ORAL ARGUMENT SCHEDULED JANUARY 23, 2024

22-CM-812, 22-CM-795

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

KRISTINA MALIMON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From The Superior Court
Of The District Of Columbia
Misdemeanor Branch

REPLY BRIEF FOR APPELLANT KRISTINA MALIMON

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ARGUMENT

The government is in a bind: If Ms. Malimon *did not know* that she was on Capitol grounds, she could not be found guilty of the unlawful entry on the Capitol grounds, because she would lack the required *mens rea* for the element that she knew she was there against the will of the lawful occupant. On the other hand, if Ms. Malimon *did know* she was on Capitol grounds, or even merely knew she was on *any* federal property, MPD's repeated statements that it was enforcing an order of the D.C. mayor, rather than the Capitol Police, would mean that she lacked the required *mens rea* to remain against the will of the lawful occupant. In either event, this Court would be required to reverse her conviction.

To resolve this dilemma, the government asks this Court to take an improper step: to ignore the fact-finding of the trial court and to substitute its own—of course, finding facts favorable to the government that were foreclosed below.

The government's arguments collapse under their own weight. The record is clear that at trial the government failed to prove beyond a reasonable doubt that Ms. Malimon knew she was on the Capitol grounds—where the government claims she knew she could not be.[1] To make matters worse, the trial court found, as a matter of fact, that when D.C. police officers ordered protestors to leave the Capitol grounds, they told anyone who could hear them that they were enforcing the will of the D.C.

[1] In the charging document, a superseding information, *see* A.4, the government alleged that Ms. Malimon entered *and* remained on the "Capitol Grounds, against the will of the lawful occupant or person lawfully in charge thereof, and . . . without the lawful authority to remain thereon." a*nd* that she refused to leave "on the demand of the lawful occupant, that being the United States Capitol Police," A.5. It was never amended, nor did the government so request.

mayor, not the Capitol Police. The problem for the government, then, is that the D.C. mayor was not the lawful occupant. As a result, even where citizens might ordinarily be expected to infer that the MPD was acting on behalf of the lawful occupant, MPD repeatedly informed the them that it was enforcing the will of someone else. At the very least, it was *reasonable* to believe MPD when it disclaimed its own authority. This Court should find that Ms. Malimon lacked the required *mens rea* to commit the charged offense.

Along the way, this Court should decline adopt the government's request that it apply a negligence standard for unlawful entry. That holding would be entirely consistent with its recent precedents embracing the approach to *mens rea* of the Model Penal Code, most-recently in *Wicks v. United States*, 226 A.3d 743, 749 (2020) (observing that a negligence standard is disfavored in the criminal law).

I. Because the government failed to prove that Ms. Malimon knew she was on Capitol grounds, she could not have formed the required *mens rea* to remain against the will of the lawful occupant.

At trial, there was no evidence that Ms. Malimon knew *or even should have known* that she was on Capitol grounds.[2] Although the government introduced as evidence a map of the area containing red shaded space and a thick red line identifying what apparently constitutes the Capitol grounds, *there was no evidence that this line appeared on the property itself*. Tr. 10/03/2022 at 34-35 (Ex. 201). According to the government's own witness, there were no signs or other postings indicating where the Capitol grounds ended and where other federal land began, or

[2] It is worth noting that in support of its argument that Ms. Malimon could not have reasonably believed that D.C. police could not enforce the D.C. mayor's curfew order on federal property, the government appears to concede that Ms. Malimon did not know she was on Capitol grounds. *See* Gov. Br. at 47.

where non-federal, D.C. land began. *See, e.g.*, Tr. 10/03/2022 at 103 (testimony of Christopher Rodriguez, of D.C. Homeland Security, that the District put up signs "[o]n District property" but not on the Capitol grounds). And contrary to the government's argument that Ms. Malimon just should have known that she was on Capitol grounds, several police officers *also* did not know where the Capitol grounds began and ended. For instance, MPD Sergeant Bonilla, who was present on the Capitol grounds on January 6, testified that there were no signs on that day informing visitors that they were on Capitol grounds. Tr. 10/06/2022 at 79-80. Nor could Sergeant Bonilla be sure whether the land in question was even part of the Capitol grounds. *See* Tr. 10/06/2022 at 86.

The government's over-reliance on *Wicks v. United States* is surprising, as *Wicks* counsels a reversal in this case, as a brief review of its facts will make this clear. Mr. Wicks had been convicted of unlawful entry after he had been asked to leave the property of the Washington Nationals by an MPD officer. 226 A.3d at 744. The officer, also working as security for the Nationals, had informed Mr. Wicks that he was to stay off the property of the Washington Nationals. *Id.* A few weeks later, Mr. Wicks was observed walking onto the sidewalk in front of the Nationals will-call office, which was asserted to be Nationals property. *Id.* at 746. At trial, there was disputed testimony about whether the sidewalk actually belonged to the Nationals.

Reversing Mr. Wicks's conviction for unlawful entry, this Court explained that the "lack of evidence that the sidewalk [where Ms. Wicks remained] belong[ed] to the Washington Nationals raised doubt that Mr. Wicks should have been aware that it did." *Id.* at 750 (citations omitted). Likewise, this Court found that the lack of

signage or other evidence that the sidewalk was Nationals property[3] meant that a reasonable person would not have been on notice that he was on Nationals property, and "the evidence was insufficient to establish that Mr. Wicks had the requisite *mens rea* regarding the circumstance element," that his presence "was against the will of the Washington Nationals." *Id.* at 750-51 (internal quotation marks omitted). Despite the fact that he had been asked to leave yet returned, he could not have formed the required *mens rea* without knowledge of where he could and could not be, and that he was actually on Nationals property. *Id.*

This case is hardly different. Ms. Malimon was in a non-descript federal parking lot adjacent to the National Mall, without any indication she was on Capitol grounds. And the warnings provided by police said nothing about the location where Ms. Malimon was standing or how far she must go before she would no longer be on property now forbidden. Like Mr. Wicks, she was essentially told to leave, that way. Absent proof that Ms. Malimon had any idea she was on Capitol grounds, and therefore remaining against the will of the Capitol Police, even assuming that Ms. Malimon could be convicted *if* she "should have known" she was on Capitol grounds, the complete lack of evidence *that she should have known* where the Capitol grounds began or ended should doom her conviction. *See Wicks*, 226 A.3d at 751.

The government argues that Ms. Malimon should have known that she was there against the will of the lawful occupant because the D.C. police ordered her to leave for violating the D.C. mayor's curfew. But the D.C. police, like the D.C.

[3] The request to leave in *Wicks*, a barring notice, provided only an address and but no description or other identification of what was, and was not, Nationals property. 226 A.3d at 750-51.

mayor, are not the lawful occupant of *any* federal property, including the Capitol grounds. Nor are they lawfully in charge of the property, even where they are invited to assist the Capitol police.[4] It is certainly reasonable to conclude that once Ms. Malimon had been ordered to go away, she knew that *someone* did not want her there. But she had no way to know that this *someone* was the lawful occupant. This lack of knowledge, and the inability of Ms. Malimon to form the required *mens rea* to remain on the Capitol grounds against the will of the actual lawful occupant, was enhanced by the utter confusion that evening, including what was and was not the Capitol grounds, where Ms. Malimon was expected to go, and how she could possibly know where she would be permitted to remain.

In light of the government's assertions, the on-the-ground confusion is set forth in Ms. Malimon's opening brief , Malimon Br. at 29-30, will benefit from more explanation. It was not only *Ms. Malimon* who did not know what was and was not permissible grounds, or D.C. police. *Both government prosecutors* were unsure what constituted the Capitol grounds and what constituted other federal land, even in the controlled environment of the trial courtroom. At one point, one of the prosecutors asked where protestors were "pushed to from the Capitol grounds . . . I guess I should say from closer to the Capitol building." Tr. 10/05/2022 at 112. And the other prosecutor referred only to the area where the *Capitol building* sat—where a visitor to D.C. would ordinarily assume the Capitol grounds began—as the Capitol grounds, asking whether, if the protestors turned north from the area they were in, "they have

[4] Likewise, when the D.C. police are requested to eject a person from private property, they do not become the person lawfully in charge of the property. Rather, it is the lawful occupant whose will matters, and MPD is there merely to enforce that will, not take lawful control of the property itself.

to go through this—sort of *the grounds*, right? The grounds of the Capitol that's unpaved, right?" Tr. 10/05/2022 at 64.

The confusion did not end there. Capitol Police Lieutenant Maria Willis testified about Government's Exhibit 201, the map purportedly showing the meets and bounds of the Capitol grounds. Tr. 10/03/2022 at 33. The area shaded red, or colored solid red (including streets), she testified, are all part of the Capitol grounds. *Id.* at 33-34. *But even that map was wrong. Id.* at 34 (Q. "What's the problem with this block?" A. "That are is not a portion of the grounds." Court: "So the map's just mistaken in that regard?" A. "Yes, outside of that square.").

Lieutenant Willis then testified—explaining something that would likely surprise even this Court—that the red lines on the map's roadways indicate that those streets are *also* the Capitol grounds, including even Second Street NE, which lies east of the Capitol building, on the other side of the U.S. Supreme Court (which is not, generally, considered part of the legislative branch). *See id.* at 33; Ex. 201. Likewise, Maryland Avenue NE, between First Street NE and Second Street NE, is, according to the map, also Capitol grounds, even though that section of Maryland Avenue is adjacent to a private building (containing a number of non-governmental organizations) and a United Methodist Church.[5] It bears repeating that these surprising red lines do not appear on the actual ground. Nor does ground evince the red shaded area, which appears to end just after what otherwise appears to be part of the National Mall, next to where Ms. Malimon was located. *Id.* at 34-35.

[5] This Court, of course, may take judicial notice of laws, statutes, and other matters of public record. *Bostic v. District of Columbia*, 906 A.2d 327, 332 (D.C. 2006); *Christopher v. Aguigui*, 841 A.2d 310, 311 n.2 (D.C. 2003) ("Judicial notice may be taken at any time, including on appeal.").

According to Officer Gutierrez, the area in which Ms. Malimon stood was west of the Peace Monument (on the south side of at Pennsylvania at 1st Street, west of the Capitol and north of the reflecting pool). Tr. 10/04/2022 at 62. Although it was a parking lot and a sidewalk, it contained bike racks that one would have to leap over to pass.[6] *Id.* There was a gap, but it was not guarded; MPD was merely "in the area." Police were blocking anyone from leaving east. Tr. 10/04/2022 at 64. But the orders were vague: The officers were not telling protestors to leave *any particular* bounded area. Rather, they were telling people to *move*, to *leave*. *See, e.g.*, Tr. 10/04/2022 at 155-56. "Clear out." Tr. 10/05/2022 at 31; Tr. 10/05/2022 at 40 (Officer Creech: "[Y]ou'll also hear me give loud verbal commands for individuals to exit and that they were under violation of the mayor's curfew.").

When asked directly about the those in the area where Ms. Malimon was arrested—"The people in the video here, did any police officer, whether they are using a megaphone or their voice, tell them *where to go* to get out?"—Officer Creech answered, "No." Tr. 10/05/2022 at 43 (emphasis added). At one point, Officer Creech testified that Ms. Malimon was moved *not* out of the area, but from one police circle to another, Tr. 10/05/2022 at 47, and that she was, while videoing the officers, actually moving in the direction she was asked to move. Tr. 10/05/2022 at 49. But police closed the circle. As Officer Creech agreed, "the circle has closed up while the lady in the red is walking toward the—what was an exit." Tr. 10/05/2022 at 52.

[6] Notably, although Ms. Malimon was *charged* with unlawfully entering the Capitol grounds, she was not convicted of entering unlawfully, only of failing to leave. Therefore, this Court may assume that her *entrance* to the area was lawful.

Throughout the confusion, Ms. Malimon, according to Officer Gutierrez, "kept walking west on the parking lot" in the direction that officers were "directing people to keep moving." Tr. 10/04/2022 at 100. Despite the fact that she was walking in the direction that officers were directing, eventually she ran into a wall of police officers and barricades." *Id.* at 101. As some protestors left, they were forced to slide "in between bike racks." *Id.* at 143.

As a result, when police instructed protestors to "leave," there was no way to know what constituted *leaving enough*.[7] Indeed, there was evidence that Ms. Malimon *did* walk in the direction of the purported exit—which she was somehow expected to divine from the angles in which the police officers situated themselves. Just as this Court explained in *Wicks*, the government has failed to prove its case where the record lacks sufficient evidence "that would have informed a reasonable person that stepping on to the sidewalk" would put them on barred property. 226 A.3d at 750. Here, there was insufficient evidence that Ms. Malimon should have known what was federal land but not Capitol grounds, on which she could remain, and what was federal land but also Capitol grounds, from which she was required to leave. No red-shaded map was available. Confusion reigned.

II. This Court should not disturb the trial court's factual finding that it could not determine beyond a reasonable doubt that Ms. Malimon heard announcements made a the loudspeaker.

It is well-established that a fact-finder "must find beyond a reasonable doubt every fact 'which the law makes essential to [a] punishment.'" *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (citing *Blakely v. Washington*, 542 U.S. 296,

[7] Such orders were likely too vague even to sustain conviction for failure to obey lawful police orders, which explains why the government did not charge that crime.

304 (2004)). As this Court has explained, "[p]roof of a fact beyond a reasonable doubt is thus 'more powerful' than proof that the fact is 'more likely true than not;' more powerful, even, than proof 'that its truth is highly probable.' *Rivas v. United States*, 783 A.2d 125, 133 (D.C. 2001) (quoting *Smith (Darius) v. United States*, 709 A.2d 78, 82 (D.C. 1998) (en banc)). A conviction must be reversed where the fact-finder could only find an essential fact "more likely than not," *id.* at 135, or that it was "even high likely," *McRae v. United States*, 148 A.3d 269, 275 (D.C. 2016).

The fact in question here was whether Ms. Malimon heard the muffled loudspeaker announcements from MPD patrol cars, with which the government sought prove that she knew her presence was against the will of the lawful occupant. The trial court made clear that it *could not find beyond a reasonable doubt* that she had heard those announcements, finding instead that it was merely "likely" that she heard them. Tr. 10/13/2022 at 10. Nonetheless, the government now asks this Court to find that Ms. Malimon heard those announcements, beyond a reasonable doubt, and to use that fact to uphold Ms. Malimon's conviction. This Court should reject the government's invitation to ignore long-standing Supreme Court precedent and to usurp the role of the trial court as fact-finder.

The context was this: It had been established that there were no signs indicating that Ms. Malimon was on Capitol grounds, as the criminal information charged. Nor was there any indication that the D.C. police were acting on anything other than the curfew order of the D.C. mayor, who was not the lawful occupant. Therefore, to prove that Ms. Malimon knew she was on the Capitol grounds as charged, and that she knew her presence was against the will of the Capitol Police, the government attempted to prove that she heard two types of warnings: (1) verbal

warnings given by MPD officers; and (2) warnings projected by muffled loudspeaker. The trial court found, *beyond a reasonable doubt*, that the defendants were "told directly by several police officers to leave." Tr. 10/13/2022 at 10. But the trial court found that it was only "likely" that the she "heard the official warnings given over the police intercom system coming from the police cruiser." Tr. 10/13/2022 at 10.

The trial court's inability to find beyond a reasonable doubt that the defendants had heard the loudspeaker warnings is unsurprising: It was a *hotly* disputed fact, throughout trial, and there was ample reason for the trial court's decision that, at best, it could only find that the warnings were "likely" heard.[8] *First*, at trial, it became clear that these loudspeaker announcements were muffled. Multiple MPD officers stated *at the* time (recorded on video), that they could not hear those announcements. Ex. 502 (translation) (Sergeant [Bonilla]: "I did not even hear the announcement." Officer Quiles: "Me neither") (admitted at Tr. 10/06/2022 at 101). And as the government conceded at trial, there was "obviously a lot of crowd noise there" during the announcements.[9] Tr. 10/03/2022 at 151. Indeed, while the police told protestors they needed to leave, protestors were "yelling stuff through megaphones from the crowd." Tr. 10/04/2022 at 65. "And at least one guy had a speaker and he was

[8] Ordinarily, the in ability to find a fact essential to the defendants' convictions would be fatal to their convictions. *See Haymond*, 139 S. Ct. at 2376. But here the trial court determined that it could find the defendants guilty based solely on the warnings that they received from MPD. Tr. 10/13/2022 at 8.

[9] The government asserts Ms. Malimon was "filming while all three announcements were made." Gov. Brief at 41. Yet despite having possession of Ms. Malimon's phone during the entire case, it produced no evidence that, for instance, her recorded videos picked up the muffled announcements at all. Surely, had her videos done so, the government would have introduced them as evidence; but it did not.

blasting music." Tr. 10/04/2022 at 65. And the speaker announcements were coming from somewhere behind the police officers. Tr. 10/04/2022 at 70.

Eventually, the judge asked the Officer Gutierrez, "How much noise was there out there? . . . How would you describe the amount of noise out there?" The officer answered that he could hear the loudspeaker, but "to be honest, there was a lot of different noises going around, a lot of people using microphones, people being loud, yelling, people playing music." Tr. 10/04/2022 at 108-09. And when the prosecutor played a video of other purported loudspeaker announcements—to prove that they were audible—defense counsel argued that the purported announcements were inaudible. Tr. 10/04/2022 at 119-20. The judge responded, "To the extent it's helpful to anyone, I didn't hear anything either." Tr. 10/04/2022 at 120.

Second, the government had tried to counter that evidence that the speaker announcements were inaudible by putting on witnesses to speculate that their outer clothing muffled the body-worn-camera audio. But the defense argued to the trial court, *successfully*, that the parties had already stipulated that the recordings "accurately" depicted the events. Tr. 10/06/2022 at 65.

Third, *every* witness who testified about MPD's announcements testified that MPD had been clear that it was demanding people leave due to the D.C. mayor's curfew. *See, e.g.*, 10/05/2022 at 16-17 ("That was a warning going out to the public or those that were still in the area that they were in violation of the mayor's order."); Tr. 10/05/2022 at 82 (Q. "[Y]ou were enforcing the curfew, that's the mayor's curfew, correct?" A. "Yes, sir."). Every MPD officer who testified about their interactions with protestors on the ground testified that they were demanding people leave because they were enforcing the D.C. mayor's curfew. Even by the time of trial

they had not decided they were enforcing the will of the Capitol Police. *See, e.g.*, Tr. 10/05/2022 at 106-07 (Commander Kyle: "there was a curfew in effect was placed by the Mayor of the District of Columbia. We issued several warnings to disperse *based off that curfew*, and once those warnings were not heeded by individuals, we made arrests.") (emphasis added); Tr. 10/05/2022 at 40 (Officer Creech: "as an individual officer I gave—throughout my body worn camera you'll also hear me give loud verbal commands for individuals to exit *and that they were under violation of the mayor's curfew*.") (emphasis added); Tr. 10/05/2022 at 70 (Officer Priebe: [MPD] SOD officials had made an announcement *that a curfew was in place and that individuals who continued to remain in the area would be in violation* and subject to arrest.") (emphasis added); Tr. 10/05/2022 at 82 (Q. "On direct you had indicated, Officer, that you—when SOD announced a curfew and that you were enforcing the curfew, *that's the mayor's curfew*, correct?" Officer Priebe: "Yes, sir.") (emphasis added); Tr. 10/05/2022 at 130 (Commander Kyle: "That was the vehicle that I recall that the PA emissions were made to the crowd, *the warnings to disperse based off the curfew order*.") (emphasis added). This was essentially conceded by the government in its brief: "As Malimon walked directly in front of Officer Christopher Creech, Officer Creech shouted at her, "You're in violation *of the Mayor's curfew*—clear out!" Gov. Br. at 12, 16 (emphasis added).

Ultimately, the trial court determined that it could not find that Ms. Malimon had heard the loudspeaker warnings beyond a reasonable doubt. Yet the government now tries to rehabilitate this evidence that the trial court found lacking, by asking this Court to make new findings of fact: that contrary to the trial court's determination that it could only determine that it was "likely" that the defendants heard those

recorded warnings, in fact the announcements "*would* have been clearly audible to appellants;" and it asks the Court to find that fact beyond a reasonable doubt. Gov. Br. at 23. The government's request is plainly improper, and this Court should decline it. *See Harris v. United States*, 738 A.2d 269, 274 (D.C. 1999) (This Court "will not disturb the judge's factual findings unless they are clearly erroneous, or without substantial support in the record.").[10]

Nor is the government entitled to remand, to ask the trial court to reverse its factual finding, Gov. Br. at 42 n.16, because that request is foreclosed by this Court's holding in *Cave v. United States*, 75 A.3d 145 (D.C. 2013). In *Cave*, the trial court had addressed a factual dispute, "created by conflicting testimony," regarding the defendant's actions. Police had claimed one thing; the defense had disputed that testimony. *Id.* at 147. This Court found that the trial court's determination about those events—"I'll never know"—*was itself* a factual finding: "The trial court made a finding—'I'll never know'—rejecting the government's evidence, or at least, deeming it insufficient to prove the government's case beyond a reasonable doubt. Implicitly, the trial court refused to credit the testimony of the police officers on which the government." *Id.* "Just as any factual finding anchored in credibility assessments derived from personal observations of the witnesses is beyond appellate reversal unless those factual findings are clearly erroneous, we must also respect a trial court's refusal to credit one witness or another when both have presented

[10] Notably, the government has not so much as asked this Court to find that the trial court's finding that the fiercely disputed fact was only "likely" true was "clearly erroneous."

conflicting testimony." *Id.* (cleaned up) (quoting *Hill v. United States*, 664 A.2d 347, 353 n.10 (D.C. 1995)).

This Court must therefore decide the matter based on the facts as found in the trial court: There were no notices or signs indicating that Ms. Malimon was on Capitol grounds, no red-shaded land, no maps or lines; and the only orders MPD that she must leave the Capitol grounds came with the misleading statements that MPD was enforcing the curfew of the D.C. mayor, who was not the lawful occupant.

III. Ms. Malimon could not have formed the required *mens rea* to remain on the Capitol grounds against the will of the lawful occupant because she was actively mislead by MPD into believing that it was enforcing the will of the D.C. mayor, who is not the lawful occupant of federal land.

It is undisputed that to convict Ms. Malimon of unlawful entry, the government was required to prove that she knew that she was remaining on the property in question against the will of the person lawfully in charge of the property. *See* Gov. Br. at 23. That person, as the trial court found, was the Capitol Police. Tr. 10/13/2022 at 9. It is likewise beyond dispute that at trial the court found the defendants "were informed that they were remaining on the property against the will of the police, having been told directly by several police officers to leave," Tr. 10/13/2022 at 10; that these officers were D.C. police officers; and that the defendants "were told they were remaining in violation of the [D.C.] mayor's curfew rather than having been told that they were remaining in violation of the order of the United States Capitol Police Board," Tr. 10/13/2022 at 8.

Furthermore, it is well established that Ms. Malimon, like any defendant, must be presumed to know the law—in this case, that the D.C. police may not enforce a D.C. mayor's curfew order on *any* federal land. *See* Malimon Br. at 24-26. For as

the Supreme Court has made clear, "[e]very citizen is presumed to know the law." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020); *Cheek v. United States*, 498 U.S. 192, 193 (1991) (the common-law rule, based on the notion that the law is definite and knowable, is that every person is presumed to know the law). Defendants in the D.C. Superior Court, and courts across the country, are convicted on this basis every day, at the government's insistence. Yet this presumption should be no less effective when advanced not by the government but by a lone defendant. To say that citizens are presumed to know the law is not a legal trick intended to trap unsuspecting defendants; it is a statement about the law and its ubiquity.[11] As a result, Ms. Malimon *must* be presumed to know that the D.C. mayor's curfew could not apply to federal property, and therefore that any attempt by D.C. police to evict her from federal property *on the D.C. mayor's curfew order* would be without the authority of the lawful occupant, because the D.C. mayor is not the lawful occupant of, or lawfully in charge of, federal property.[12]

Ordinarily, an order by MPD directing citizens to leave federal property may be considered authoritative, because citizens may assume—absent any reason to believe otherwise—that MPD is acting lawfully, at the statutorily required request of the Capitol Police. (This, of course, requires a similar presumption: that citizens know that MPD can even be invited to assist the Capitol police on Capitol grounds.)

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[11] In fact, the government tacitly concedes this point, as it demands that Ms. Malimon be convicted because she presumably should have known that MPD was acting at the behest of the Capitol police. That is actually two pieces of knowledge, one legal, one factual: (1) that MPD is permitted to enforce the law on Capitol grounds when invited to assist in doing so by the Capitol Police; and (2) that the Capitol Police actually did invite the assistance of MPD.

[12] Even if this presumption were rebuttable, the government not attempted to rebut it.

And had MPD done nothing other than order Ms. Malimon to leave federal property, it could have been reasonable to assume that she should have known that her presence was unwanted by the Capitol Police.[13] But the order to leave in this case was anything but ordinary. Rather, D.C. police *affirmatively mislead* anyone who could hear them into believing that D.C. police were acting not on authority of the Capitol Police, but on authority of the D.C. mayor. Because citizens must be presumed to know that a curfew order of the D.C. mayor is no authority at all to evict citizens from federal property, a belief that MPD was ordering them to leave federal property without authority was necessarily reasonable. And therefore, Ms. Malimon could not have formed the requisite *mens rea* to remain against the will of the lawful occupant.

The government argues that it is sufficient to prove that the defendant "knew or should have known that h[er] entry or remaining was *unwanted*," without more. Gov. Br. at 29 (emphasis added). But unwanted *by whom*? After all, it would surely be insufficient if the government could only prove that she knew her presence was unwanted by an unrelated third party.[14] Of course, as the government tacitly concedes, it was required to prove that the defendant knew that her presence was unwanted *by the Capitol Police*. Yet its own evidence negated that fact, as each of its witnesses testified that MPD had informed everyone assembled, at every opportunity, that their presence was unwanted *by the D.C. mayor*. This squarely defeats the government's attempt to prove that Ms. Malimon formed the required *mens rea* to

[13] Of course, if this Court rejects the government's attempt to use a negligence standard, even this conclusion is in serious doubt.

[14] One wonders why the government did not simply charge the crime it appears to have wanted to prosecute: failure to obey a lawful order of a police officer. *See, e.g., Streit v. District of Columbia*, 26 A.3d 315, 316 (D.C. 2011) (reversing FTO convictions for protesting at the White House).

violate the element of unlawful entry that she intended to remain against the will of the lawful occupant. The lawful occupant was *not* the D.C. mayor; it was the Capitol Police. And having been actively mislead by D.C. police at every turn, it cannot only have been reasonable for Ms. Malimon *disbelieve* MPD's repeated assertions and somehow divine that they were misinforming her.[15] MPD officers said they were enforcing the D.C. mayor's order, and citizens had a right to believe them. It was therefore reasonable for her to believe, even if ultimately incorrectly, that her presence may have been against the will of the D.C. mayor, but it was not against the will of the lawful occupant.

IV. Ms. Malimon's belief that her presence was not against the will of the actual lawful occupant was both *bona fide* and reasonable.

To defeat Ms. Malimon's reasonably held belief that MPD was enforcing an order of the D.C. mayor, and not the Capitol Police, the government argues that the mere request to leave the property should have been enough, no matter who made it or what else they said. For this unlikely argument, the government relies heavily upon *Darab v. United States*, for the proposition that "[e]vidnce of awareness of a request to leave will defeat a bona fide claim of belief." Gov. Br. at 46 (quoting *Darab v. United States*, 623 A.2d 127, 137 (D.C. 1993)). But the government fails to quote the rest: "[I]n view of the fact that the Mosque is *private property, as opposed to government property*, 'the mere demand of the person lawfully in charge to leave necessarily deprives the other party of any lawful authority to remain on the premises.'" *Darab*, 623 A.2d at 135 (emphasis added) (quoting *O'Brien v. United*

[15] This is not to say that MPD had been acting against the public interest. In the utter confusion of that night, D.C. police might have decided that invitation or no, the city's safety required their presence, even if they could not legally make arrests.

States, 444 A.2d 946, 948 (D.C. 1982)). *O'Brien* further explains that "in addition to and independent of the evictor's wishes, there exists some additional specific factor establishing the party's lack of a legal right to remain." *O'Brien*, 444 A.2d at 948. And *Byrne v. United States*, also cited by *Darab* in the same paragraph, further explains that this additional requirement ensures that a person's "otherwise lawful presence is not conditioned upon the mere whim of a public official." 578 A.2d 700, 702 (D.C. 1990).

The fact that appellants' evictions from public property was "at the mere whim of a public official" was *exactly* what MPD officers repeatedly convinced every person who heard their warnings: that their demands to leave federal property were at the order of the D.C. mayor, not the lawful occupant. And that fact, mistaken *only because of MPD's actions*, if correct, would have rendered the order unenforceable on federal land. The government counters that because Ms. Malimon testified that she was not aware that she was on the *Capitol* grounds, she cannot assert in good faith that she believed MPD lacked authority to order her to leave." Gov. Br. at 47. But this misses the point entirely: She quite clearly knew that she was on *federal* land,[16] where she is presumed to know the D.C. mayor's orders have no force.

The government appears to argue that when a person is asked to leave a place, nothing matters other than the fact of the request. But this argument quickly veers

[16] The government's recitation of an unknown man's "diatribe," and Ms. Malimon's alleged agreement that MPD could not evict him from the land on which he stood, because "[t]axes pay for this land," is not to the contrary. *See* Gov. Br. at 13. Inasmuch as Ms. Malimon does not live in the District of Columbia, her taxes could only "pay for this land" if she was standing on *federal* land. This only reinforces her claim that she knew she was on federal property when D.C. police attempted without authority enforce the D.C. mayor's curfew order.

into the absurd. For instance, suppose D.C. officers had been *even more* explicit about the improper source of their authority, announcing, "We have no authority to ask you to leave federal property, and the Capitol Police do not even know we are here; nonetheless, we are ordering you to leave." On the government's theory, listeners *should have known* not just that they were on Capitol grounds, but also that the D.C. police were misleading them, and in fact the Capitol police had authorized the eviction after all. The result would be ridiculous: Such an order, explicitly disclaiming any authority over the property, would surely preclude a finding that a defendant knew she was remaining on federal property against the will of the *lawful occupant*. And the difference between the hypothetical and the case at bar is slight: To know that D.C. police were disclaiming the authority to order her to leave, Ms. Malimon only need know that the D.C. mayor's curfew orders are no authority on federal land—which Ms. Malimon must be presumed to know. The government's argument collapses under its own weight.

* * *

Ms. Malimon's actions are also justified based on a reasonable mistake of fact. As this Court held in *Gaetano v. United States*, to prove a reasonable belief in an individual's right to remain on property, there "must be some evidence that, for example, the individual had no reason to know that he was trespassing on the rights of others"—for example, that the land was publicly owned. 406 A.2d 1291, 1294 (D.C. 1979). And as this Court later explained in *Moran v. District of Columbia*, "the belief must be based on a reasonable mistake of fact . . . which, if not a mistake, would justify remaining on the property." 476 A.2d 1128, 1133 (D.C. 1984).

Ms. Malimon did not invent the idea that D.C. police were enforcing the D.C. mayor's curfew order. That fact was repeated by police, as testified to by the government's own witnesses, without contradiction. And had her reasonable mistake not been a mistake, it would have justified remaining on federal property. As a result, her conviction for unlawful entry should be reversed. *See id.*

Indeed, the government cites *Wicks* for the proposition that the "'requisite state of mind with respect to the circumstance that [Mr. Wicks's] entry was against the will of the Washington Nationals' is that he "knew or should have known that his entry on private property was unwanted." Gov. Br. at 29. Yet Mr. Wicks's conviction was reversed because the government failed to prove that he knew he was on the property of the Washington Nationals—the entity that had demanded he leave. *Wicks*, 226 A.3d at 751. Likewise, here the government failed to prove that Ms. Malimon knew she was on the Capitol grounds, assuming that a general order to leave the area, which was not demarcated in any way, would suffice. As in *Wicks*, it should not suffice, and Ms. Malimon's conviction should be reversed.

CONCLUSION

This Court should reverse Ms. Malimon's conviction because she could not have formed the requisite *mens rea* to commit the crime of unlawful entry on Capitol grounds, as the government charged.

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Respectfully submitted,

s/ Richard P. Goldberg

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2024, I caused the foregoing to be served via the Court's electronic filing and service system, upon all counsel of record.

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