidelines' statutory index, "the offense guideline section from Chapter Two [of the Sentencing Guidelines] applicable to the offense of conviction." *United States v. Flores*, 912 F.3d 613, 621 (D.C. Cir. 2019). As relevant here, the Guidelines' statutory index references two offense guideline sections applicable to 18 U.S.C. § 1752. Section 2A2.4, titled "Obstructing or Impeding Officers," carries with it a base offense level of 10; section 2B2.3, titled "Trespass," carries a base offense level of 4. *See* U.S.S.G. §§ 2A2.4, 2B2.3.

Where, as here, the statutory index references more than one applicable guideline for a particular statute, the Sentencing

Guidelines dictate that the court shall "use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted." U.S.S.G. App. A. Over Nassif's objection, the district court held that section 2A2.4, with base offense level 10, applied to Nassif's conviction on Count Two. The court reasoned that section 1752(a)(2) does not prohibit unauthorized entry, but rather "conduct that impedes or disturbs the orderly conduct of government business or official functions." App. 374-75 (Sentencing Tr.).

Nassif challenges that decision on appeal, arguing that section 2A2.4 applies only to offenses "against a person with a specific status, such as federal officers." Nassif Br. 25. As support, Nassif highlights the other statutory provisions to which section 2A2.4 applies, which prohibit, among other things, resisting or assaulting specific law enforcement officers, process servers, or extradition agents. U.S.S.G. § 2A2.4 (referencing, *inter alia*, 18 U.S.C. §§ 111, 1501, 1502, 2237(a), and 3056(d)). Because Count Two charges Nassif with disorderly and disruptive conduct in the United States Capitol—and not with an offense against an identified person—he argues that section 2B2.3, the "Trespass" Guideline, identifies the appropriate base offense level. Nassif Br. 25-26.

But section 2B2.3 is a mismatch for the section 1752(a)(2) violation charged in Count Two. Nassif's offense conduct, as charged, was disorderly and disruptive conduct in the Capitol building; for purposes of section 1752(a)(2), it does not matter whether he had permission to enter or remain in that restricted area. Unlike the remaining statutes to which Guidelines section 2B2.3 applies—which prohibit, among other things, accessing a private government computer without authorization, 18 U.S.C. § 1030(a)(3), trespassing on Strategic Petroleum Reserve facilities, 42 U.S.C. § 7270b, or traveling aboard a

vessel or aircraft without consent, 18 U.S.C. § 2199—section 1752(a)(2) requires no unauthorized entry into government property or systems.

Section 2A2.4 is a more natural fit. Although Count Two does not specifically charge Nassif with "Obstructing or Impeding Officers," U.S.S.G. § 2A2.4, such obstruction is implicit in the charge that Nassif "did in fact impede and disrupt the orderly conduct of Government business" in a "restricted building." App. 14. Indeed, it is hard to see how someone could impede the orderly conduct of government business in a building temporarily restricted for a visit by a Secret Service protectee, *see* 18 U.S.C. § 1752(c)(1)(B), without at least obstructing or impeding the work of the officers who restrict the space and guard the protectee.

It is not determinative, then, that some of the statutory provisions cross-referenced by section 2A2.4 explicitly prohibit assaulting or resisting law enforcement officers, while others more implicitly or indirectly protect official functions. Indeed, section 2A2.4 also supplies the relevant base offense level for all convictions under 18 U.S.C. § 2237(a)(2)(A), which makes it unlawful "for any person on board a vessel of the United States . . . to . . . forcibly resist, oppose, prevent, impede, intimidate, or interfere with a boarding" of the vessel or with "other law enforcement action authorized by any Federal law." *See* U.S.S.G. § 2A2.4. The text of section 1752(a)(2), like section 2237(a)(2)(A), is not framed as a prohibition on assault, resistance, or obstruction of federal law enforcement agents. Rather, both provisions penalize hindering of the work of government officials. Just as impeding government business in a Secret-Service restricted area will necessarily impede the work of Secret Service agents, forcible "interfer[ence] with a boarding" necessarily impedes the personnel supervising that boarding.

We accordingly hold that U.S.S.G. § 2A2.4 is the guideline most appropriate to the offense conduct charged in Count Two.

B.

Nassif also contends that, in imposing his sentence, the district court unconstitutionally penalized him for going to trial rather than accepting a guilty plea. He bases this claim on a short exchange between the district court and defense counsel at his sentencing hearing. In his sentencing memorandum and at the ensuing hearing, Nassif highlighted that many other January 6 misdemeanants had received sentences of probation or one-to-four-month sentences of incarceration, even where the government had requested much higher sentences. In imposing Nassif's sentence, the court noted that it had "reviewed a lot of other cases, including the chart" of January 6 misdemeanor sentences that Nassif provided. The court distinguished Nassif's proposed comparator misdemeanants on the ground that "[m]ost of those cases are guilty pleas, and, therefore, do not involve a situation like [Nassif's] where there's no acceptance of responsibility, no remorse, and [where] the defendant . . . testified . . . inaccurately or falsely" at his trial. App. 394. At the time, Nassif objected that the court "cannot penalize somebody for going to trial." App. 383. The court responded: "Well, they are penalized for going to trial in terms of the acceptance of responsibility." App. 383. Nassif renews his objection on appeal, arguing that his seven-month sentence is an unconstitutional trial penalty.

The record does not support that claim. The district court correctly observed that, unlike the misdemeanants Nassif identified whose sentences were lower, Nassif did not accept responsibility, so was not afforded the corresponding two-point downward adjustment to his sentencing range. App. 383; *see*

U.S.S.G. § 3E1.1(a) (providing for a two-point reduction where the defendant "clearly demonstrates acceptance of responsibility for his offense"). What Nassif casts as a trial penalty is the effect of applying guidelines that "explicitly tell Judges that they normally should deny the two-point reduction to a defendant who does not plead guilty." *United States v. Jones*, 997 F.2d 1475, 1478 (D.C. Cir. 1993) (en banc). The fact that "some defendants pled guilty while others did not provides a perfectly valid basis for a sentencing disparity." *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 208 (D.C. Cir. 2013). The district court's imposition of a sentence reflecting that distinction does not impermissibly burden Nassif's trial right. Nassif "was entitled to put the government to its burden of proof, but electing to do so meant foregoing benefits that other defendants obtained by striking plea bargains." *United States v. Alford*, 89 F.4th 943, 954 (D.C. Cir. 2024).

Nassif counters that the district court in fact "considered that Mr. Nassif had gone to trial *in addition* to the lack of acceptance of responsibility," Nassif Br. 29 (emphasis added), because, in preparing to impose his sentence, the court characterized Nassif as a defendant who "went to trial, who testified falsely, . . . and who has shown not only no acceptance of responsibility but no remorse," App. 387. Read in context, the district court's reference to Nassif going "to trial" is the backdrop for his false testimony and his refusal to accept responsibility. And, just as the district court reasonably denied Nassif the two-point downward adjustment for acceptance of responsibility, it permissibly imposed a two-point sentencing enhancement because Nassif "willfully obstructed or impeded . . . the administration of justice" when he testified falsely at trial. U.S.S.G. § 3C1.1.

In short, it is clear from the record, including the sentencing transcript, that the district court did not increase Nassif's sentence as a penalty for his exercise of his trial right. The court permissibly gave Nassif "less of a benefit than [it] would have allowed an otherwise identical defendant who showed greater acceptance of responsibility" and who did not testify falsely on the stand. *Jones*, 997 F.2d at 1477. That decision accords with the Sentencing Guidelines and respects Nassif's Sixth Amendment right. *See Otunyo*, 63 F.4th at 960 ("The best way to curtail unwarranted disparities is to follow the Guidelines, which are designed to treat similar offenses and offenders similarly." (quoting *United States v. Bartlett*, 567 F.3d 901, 908 (7th Cir. 2009))); *Alford*, 89 F.4th at 954.

* * *

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.