**No. 24-5041**

IN THE
SUPREME COURT OF THE UNITED STATES

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**JOHN MARON NASSIF,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit**

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# REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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**A. FITZGERALD HALL, ESQ.**
**FEDERAL DEFENDER**

**MELISSA FUSSELL, ESQ.**
***Counsel of Record***
**ASSISTANT FEDERAL DEFENDER**
**201 S. Orange Avenue, Suite 300**
**Orlando, Florida 32801**
**(407) 648-6338**
**Melissa_Fussell@fd.org**

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## REPLY IN SUPPORT OF PETITION FOR CERTIORARI

## ARGUMENT

Mr. Nassif's case challenges the constitutionality of 40 U.S.C. § 5104(e)(2)(G), a rare example of a law that directly targets core First Amendment expression and imposes a criminal penalty for engaging in it. The resolution of this case will determine whether Congress can flatly prohibit Capitol visitors from expressing their viewpoints while inside the publicly accessible seat of our democratic government.

The government does not dispute that § 5104(e)(2)(G) criminalizes all viewpoint expression that draws attention, regardless of whether it is disruptive, in all parts of the Capitol Buildings—a statutorily defined term that includes "not just the Capitol itself and Senate and House office buildings, but also garage space, a power plant, subways and passageways connecting the buildings, and other property."[1] Nor does the

[1] Rachel Moran, *Overbroad Protest Laws*, U of St. Thomas (Minnesota), Legal Studies Research Paper No. 24-16, *Forthcoming* COLUMBIA LAW REVIEW (2025) at *38, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4958132. The breadth and complexity of the locations included is why this facial overbreadth challenge was, at the district court level, argued by both parties without reliance on a scrutiny-based forum analysis. *See* Reply to Gov't Resp. to Mot. to Dismiss, *United States v. Nassif*, 1:21-cr-00421-JDB-1 (D.D.C), Doc. 34 at 11 ("And while *Lederman* did engage in a different, scrutiny-based forum analysis—

government dispute that the D.C. Court of Appeals and the D.C. Circuit are in direct conflict as to whether restrictions on expression in the Capitol Buildings must be narrowly tailored and as to whether the First Amendment permits a law that bans non-disruptive demonstrating in the Capitol Buildings. Finally, the government does not dispute that this is the only Court capable of resolving those conflicts. Instead, the government attempts to persuade the Court that those conflicts do not justify granting the writ and that the statute's unconstitutional sweep is not substantial—even though recent real-life examples show how the government is using the broad prohibition to chill protected speech.

## I. This Court should grant the writ to resolve the direct conflict between the D.C. Circuit and the D.C. Court of Appeals as to whether restrictions on speech in the publicly accessible portions of the Capitol Buildings must be narrowly tailored.

The government does not dispute that the D.C. Circuit and the D.C. Court of Appeals are in direct conflict as to whether restrictions on speech in the publicly accessible portions of the Capitol Buildings must be narrowly tailored. Instead, the government tries to argue that the Court

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which the government does not appear to argue is appropriate here—it indicated its reasoning would be the same even if it were not dealing with a public forum.").

should not act to resolve this direct conflict. It contends that the D.C. Circuit was right to reject the D.C. Court of Appeals precedent, to rule that there was no basis to conclude any part of the Capitol Buildings were a public forum, and to find that the statute is a reasonable speech restriction in a nonpublic forum. Br. in Opp. at 10-11.

As an initial matter, the government incorrectly claims that Mr. Nassif never argued that any portion of the Capitol Buildings is a public forum. Br. in Opp. at 12. Not only did Mr. Nassif argue below that portions of the Capitol Buildings are public forums, he cited substantial case law in support of his contention, including D.C. Court of Appeals decisions indicating that the Capitol Rotunda is a public forum. *See, e.g.*, Initial Br. at 15-16, Reply Br. for Appellant at 12-17, *United States v. Nassif*, Case No. 23-3069 (D.C. Cir.).

Indeed, the D.C. Circuit had ample basis to find that parts of the Capitol Buildings are public forums in the form of decades of precedent from the D.C. Court of Appeals, which has made clear that "[i]t is well established in this jurisdiction 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 . . . to which access cannot be denied broadly or absolutely.'" *Berg v. United States*, 631 A.2d 394, 397–98 (D.C. 1993). The D.C. Circuit's wholesale rejection of the D.C. Court of Appeals case law weighs in favor of certiorari, not against it as claimed by the government. And notably, the government does not argue that, if portions of the Capitol Building were public forums, the statute would pass the Constitution's narrow tailoring requirement.

Along with arguing that the record was devoid of evidence that any of part of the Capitol Buildings is a public forum, the government avers that Mr. Nassif does not dispute that communications are typically controlled by Senators or Representatives or that entry to the Capitol Buildings is strictly regulated. Br. in Opp. at 11. Mr. Nassif disputes both, however. While tours are required to view some parts of the Capitol Buildings, entry to the Buildings is far from "strictly regulated." The Capitol Visitors website makes clear that it "welcome[s] visitors without reservations."[2] Although it states that tours are recommended if one wants to see the "rooms of the historic Capitol," no tour is required to

[2] "Visit the U.S. Capitol," https://www.visitthecapitol.gov/visit (last accessed Oct. 21, 2024).

enter numerous publicly accessible parts of the Capitol Buildings, including the Visitor's Center, Exhibition Hall, the Gift Shops, or the Capitol Café. *Id.* As for communication control by members of Congress, lobbyists and ordinary constituents alike have long used the Capitol Buildings as a place to express their views—with and without appointments, to one another and to Congresspersons.[3]

The government's argument that this Court should not grant certiorari because the statute is a reasonable restriction in a nonpublic forum is also unavailing. The government points to the D.C. Circuit's conclusions that Congressmembers need a quiet place to work, and that Capitol Police do not have time to waste on policing demonstrators. Br. in Opp. at 13-14. But banning all viewpoint expression that draws any attention whatsoever in the Capitol Buildings, including portions where Congresspersons are not working, is not reasonable in light of the purpose served by the forum. If quiet is needed, then it is reasonable to police noise or crowding, as the rest of the statutory scheme already does.

[3] *See* "Lobbyists relish return to Capitol after years of COVID restrictions," THE HILL (Jan. 5, 2023), https://thehill.com/lobbying/3799273-lobbyists-relish-return-to-capitol-after-years-of-covid-restrictions/ (last accessed Oct. 22, 2024).

However, as the government has argued elsewhere, "demonstrating" reaches even "silent and reproachful presence," as well as "merely showing up at a place that was the focal point of their beliefs," "regardless of how quiet or peaceful." Gov't Mem. in Opp., *United States v. Ballenger*, Case 1:21-cr-00719-JEB (D.D.C), Doc. 112 at 11-12 (May 9, 2023).

As for the limited resources of the Capitol Police, if anything, this statute seems to further strain them, causing them to spend time doing things like stopping children who were invited to sing the national anthem from continuing their song.[4] Moreover, the statute provides no exception for visitors who express their viewpoints at a scheduled meeting with a Senator or Representative. Under the D.C. Circuit's interpretation of the law, those who draw attention to themselves by expressing a viewpoint while in the Capitol Buildings are committing a crime, regardless of who scheduled or invited the communication. That broad of a restriction on core First Amendment speech is unreasonable, regardless of the forum.

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[4] *See* "Capitol Police stopped a children's choir from singing the national anthem. Why?" ASSOCIATED PRESS, https://thehill.com/homenews/4033807-capitol-police-stopped-achildrens-choir-from-singing-the-national-anthem-why/ (last accessed May 6, 2024).

## II. This Court should grant the writ to resolve the direct conflict between the D.C. Circuit and the D.C. Court of Appeals as to whether a ban on non-disruptive viewpoint expression in the publicly accessible portions of the Capitol Buildings violates the First Amendment.

Although the government appears to acknowledge there is a conflict between the D.C. Circuit and the D.C. Court of Appeals as to whether the Constitution requires that the demonstrating ban be limited to disruptive conduct, it argues that this Court's review is not warranted to resolve it. Br. in Opp. at 16-17. Attempting to support its position, the government misleadingly cites *Grogan v. United States*, 271 A.3d 196 (D.C. 2022), *cert. denied*, 143 S. Ct. 191 (2022). *Grogan*, it avers, rejected a facial challenge to an identically-worded statute, and the government states "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." Br. in Opp. at 16-17. However, *Grogan* made clear that it adopted the tourist standard—a narrowing construction that limits the demonstrating prohibition to conduct more disturbing than the actions of a tourist would normally be—in order to "save [the prohibition] from being unconstitutionally overbroad." 271 A.3d at 211. The government further cites *Grogan* for the proposition that

the statute would not reach nuns bowing their head in prayer or spectators wearing political arm bands, omitting the part of the sentence where *Grogan* said those things "do not violate the statute because they are not more disturbing than the behavior of a typical tourist." 271 A.3d at 211.

The D.C. Circuit, by contrast, has "never 'held' that the tourist standard 'governs' the constitutionality 'of arrests for demonstration activity on the Capitol Grounds.'" *Lederman v. United States*, 291 F.3d 36, 47 (D.C. Cir. 2002). And the D.C. Circuit heard the government's argument below that the statute reached only conduct that would "tend to disrupt" and declined to adopt it, instead concluding that the statute "prohibit[s] demonstrations beyond those that are most likely to disrupt the business of Congress" and that it does not "require[e] case-specific proof of actual or imminent disruption." Pet. App. C19. The government's statement that "the court of appeals here did not adopt that precise formulation" is thus quite an understatement. *See* Br. in Opp. at 17.

The government dismisses the conflict as "marginal." Br. in Opp. at 17. In other cases, however, the government has relied on the difference it now minimizes. *See United States v. Ballenger*, No. CR 21-719 (JEB),

2023 WL 4581846, at *9 (D.D.C. July 18, 2023) (noting that government disputed defendants' proposed requirement that conduct be disruptive to qualify as demonstration under § 5104(e)(2)(G)); *see also United States v. Griffith*, No. 21-cr-244-2, Gov't Opp. to Def.'s Mot. to Dismiss, 2023 WL 2117974 (D.D.C. January 12, 2023) (arguing § 5104(e)(2)(G) does not require "proof that the defendant engaged in disorderly or disruptive conduct 'in any of the United States Capitol Buildings.'").

The government also claims that both courts agree that "off-handed expressive conduct or remarks" would not be reached by the demonstrating prohibition. Br. in Opp. at 17-18. However, the D.C. Circuit held that the statute bans members of the public from "drawing attention to themselves" in order "to express support for or disapproval of an identified action or viewpoint" anywhere in the Capitol Buildings. Pet. App. C18-19. While the D.C. Circuit stated it did not apply to "off-handed" remarks, the D.C. Circuit's definition clearly targets deliberate expression. To the extent the "off-handed remarks" exclusion provides any workable standard—and Mr. Nassif maintains it does not—it does not mitigate the unconstitutionality of banning deliberate viewpoint

expression, nor does it reconcile the direct conflict between the D.C. Court of Appeals and the D.C. Circuit.

Although the government attempts to minimize the conflict as limited to isolated applications, the D.C. Court of Appeals has held that a ban on demonstrating in the Capitol Buildings must be limited to conduct more disruptive than that of an ordinary tourist in order to avoid unconstitutional overbreadth. The D.C. Circuit, to the contrary, has concluded that the statute is not limited to disruptive conduct and that it has no constitutional overbreadth problem. That creates a conflict as to whether a ban on non-disruptive demonstrating in the Capitol Buildings is unconstitutional on its face—not merely, like the government indicates, as to whether it might be unconstitutional in certain applications. A conflict as to unconstitutional overbreadth implicates all cases arising under the statute in question, regardless of the individual facts underlying them.

Finally, the government suggests that this Court should not grant certiorari because Mr. Nassif did not "urge" the court to adopt a disruptive conduct limitation below, *see* Br. in Opp. at 17, but that is immaterial. Mr. Nassif asks this Court to resolve the conflict as to

whether a statute that bans non-disruptive viewpoint expression in the Capitol Buildings is unconstitutional, an issue that Mr. Nassif argued extensively below. *See, e.g.*, Reply Br. for Appellant at 10-11, *United States v. Nassif*, Case No. 23-3069 (D.C. Cir.).

## III. This Court should grant the writ because § 5104(e)(2)(G)'s unconstitutional applications are substantial relative to any plainly legitimate sweep.

Although §5104(e)(2)(G) may incidentally reach unprotected speech, the plain language and the D.C. Circuit's interpretation of it both target core First Amendment expression. That itself is reason enough to the grant the writ; this is a question of exceptional importance. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002). Section 5104(e)(2)(G) prohibits and chills a substantial amount of speech relative to any plainly legitimate sweep.

The government relies on *United States v. Hansen*, 599 U.S. 762, 781 (2023), in arguing that facial invalidation is unwarranted here. But *Hansen* involved a "provision [that] encompasses a great deal of nonexpressive conduct—which does not implicate the First Amendment

at all." *United States v. Hansen*, 599 U.S. at 782. Thus, the plainly legitimate sweep in *Hansen* was "extensive." In contrast, § 5104(e)(2)(g) exclusively targets core First Amendment expression, and therefore is not analogous to a statute that only incidentally reaches protected speech.

The government avers that Mr. Nassif overstates the statute's reach, contending that it does not apply to symbolic clothing, religious vestments, or political attire. Citing *Fischer v. United States*, 144 S. Ct. 2176, 2184 (2024), the government suggests that Mr. Nassif's hypotheticals would give "demonstrate" a definition so broad that it would be inconsistent with the surrounding words. Br. in Opp. at 15. But that argument strains credulity when the government has contended that "demonstrating" reaches even "silent and reproachful presence," as well as "merely showing up at a place that was the focal point of their beliefs," "regardless of how quiet or peaceful." Gov't Mem. in Opp., *United States v. Ballenger*, Case 1:21-cr-00719-JEB (D.D.C), Doc. 112 at 11-12 (May 9, 2023). The government also cites *Hill v. Colorado* in order to support its position that "demonstrating" does not include the examples Mr. Nassif has cited. *Id.* at 15-16. However, *Hill* defines "demonstrate"

as "to make a public display of sentiment for or against a person or cause." 530 U.S. 703, 721 (2000). Ironically, that definition is nearly identical to the one provided by Mr. Nassif below, which the D.C. Circuit derided as "a strained, maximalist reading." Pet. App. C17 (rejecting Mr. Nassif's "broad definitions of 'demonstration' as 'an outward expression or display' or 'a public display of group feelings toward a person or cause'").

Mr. Nassif's hypotheticals are not speculative. Just this past July, relatives of Israeli hostages attended a speech by Israeli Prime Minister Netanyahu in the House Gallery as invited guests. During a standing ovation, the relatives opened their jackets to reveal t-shirts saying "Seal the Deal Now."[5] Because their t-shirts bore political messages, the Capitol Police arrested them.[6] "Capitol Police spokeswoman Brianna

[5] "Protesters Removed From Netanyahu's Speech To Congress," *Forbes* (July 24, 2024), https://www.forbes.com/sites/mollybohannon/2024/07/24/protesters-removed-from-netanyahus-speech-to-congress/ (last accessed October 15, 2024).

[6] "6 arrested inside Capitol during Israeli PM's address: 'Seal the Deal Now!'" NBC News 15 (July 25, 2024), https://mynbc15.com/news/nation-world/6-arrested-inside-capitol-during-israeli-pms-address-seal-the-deal-now-benjamin-netanyahu-us-congress-us-capitol-police-israel-hamas-terrorism-hostages-dean-phillips-ilhan-omar (last accessed October 15 2024).

Burch told [press] that the individuals were taken into custody because they violated a statute prohibiting demonstrations inside the US Capitol."[7] Those words, straight from the entity charged with enforcing the statute, leave no doubt that the statute has and will continue to chill speech.

While the government stops short of disputing the statute's chilling effect on protected expression, it complains that Mr. Nassif has not shown "actual prosecutions" involving protected expression. Br. in Opp. at 15 n.2. However, the overbreadth doctrine applies to "sweeping, dragnet laws" regardless of actual enforcement, because the Supreme Court recognized the danger in permitting lawmakers to cast a huge net to catch all possible offenders and "leave it to the courts to step inside and say who could be rightfully detained" and who should be released. *City of Houston v. Hill*, 482 U.S. 451, 466 (1987). Arresting people for engaging in protected speech creates a constitutional problem even if the United States declines to file (or decides to drop) formal charges. Chilling effect

[7] "Israeli captives' relatives detained during Netanyahu speech in US," ALJAZEERA (July 25, 2024) https://www.aljazeera.com/news/2024/7/25/israeli-captives-relatives-detained-during-netanyahu-speech-in-us-reports (last accessed October 15, 2024).

is about the risk of deterring protected speech; it is not limited to prosecutions or convictions.

## CONCLUSION

For the above reasons, Mr. Nassif respectfully requests that this Court grant the petition for a writ of certiorari.

A. Fitzgerald Hall, Esq.
Federal Defender

*/s/ Melissa Fussell*
Melissa Fussell, Esq.
Counsel of Record
Assistant Federal Defender
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Email: Melissa_Fussell@fd.org