No. 24-5041

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARON NASSIF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 40 U.S.C. 5104(e)(2)(G), which prohibits parading, demonstrating, or picketing inside U.S. Capitol buildings, is facially unconstitutional on the theory that it is overbroad under the First Amendment.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

United States v. Nassif, No. 23-3069 (Apr. 9, 2024)

United States District Court (D.D.C.):

United States v. Nassif, No. 21-cr-421 (May 8, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C27) is reported at 97 F.4th 968. The memorandum opinion of the district court (Pet. App. A1-A26) is reported at 628 F. Supp. 3d 169.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2024. The petition for a writ of certiorari was filed on July 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of entering or remaining in a restricted building, in violation of 18 U.S.C. 1752(a)(1); one count of disorderly or disruptive conduct in a restricted building, in violation of 18 U.S.C. 1752(a)(2); one count of violent entry or disorderly conduct in a U.S. Capitol building, in violation of 40 U.S.C. 5104(e)(2)(D); and one count of parading, demonstrating, or picketing in a U.S. Capitol building, in violation of 40 U.S.C. 5104(e)(2)(G). Pet. App. B1-B2. He was sentenced to seven months of imprisonment, to be followed by one year of supervised release. Id. at B3-B4. The court of appeals affirmed. Id. at C1-C27.

1. On January 6, 2021, Congress convened in the U.S. Capitol to certify the Electoral College vote and declare the winner of the 2020 presidential election. Pet. App. C2. As that proceeding was taking place, "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." Id. at C2-C3. The crowd "'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." Id. at C3 (citation omitted). The crowd "caused 'millions of dollars of

damage to the Capitol,' injured 'approximately 140 law enforcement officers,' and left multiple people dead." Ibid. (citations omitted). "The chaos forced members of Congress to halt the certification proceedings for more than six hours." Ibid.

Petitioner participated in that incursion inside the Capitol. Pet. App. C3. After attending a rally near the Washington Monument, he went to the Capitol and joined hundreds of people congregating outside the building's east-front doors. Ibid. "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." Ibid. Petitioner "led a call-and-response chant, yelling, 'Whose house?' 'Our house!'" Ibid. (citation omitted). Others pushed open the east-front doors, at which point petitioner encouraged the crowd to "'keep fighting' and forced his way into the Capitol Rotunda." Id. at C4. Once inside, petitioner gestured to others to join him there, and he remained in the Capitol building for ten minutes. Ibid.

2. The government charged petitioner with four misdemeanor offenses: one count of entering or remaining in a restricted building, in violation of 18 U.S.C. 1752(a)(1); one count of disorderly or disruptive conduct in a restricted building, in violation of 18 U.S.C. 1752(a)(2); one count of violent entry or disorderly conduct in a U.S. Capitol building, in violation of 40 U.S.C. 5104(e)(2)(D); and one count of parading, demonstrating, or

picketing in a U.S. Capitol building, in violation of 40 U.S.C. 5104(e)(2)(G). Pet. App. C4.

Before trial, petitioner moved to dismiss the Section 5104(e)(2)(G) count on First Amendment grounds. Pet. App. C4. Section 5104(e)(2)(G) provides that "[a]n individual or group of individuals may not willfully and knowingly * * * parade, demonstrate, or picket in any of the Capitol Buildings." 40 U.S.C. 5104(e)(2)(G). Petitioner did not argue that "his own conduct in the Capitol on January 6, 2021, was protected by the First Amendment." Pet. App. C7. Instead, he argued, inter alia, that Section 5104(e)(2)(G) was "unconstitutionally overbroad," in violation of the First Amendment. Ibid.

The district court denied petitioner's motion. Pet. App. A1-A23. The court explained that the Capitol building's interior 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.'" Id. at A8 (quoting Cornelius v. NAACP Leg. Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)). The court observed that "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.'" Ibid. (citation omitted). The court acknowledged that "Congress 'allows the public to observe its proceedings and visit the inside of the Capitol,'" but

emphasized that "the government nevertheless 'has a legitimate interest in ensuring that the activities of Congress proceed without disruption'" and "does not create a public forum" simply by "permitting limited discourse." Id. at A8-A9 (citations omitted).

The district court further recognized that Section 5104(e)(2)(G) is a valid regulation of a nonpublic forum because it "is both viewpoint-neutral and reasonable." Pet. App. A9. The court observed that Section 5104(e)(2)(G) "contains nothing limiting its application to a particular viewpoint -- political or otherwise." Ibid. And the court found that "it is reasonable for the Congress to conclude that its interest in peaceful lawmaking requires a limitation on the demonstrative activities of non-legislators" within the Capitol building. Id. at A10.

The district court rejected petitioner's suggestion that the statute applies to "off-handed expressive conduct or remarks," such as "a child on a field trip remarking 'We love our Capitol Police.'" Pet. App. A13 n.9. Instead, the court interpreted Section 5104(e)(2)(G) to cover only "organized conduct advocating a viewpoint" that could "disrupt [the] legislative process." Id. at A9, A13 n.9. Accordingly, the court determined "that the plain text of § 5104(e)(2)(G)" -- which applies to a "narrow[]" category of "conduct only in the nonpublic forum of the Capitol building" -- "is not unconstitutionally overbroad on its face." Id. at A11.

The case proceeded to a bench trial, where the district court found petitioner guilty on all counts. Pet. App. C5. The court sentenced petitioner to seven months of imprisonment, to be followed by 12 months of supervised release. Ibid. Petitioner's sentence was below the Sentencing Guidelines range of 10 to 16 months of imprisonment. Ibid.

3. The court of appeals affirmed. Pet. App. C1-C27.

The court of appeals explained that "Congress's power to restrict expression" in the "Capitol buildings" "turns in part on whether the Capitol buildings are a public forum." Pet. App. C8. The court observed that "the Capitol grounds," which are "a series of lawns, only partially walled, surrounding the Capitol buildings," as well as "the sidewalks wrapping around the Capitol," are "a traditional public forum." Id. at C9 (citation omitted). But the court found that "[t]he record before [it] contains no evidence that Congress intended to open any portion of the Capitol buildings as a public forum for assembly and discourse." Id. at C12.

The court of appeals emphasized that "the communications that take place in the Capitol are typically 'scheduled and controlled by Senators or Representatives,'" and "[e]ntry to the Capitol buildings is * * * strictly regulated" through requirements that visitors "book a tour," "proceed through security," and "subject all carried items to inspection." Pet. App. C12 (citation

omitted). The court thus found no "'consistent pattern' of authorizing expressive activity that evinces congressional intent to create a public forum." Id. at C13 (citation omitted).

The court of appeals declined to give controlling weight to a D.C. Court of Appeals decision stating that the Capitol Rotunda "is a 'unique situs for demonstration activity' and 'a place traditionally open to the public,'" Pet. App. C14 (quoting Berg v. United States, 631 A.2d 394, 397-398 (D.C. 1993)), because the D.C. Court of Appeals had "mustered no historical evidence" of "the Rotunda's openness to public discourse" that would support public-forum status, ibid. But the court of appeals "d[id] not foreclose the possibility that a future case might find that there is a designated public forum somewhere inside the Capitol buildings." Ibid. And the court emphasized that petitioner here "never claimed that any portion of the Capitol buildings was a public forum," and "the present record" did "not support such a characterization." Id. at C14-C15.

The court of appeals observed that as "a nonpublic forum," Section 5104(e)(2)(G)'s "restrictions on speech" inside the Capitol buildings satisfy the First Amendment if they are viewpoint-neutral and "'reasonable' in light of the purpose of the forum." Pet. App. C15 (citing International Society For Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992)). The court perceived "no serious assertion that section 5104(e)(2)(G)

discriminates on the basis of viewpoint." Ibid. And the court found that "Congress reasonably decided that parades, pickets, or demonstrations inside the Capitol buildings would interfere with those buildings' intended use." Id. at C16.

"After all," the court of appeals observed, "congressmembers and their staffs require secure and quiet places to work on legislative proposals and meet with colleagues and constituents," while "Capitol Police officers must prioritize safeguarding the building and protecting the individuals who work therein -- not policing pickets and demonstrations." Pet. App. C16. "Against that backdrop," the court explained, "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." Ibid.

The court of appeals disagreed with petitioner's assertion that Section 5104(e)(2)(G) "criminalizes a substantial amount of protected speech that would not as a practical matter disrupt Congress's activities." Pet. App. C17. That "premise," the court determined, "rests on a strained, maximalist reading of the statutory text." Ibid. The court explained that the statute does not "categorically prohibit all speech or expression in the Capitol buildings" but instead reaches only "people gathering or individually drawing attention to themselves inside the Capitol

buildings to express support for or disapproval of an identified action or viewpoint." Id. at C18-C19. And the court accordingly explained that the statute would not cover petitioner's hypothetical examples of "expression entirely unlike parades or pickets," such as "Capitol visitors * * * bowing their heads in unison to recognize victims of a tragedy." Id. at C17.

"In rejecting [petitioner's] facial challenge," the court of appeals "d[id] not foreclose future as-applied challenges to section 5104(e)(2)(G)." Pet. App. C19. "Nor d[id] [the court] purport to hold that every conceivable application of the statute would pass constitutional muster." Ibid. The court instead found that "[o]n the record [petitioner] presents, there is no basis to conclude that the prohibition on demonstrating in the Capitol buildings is facially invalid." Id. at C20.[1]

ARGUMENT

Petitioner renews (Pet. 20-22) his contention that 40 U.S.C. 5104(e)(2)(G) is facially overbroad, in violation of the First Amendment. The court of appeals correctly rejected that contention, finding that the interior of the U.S. Capitol is a nonpublic forum and that Section 5104(e)(2)(G) imposes reasonable restrictions on expression in light of the forum's purpose as "the

[1] The court of appeals also rejected petitioner's argument that Section 5104(e)(2)(G) is unconstitutionally vague. Pet. App. C20-C21; see id. at A11-A14 (district court rejecting similar claim). Petitioner has not renewed that contention in this Court. See Pet. i.

workplace[] of the legislative branch." Pet. App. C19. Contrary to petitioner's submission (Pet. 15-20), review is not warranted to resolve an asserted conflict between the decision below and precedent of the D.C. Court of Appeals. The petition should be denied.

1. Petitioner "does not argue that his own conduct in the Capitol on January 6, 2021, was protected by the First Amendment"; instead, he argues only that Section 5104(e)(2)(G)'s "prohibition on picketing, parading, and demonstrating inside the Capitol" is facially "overbroad." Pet. App. C7. "[I]nvalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" United States v. Hansen, 599 U.S. 762, 770 (2023) (citation omitted). "To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." Ibid. Petitioner has not satisfied that standard.

a. As the court of appeals recognized, Section 5104(e)(2)(G)'s facial constitutionality "turns in part on whether the Capitol buildings are a public forum." Pet. App. C8. "[Q]uintessential public forums" include "streets and parks which 'have immemorially been held in trust for the use of the public.'" Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citation omitted). As the court observed, "the Capitol

grounds" and "the sidewalks wrapping around the Capitol" are such "traditional public for[a]." Pet. App. C9. But because the interior of the Capitol buildings does not resemble "a street, sidewalk, or park," id. at C10, it can be deemed a public forum only if it has been intentionally "opened for use by the public as a place for expressive activity," Perry Educ. Ass'n, 460 U.S. at 45. To "ascertain whether [the government] intended to designate" such a public forum, this Court "has looked to the policy and practice of the government" and "the nature of the property and its compatibility with expressive activity." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

Applying those principles here, the court of appeals correctly found that "[t]he record before [it] contains no evidence that Congress intended to open any portion of the Capitol buildings as a public forum." Pet. App. C12. Petitioner does not dispute either that "the communications that take place in the Capitol are typically 'scheduled and controlled by Senators or Representatives'" or that "[e]ntry to the Capitol buildings is * * * strictly regulated," requiring that visitors "book a tour," enter through the "visitor center between 8:30 a.m. and 4:30 p.m., proceed through security, and subject all carried items to inspection." Ibid.

The court of appeals correctly recognized that "[a]gainst that backdrop," petitioner has not shown that Congress

intentionally opened the Capitol buildings "for use by members of the public to voice whatever concerns they may have -- much less to use for protests, pickets, or demonstrations." Pet. App. C12. Petitioner emphasizes (Pet. 10) that the Capitol buildings are "publicly accessible." But this Court has squarely rejected any "principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment." Greer v. Spock, 424 U.S. 828, 836 (1976). And petitioner disregards the strict limits on public accessibility that Congress has imposed here.

Petitioner also now claims (Pet. 10-11) that certain portions of the Capitol -- namely, "the Senate Reception Room" and "the Rotunda" -- are designated public fora. In the lower courts, however, petitioner "never claimed that any portion of the Capitol buildings was a public forum" and failed to offer any evidence "support[ing] such a characterization." Pet. App. C14-C15. In any event, petitioner's isolated examples (Pet. 10-11) of public expression in certain portions of the Capitol come nowhere close to "establish[ing] 'a consistent pattern' of authorizing expressive activity that evinces congressional intent to create a public forum." Pet. App. C13; see Cornelius, 473 U.S. at 803 ("We will not find that a public forum has been created in the face of clear evidence of a contrary intent * * * nor will we infer that

the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.").

b. Because the Capitol buildings are a "nonpublic forum," the only remaining question is whether Section 5104(e)(2)(G)'s restrictions on expression are "viewpoint neutral" and "reasonable in light of the purpose served by the forum." Cornelius, 473 U.S. at 806. As the court of appeals observed, petitioner does not meaningfully "assert[] that section 5104(e)(2)(G) discriminates on the basis of viewpoint." Pet. App. C15. Nor could he: By its terms, Section 5104(e)(2)(G) prohibits all "parade[s], demonstrat[ions], or picket[s] in any of the Capitol Buildings," 40 U.S.C. 5104(e)(2)(G) -- regardless of the viewpoint advocated.

The court of appeals also correctly found Section 5104(e)(2)(G)'s restrictions to be reasonable. The Capitol buildings "serve as a workplace for Senators, Representatives, and their staffs" and as the center of the Nation's "legislative process." Pet. App. C13. And Congress "reasonably decided that parades, pickets, or demonstrations inside the Capitol buildings would interfere with" those "intended use[s]." Id. at C16. Members of Congress and their staffs need "secure and quiet places to work on legislative proposals and meet with colleagues and constituents," while "Capitol Police officers must prioritize safeguarding the building and protecting the individuals who work therein -- not policing pickets and demonstrations." Ibid. The

activities of those who work in the Capitol would plainly be disrupted if Congress were forced to allow "the hundreds of demonstration groups that descend on the nation's capital each year" to use "the Capitol buildings as a sheltered extension of the ample public fora provided on the adjacent parklands." Ibid. And policing all of those groups would distract from the principal mission of the Capitol Police to ensure the safety of the Capitol and its occupants.

Petitioner acknowledges (Pet. 21) that Section 5104(e)(2)(G) "reaches some unprotected speech," but asserts that the prohibition against "demonstrating" also covers "substantial amounts of protected speech relative to any legitimate sweep." But "[t]o judge whether a statute is overbroad," it is necessary to "first determine what it covers." Hansen, 599 U.S. at 770. And here, the prohibition against "demonstrat[ions]" in the Capitol buildings must be read in the context of Section 5104(e)(2)(G)'s other prohibitions against "parade[s]" and "picket[s]," as well as Section 5104(e)(2)'s neighboring prohibitions against "loud, threatening, or abusive language," "obstruct[ing] * * * passage[s]," and "engag[ing] in an act of physical violence" in the Capitol Buildings. 40 U.S.C. 5104(e)(2)(D)-(G); see Fischer v. United States, 144 S. Ct. 2176, 2183 (2024) ("[A] word is 'given more precise content by the neighboring words with which it is associated.'") (citation

omitted). In light of that context, Section 5104(e)(2)(G) reaches only demonstrations that "draw[] attention to themselves" and thereby may "detract from the efficacy of the Capitol buildings as the workplaces of the legislative branch" in a manner similar to the other conduct that Section 5104(e)(2) prohibits. Pet. App. C18-C19.

Petitioner is thus incorrect to claim (Pet. 21) that Section 5104(e)(2)(G) "reaches religious vestments, slogan-bearing t-shirts, political campaign buttons, and cause awareness ribbons." That "maximalist reading" of the prohibition against demonstrations, Pet. App. C17, would "'ascrib[e] to one word a meaning so broad that it is inconsistent with' 'the company it keeps,'" in violation of established interpretive principles, Fischer, 144 S. Ct. at 2183-2184 (citation omitted). Indeed, petitioner has offered no evidence of Section 5104(e)(2)(G) "prosecution[s] for ostensibly protected expression," instead relying on "a string of hypotheticals, all premised on" an unduly "expansive" reading of Section 5104(e)(2)(G). Hansen, 599 U.S. at 782.[2] Properly understood, Section 5104(e)(2)(G) does not extend to petitioner's hypothetical examples of "social, random, or other everyday communications." Hill v. Colorado, 530 U.S. 703, 721

[2] Petitioner's suggestion (Pet. 12 n.6) that the Capitol police have deterred musical performances is not the equivalent of showing actual prosecutions for such conduct. Much less does it show that the statute is overbroad.

(2000); see ibid. (interpreting "prohibition of 'picketing' or 'demonstrating'" to exclude "innocuous speech").

Furthermore, "even if the Government's reading were not the best one, the interpretation is at least 'fairly possible' -- so the canon of constitutional avoidance would still counsel [the Court] to adopt it." Hansen, 599 U.S. at 781 (citation omitted). Because Section 5104(e)(2)(G) therefore "does not 'prohibi[t] a substantial amount of protected speech' relative to its 'plainly legitimate sweep,'" petitioner has not shown that "the 'strong medicine' of facial invalidation for overbreadth" is warranted here. Id. at 781, 784 (citations omitted).

2. Petitioner also errs in contending (Pet. 15-20) that this Court's review is warranted to resolve an asserted conflict between the decision below and decisions of the D.C. Court of Appeals. In Grogan v. United States, 271 A.3d 196 (2022), cert. denied, 143 S. Ct. 191 (2022), the D.C. Court of Appeals rejected a First Amendment overbreadth challenge to the analogous provision of D.C. law prohibiting individuals from "parad[ing], demonstrat[ing], or picket[ing] within any of the Capitol Buildings." D.C. Code § 10-503.16(b)(7); see Grogan, 271 A.3d at 210-212. The court disagreed with the defendant's contention that "benign activities" -- "such as a nun bowing her head or a spectator wearing an armband to convey a political message" -- "could be prosecuted under" the provision. Grogan, 271 A.3d at

211. And the court explained that because "[t]he government has a 'substantial' interest in '[p]reventing disruption of the orderly conduct of the legislature's business,'" it may "regulate demonstrations within the Capitol buildings that represent 'potential interference with or disturbance of the activities of Congress.'" Id. at 212 (citations omitted). The D.C. Court of Appeals thus made the same legal determination when addressing a legal issue analogous to the one addressed by the court of appeals here.

Any differences in the courts' reasoning are marginal and not implicated by this case. For instance, petitioner observes (Pet. 18) that the D.C. Court of Appeals has interpreted the relevant D.C.-law provision "to prohibit only 'demonstrations that involve conduct more disturbing than the actions of a tourist would normally be,'" Grogan, 271 A.3d at 211, whereas the court of appeals here did not adopt that precise formulation, Pet. App. C18-C19. But as an initial matter, petitioner did not urge the D.C. Circuit to adopt the D.C. Court of Appeals' tourist standard, see Pet. C.A. Br. 6-22, and he cannot now credibly ask this Court to review an asserted conflict on a question that "was not pressed or passed upon below," United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). In any event, both courts agree on the basic contours of the statutory prohibition -- specifically, that it excludes "'off-handed expressive conduct or remarks,'" such as

individuals wearing symbolic clothing or "bowing their heads." Pet. App. C17, C19 (citation omitted); see Grogan, 271 A.3d at 211. And even to the extent the two courts were to disagree about certain isolated applications of the prohibition, this facial overbreadth challenge would not implicate that disagreement. See Pet. App. C19 (rejecting only a "facial challenge," while not "purport[ing] to hold that every conceivable application of the statute would pass constitutional muster").

Petitioner also highlights (Pet. 15-17) the D.C. Court of Appeals' statement that the "Capitol Rotunda" is a "'unique situs for demonstration activity' and 'a place traditionally open to the public . . . to which access cannot be denied broadly or absolutely.'" Berg v. United States, 631 A.2d 394, 397-398 (1993) (citation omitted). But while the court of appeals here found that statement to be unsupported by "a considered assessment of the Capitol Rotunda's history," it emphasized that petitioner had "never claimed that any portion of the Capitol buildings," such as the Rotunda, "was a public forum." Pet. App. C14-C15. And the court of appeals expressly declined to "foreclose the possibility that a future case might find that there is a designated public forum somewhere inside the Capitol buildings," finding only that "[t]he record before [it]" did "not support such a characterization." Id. at 14.

Moreover, the D.C. Court of Appeals has distinguished the Rotunda from the areas in the Capitol "that are restricted as to the general public including tourists," which the court has found to be "nonpublic for[a]." Markowitz v. United States, 598 A.2d 398, 409 (1991), cert. denied, 506 U.S. 1035 (1992). Petitioner has not disputed that the Capitol building's interior "was closed to the public" at the time petitioner entered it on January 6, 2021. Pet. App. C5. Thus, if presented with an as-applied challenge on the facts here, the D.C. Court of Appeals would classify the Capitol's interior as a "nonpublic forum" and apply only limited review to any speech restrictions. Markowitz, 598 A.2d at 404. Even assuming the Capitol Rotunda were a public forum under some circumstances, it plainly is not so at all times (such as when the building is otherwise closed), and it was not a public forum when the Capitol was closed to the public while Congress certified the Electoral College vote on January 6, 2021. Accordingly, this case would be a poor vehicle for resolving any asserted tension between the D.C. Court of Appeals and D.C. Circuit in their analysis of speech restrictions in particular portions of the Capitol.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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