CONSOLIDATED BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 22-CM-795 & 22-CM-812

EARL GLOSSER and KRISTINA MALIMON, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. Nos. 2021-CMD-187 & -195

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ISSUES PRESENTED

I. Whether, in order to convict appellants of unlawful entry on public property, the government was required to prove that they knew or should have known the status of the specific property that police were ordering them to leave; or whether, as the trial court found, a general police command to leave an area may provide sufficient notice, particularly where context aids understanding.

II. Whether, even assuming the government was required to prove that appellants knew or should have known they were on the United States Capitol Grounds, the evidence was sufficient to sustain the unlawful entry convictions, where police broadcast three "very loud" warning announcements near where the defendants were standing, warning crowd members that they were in violation of a "United States Capitol curfew" in "the 100 block of Pennsylvania Avenue, Northwest," and ordering them to leave to avoid arrest.

III. Whether Malimon had a bona fide belief in her right to refuse MPD orders to leave the Capitol Grounds, where the Capitol Police requested MPD assistance to clear the Capitol Grounds, and Malimon

neither actually nor reasonably believed that MPD lacked authority to order her to leave.

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COUNTERSTATEMENT OF THE CASE

Procedural History

On January 6, 2021, appellants Earl Glosser and Kristina Malimon (collectively, "appellants") were arrested and charged with unlawful entry on public property (UE), in violation of D.C. Code § 22-3302(b) (Glosser Record (G.R.) 1). On September 27, 2022, the government filed a superseding information in each appellant's case charging them with

UE (G.R. 24; Malimon Record (M.R.) 33).[1] Appellants waived their right to jury trials (G.R. 18; M.R. 18).

Appellants' bench trial began on October 3, 2022 (10/3/22 Transcript (Tr.) 18). On October 13, 2022, the Honorable Neal Kravitz found both appellants guilty (10/13/22 Tr. 4-11). Judge Kravitz sentenced both appellants to six months of incarceration, execution of sentence suspended in favor of one year of probation (*id.* at 75). As conditions of their probation, the court ordered appellants to stay out of Washington, D.C., except for court hearings, perform 100 hours of community service each, and pay $500 fines (*id.*). The court also directed appellants to pay $50 to the Victims of Violent Crime Compensation Fund (*id.*). Both appellants timely appealed (G.R. 31; M.R. 40).

[1] The government filed superseding informations "to bring the charging language in line with the language used in the statute (D.C. Code § 22-3302(b))" (G.R. 24).

The Trial

The Government's Evidence

On January 6, 2021, both houses of Congress gathered inside the Capitol Building in a joint session to certify the results of the 2020 presidential election, in which President Joseph R. Biden, Jr., defeated the incumbent, former President Donald J. Trump (10/3/22 Tr. 54-55). Then-President Trump held a rally at the Ellipse outside the White House, repeated his false claims that the election was "rigged" and "stolen," and goaded his supporters to "walk down Pennsylvania Avenue . . . to the Capitol," where members of Congress had begun voting to certify the election (*id.* at 55). *See generally Trump v. Thompson*, 20 F.4th 10, 17-19 (D.C. Cir. 2021). As a mob of thousands descended on the Capitol, the United States Capitol Police (USCP) Chief requested that the Metropolitan Police Department (MPD) "send any available resources they had to the Capitol Grounds" (10/3/22 Tr. 55-56). A USCP lieutenant testified that, because USCP requested MPD's assistance on January 6, MPD officers had "the same authority on [the] Capitol Grounds as a [USCP] officer" (*id.* at 57). *See* 2 U.S.C. § 1961(a) (authorizing MPD to patrol and make arrests on Capitol Grounds "with

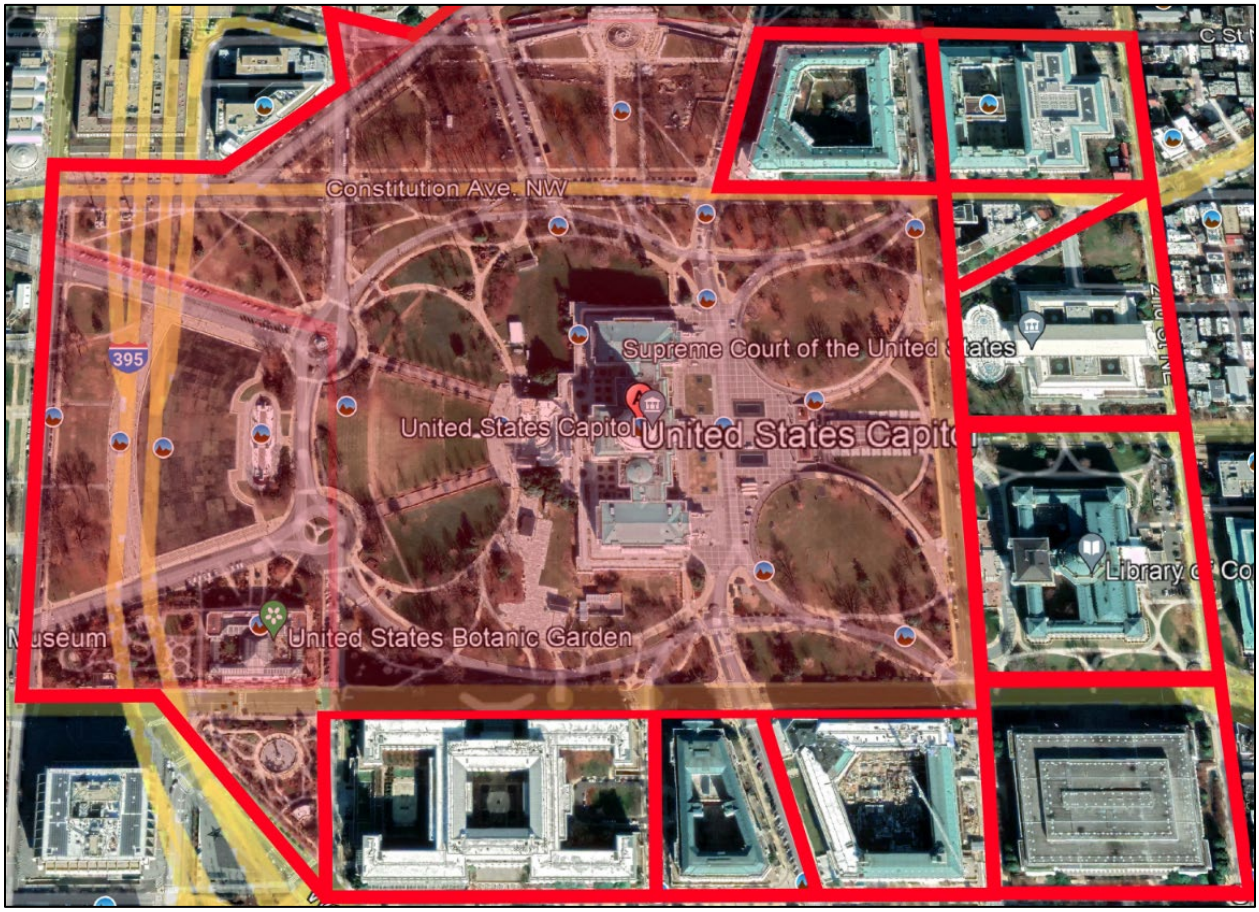
consent or upon request of" USCP) (incorporated into D.C. Code at § 10-503.19).

Members of the mob stormed through the Capitol Grounds, attacked and overwhelmed USCP and MPD officers, breached the Capitol Building, and forced a pause in certification proceedings at approximately 2 p.m. (10/3/22 Tr. 57-58). *See generally United States v. Fischer*, 64 F.4th 329, 332 (D.C. Cir. 2023); *Thompson*, 20 F.4th at 18. To help regain control, remove the rioters, and allow Congress to resume certification proceedings, the Capitol Police Board imposed a curfew and ordered the closure of the Capitol Grounds to the public from 6:00 p.m. on January 6, 2021, until 6:00 a.m. on January 22, 2021 (10/3/22 Tr. 58-59; Government Exhibit (GX) 601 ¶ 20 (stipulations)). Additionally, Mayor Muriel Bowser declared a public emergency in the District of Columbia and ordered a city-wide curfew from 6:00 p.m. on January 6 until 6:00 a.m. on January 7 (GX 601 ¶ 3; 10/3/22 Tr. 116-118). At 2:28 p.m., the D.C. government caused an alert to be sent to all cell phones located in D.C., notifying users of the curfew (10/3/22 Tr. 93-96; GX 204).

Aided by National Guard reinforcements, the USCP and MPD cleared rioters from the Capitol Building (10/5/22 Tr. 69, 105). Then, as

an MPD commander testified, police "attempted to push [the rioters] away from the Capitol. Since the Capitol wasn't secure, there had been windows broken, doors breached. Basically the idea was to get them as far [ ] away from the Capitol as possible so Congress can get back into session." (*Id.* at 106.) MPD and the National Guard formed a line along the west side of the Capitol Building and pushed rioters towards the western edge of the Capitol Grounds at the intersection of Pennsylvania Avenue, NW, and 3rd Street, NW (*id.* at 69-70, 106; GX 201).

GX 201: Map of Capitol Grounds



The 100 block of Pennsylvania Avenue, NW, is part of the Capitol Grounds (10/3/22 Tr. 36-37; GX 201; GX 601 ¶ 1). At the southeastern end of the block, the Peace Memorial sits inside a traffic circle where Pennsylvania Avenue meets 1st Street, NW, adjacent to the west front of the Capitol Building (GX 201; GX 401; 10/3/22 Tr. 36-37). The block extends northwest to 3rd Street, NW (*id.*), and is used as a parking lot, with parking spaces visible on the pavement (10/4/22 Tr. 35; GX 401). After 6:00 p.m. on January 6, 2021, when the D.C. and Capitol curfews took effect, there were still numerous people gathered on the Capitol Grounds; a crowd of more than one hundred remained in the vicinity of the Peace Memorial (10/5/22 Tr. 70).

The police line continued moving northwest down Pennsylvania Avenue towards 3rd Street and the edge of the Capitol Grounds (10/4/22 Tr. 39; 10/5/22 Tr. 10, 69, 106-07). Officers directed lingering crowd members to keep walking towards 3rd Street and disperse (10/4/22 Tr. 43-44; 10/5/22 Tr. 10). The police deliberately left the 3rd Street exit from

the Capitol Grounds open so that the crowd could leave in that direction, as officers ordered them to do.[2]

At approximately 7:17 p.m., the MPD incident commander determined that the time had come to arrest those who still refused to disperse (10/3/22 Tr. 142-43, 147). By this time, the police line had pushed the remaining members of the crowd about halfway down the 100 block of Pennsylvania Avenue towards 3rd Street (10/4/22 Tr. 42). Following protocol, MPD used a speaker to issue warnings that those who did not comply with orders to leave would be arrested (10/3/22 Tr. 142-44). The speaker was attached to the front grill of the incident commander's car, which the commander moved immediately behind the police and National Guard line before making the announcements towards the crowd (*id.*; GX 401 at 7:17 p.m. (see below)). The warnings were broadcast at 110-120 decibels, approximately twice the volume that

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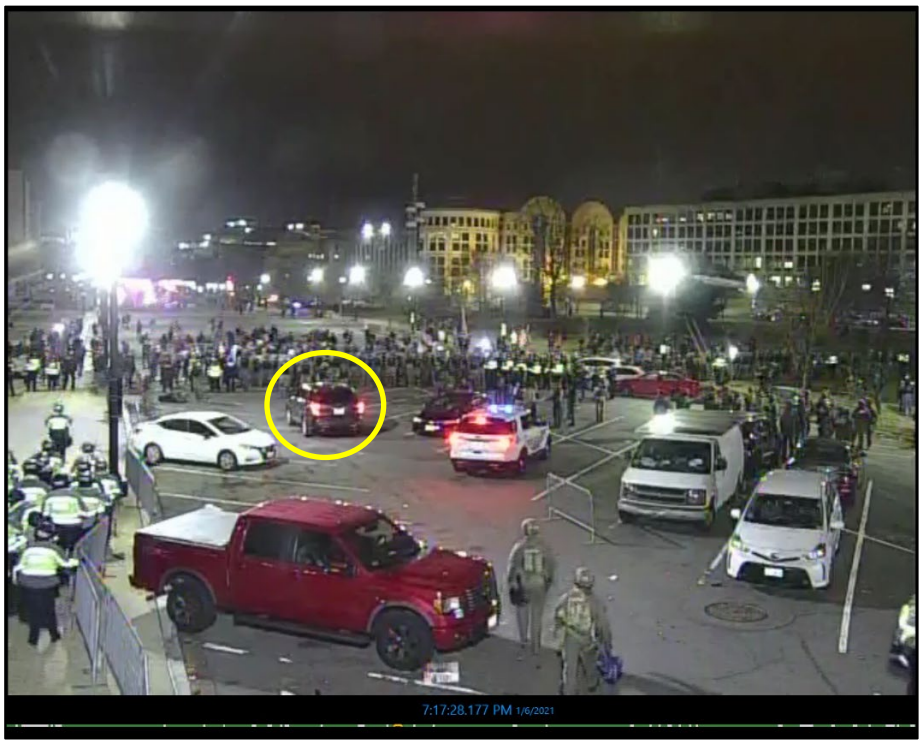
[2] *See* 10/4/22 Tr. 44 (Officer Gutierrez) ("[W]e [were] directing people to keep walking towards 3rd Street, and that way . . . they had a path in which they can get out of the parking lot[.]"); 10/5/22 Tr. 41-42 (Officer Creech) (3rd Street "was the only exit not blocked by police" and "the only exit that was presented to the public"); 10/6/22 Tr. 19, 22 (Officer Quiles) (3rd Street exit was "completely open"; officers were "just trying to guide them[,] just telling people to leave" for at least "20, 30 minutes").

would violate noise ordinances, and invoked both the Capitol and D.C. curfews (*id.* at 144).

GX 401 at 7:17 p.m. (commander's car highlighted)



The first warning, at 7:17 p.m., notified those remaining in the area:

> You're in violation of a curfew of both the United States Capitol and the District of Columbia, effective 1800 hours. You're in violation of a curfew. If you do not leave the area, you will be arrested. This is your first warning. (10/3/22 Tr. 147; GX 315 at 19:17:19-36.)

The second warning, at 7:18 p.m., stated:

> Attention, attention. All those unlawfully assembled in the 100 block of Pennsylvania Avenue, Northwest, Washington,

> D.C. It is 1918 hours, 7:18 p.m. You're in violation of both the United States Capitol curfew and the city curfew at 1800 hours or 6:00 p.m. If you do not leave you are subject to immediate arrest. (10/3/22 Tr. 148; GX 315 at 19:18:03-26.)
>
> And the third warning, at 7:19 p.m.:
>
> This is your last and final warning. You're in violation of a curfew in the 100 block of Pennsylvania Avenue, Northwest. You are subject to immediate arrest if you do not disperse. (10/3/22 Tr. 150; GX 315 at 19:19:17-27.)

Multiple officers testified that the three warnings were loud and clearly audible to the officers and crowd gathered in the 100 block of Pennsylvania Avenue—and that the announcements were louder and clearer in person than in the body-worn camera recordings admitted as evidence at trial.[3] Crowd members heard and visibly reacted to the warnings; the "overwhelming majority" complied and left the Capitol Grounds at 3rd Street (10/5/22 Tr. 72 (Priebe); *see also* 10/4/22 Tr. 44-46 (Gutierrez); *id.* at 125 (Fellin); 10/5/22 Tr. 108 (Kyle); 10/6/22 Tr. 10 (Quiles); *id.* at 69 (Bonilla)).

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[3] *See* 10/3/22 Tr. 148-49 (Harris) ("very loud"); 10/4/22 Tr. 40, 108-109 (Gutierrez) ("definitely can hear" the "very distinctive" warnings "in the whole block"); *id.* at 122, 140 (Fellin) ("loud and clear"); 10/5/22 Tr. 11, 17 (Creech) ("pretty loud, audible" and "a lot clearer in person that it is from this [body-worn camera] audio"); *id.* at 71-72 (Priebe); *id.* at 107 (Kyle).

Appellants—pictured below—were among the minority who did not leave (*e.g.*, 10/5/22 Tr. 30-32, 36-37 (Creech)).

GX 101: Malimon GX 104: Glosser

Appellants loitered among the crowd in the middle of the 100 block of Pennsylvania Avenue, west of the police and National Guard line blocking the crowd from returning to the Capitol Building (10/5/22 Tr. 75-76 (Priebe)). Video from Officer Priebe's body-worn camera shows Glosser (in his distinctive green jacket) standing directly in front of the line while all three warnings play audibly (GX 301 (Priebe BWC) at 19:17:16-19:19:27). During the third warning, Malimon can be seen walking over and joining Glosser (10/5/22 Tr. 75-76; GX 301 at 19:19:15-27 (see below)). Neither made any effort to leave; to the contrary, appellants both faced east towards the Capitol Building and

held up their cell phones as if filming (*id.*). As Guardsmen in the line moved forward in unison, Glosser pressed himself against a riot shield and had to be pulled off physically by an MPD officer (GX 301 at 19:20:30-21:30). Glosser argued with the police and Guardsmen, repeatedly calling them "Nazis" (*id.*).

GX 301 at 19:19:26 (during third warning announcement)

A row of bike-rack barriers lay across the parking lot in the middle of the block, with openings on the right and left (10/5/22 Tr. 25). After the warning announcements, Guardsmen in the line advanced and police escorted members of the crowd through the openings (*id.*). Officers then moved in front of the barriers to create a "safe space" because "those bike

racks have been used as weapons" against police (*id.* at 25-26 (Creech)). A line of people passed through the barrier openings at approximately 7:20 p.m.—including what appears to be a video journalist, who can be heard in body-worn camera footage stating, "The police are forcing people out. They're saying they're going to arrest anybody who's still going to be here into the curfew." (GX 306 (Creech BWC) at 19:20:53-21:00.) Appellants passed through a barrier opening at 7:22 p.m., Malimon slightly ahead of Glosser (GX 304 (Gutierrez BWC) at 19:22:20-45). Glosser shouted, "You're a Nazi!", to an officer with a hand on his backpack, then stated, "I'm trying, but you're pushing me out where I have the legal right to stand" (*id.*). The officer responded, "No, no, no. You're in violation of a curfew." (*Id.*) Glosser yelled back, "I'm not in violation of a curfew! That's arbitrary! That's arbitrary, made-up, fucking bullshit-ass law!" (*Id.*). At this point, appellants could still have left the Capitol Grounds without being arrested by continuing to walk west to 3rd Street—as many other members of the crowd did (10/4/22 Tr. 143-44 (Fellin); 10/5/22 Tr. 26-27 (Creech)).

Instead, after passing through the barriers, appellants turned back towards the Capitol and continued filming with their cell phones (GX 306

at 19:23:00-25:20). 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!"; Malimon, who was facing the officer, ignored him (*id.* at 19:23:25-35). A few moments later, an officer told a man pacing nearby, "We've given you several chances"; the man angrily responded, "We pay for this land! Taxes pay for this land! We can stand here at any time of the fucking day that we want!" (*Id.* at 19:23:40-50.) In the middle of this diatribe, Malimon chimed in, "Exactly!" (*Id.*)

Not to be outdone, Glosser walked in front of the police line, his cell phone aloft, taunting the officers: "They're just lucky we're the peaceful ones. . . . Nazis do what Nazis do, I guess. . . . Y'all choosing the wrong fucking side. You guys are choosing Naziism!" (GX 306 at 19:24:10-25:15.) As a ring of police slowly closed behind him at 7:25 p.m., Glosser continued shouting about "arbitrary power wielded by arbitrary, weak-ass, punk-ass politicians" and that "all of it" was unconstitutional (*id.*; 10/5/22 Tr. 38; GX 315 (Harris BWC) at 19:25:15-35). When an officer again reminded Glosser that a "curfew [was] in" effect, Glosser responded

that he was "good right now" and would "wait for the shields to push [him] out" (GX 315 at 19:25:25-31).[4]

Even after the police ring closed, however, officers continued urging members of the dwindling crowd to leave the Capitol Grounds, and many did so—but not appellants (10/6/22 Tr. 21-24 (Quiles); *id.* at 75-76 (Bonilla)). At approximately 7:27 p.m., police finally began making arrests (10/6/22 Tr. 35 (Quiles); *see also* 10/4/22 Tr. 46-47 (Gutierrez) (estimating that ten minutes passed between warning announcements and arrests)). Glosser and Malimon remained on the Capitol Grounds in the 100 block of Pennsylvania Avenue and were arrested (GX 601 ¶¶ 18-19 (stipulations)).

The Defense Evidence

Malimon chose to testify (10/6/22 Tr. 105). Malimon, "an influencer on social media," traveled from Portland, Oregon, with her mother to attend Trump's rally on January 6 (*id.* at 106, 149-51; 10/11/22 Tr. 6-10). After the rally, Malimon and her mother returned to their downtown D.C.

[4] The officer's statement is difficult to understand, but Glosser agrees that the officer "can be heard to say the word 'curfew'" (Glosser Brief (G. Br.) 16).

hotel (10/6/22 Tr. 141). Malimon testified that her mother watched television that afternoon, and in the evening, told Malimon "she saw things on TV and she said let's go for a walk" (*id.* at 143-44). The pair walked to the Capitol, which took about 30 minutes (*id.* at 144-45). Malimon claimed that her mother did not tell her what was on the news, and that she had "limited internet access or any signal" on her phone; therefore, Malimon claimed, she had not known about the breach of the Capitol when the pair arrived there at 7:15 p.m. (*id.* at 110-12, 143-44). Indeed, Malimon asserted, she did not learn about the Capitol breach until "a few weeks after [her] arrest" (*id.* at 111).[5]

Malimon testified that, upon arrival at the Capitol, she observed the National Guard and police lines and "was curious why they were there" (10/6/22 Tr. 146). She began "recording video" on her cell phone to "later share with [her] followers" on social media, because she was "shocked" to see so many police officers, and "wanted to share that" (*id.*

[5] Malimon was impeached with her statement to police on January 6 that "[w]e"—Malimon and her mother—"were watching TV and we wanted to see what's going on here" (10/6/22 Tr. 142). Malimon claimed that she was "translating" for her mother, and that she "translat[ed] it incorrect[ly]" (*id.* at 143).

at 149-50). Malimon acknowledged walking up to officers and telling them, "They're taking our country and you're not standing on the right side," (*id.* at 147-48; GX 309 (DeFreytag BWC) at 19:17:35-50); she claimed not to recall what she was talking about, although she denied that she was referring to the election or the assault on the Capitol (10/6/22 Tr. 148).

Malimon claimed that she did not hear any of the warning announcements (10/6/22 Tr. 121). She also claimed that she "first learned" that "the authorities wanted [her] to leave" at "19:29," when she was told to do so by an officer (*id.* at 121-22). Malimon was impeached with body-worn-camera video of Officer Creech's warning to her that she was "in violation of the Mayor's curfew" and to "clear out" at 7:23 p.m. (10/11/22 Tr. 12-16; GX 306 (Creech) at 19:23:25-35). Malimon testified that she could not "remember . . . if [she] heard it back then," but acknowledged that she "turn[ed] and . . . look[ed]" (10/11/22 Tr. 16).

Malimon also testified that she and her mother tried "multiple times" to leave, but the police would not allow them to do so (10/6/22 Tr. 122). Malimon claimed that she was "trying to leave way prior" to 7:29 p.m., but was impeached with body-worn-camera video showing her

facing "the opposite direction" from her hotel, filming police with her phone at 7:23 p.m. (*id.* at 122, 163-64). According to Malimon, she was ordinarily "obedient to police officers, and [she] wasn't trying to like break the law in any way" (10/11/22 Tr. 43-44).

Post-Trial Briefing on Elements

After the parties' closing arguments, the trial court requested additional briefing from the parties on two legal questions relating to the second element of the model jury instruction on unlawful entry: "[The defendant] was directed to leave [the property]" (10/11/22 Tr. 160-61):[6]

> Does the government have to prove beyond a reasonable doubt that the defendant was ordered to leave the United States Capitol [G]rounds as opposed to ordered to leave the location where they were?
>
> And relatedly, if there is in any Court of Appeals opinion a definition of the elements or statement of the elements of this offense, that would be helpful. (10/11/22 Tr. 166-67.)

Glosser filed a short response stating that he "ha[d] found no case precisely defining 'property' or what must constitute notice of the 'property,'" and that "[t]he relevant portion of" the offense "does not appear to be well-defined in the case law"; he directed the trial court to

[6] *See* D.C. Criminal Jury ("Red Book") Instruction 5.401(B) ¶ 2 (2021 ed.).

O'Brien v. United States, 444 A.2d 946 (D.C. 1982), and *Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (G.R. 27 at 1-2). Malimon, also relying on *O'Brien* and *Wicks*, argued that "MPD was required to announce, or otherwise make clear to [Malimon] that she must specifically leave the *Capitol Grounds*" (Malimon Appendix 152).

The government disagreed, arguing that it was not required to prove "that a defendant was instructed to leave a specific property by name"; "[i]nstead, a person lawfully in charge need only direct an individual to leave without necessarily specifying the name, metes, or bounds of the precise property" (G.R. 28 at 1). The government pointed out that "general commands to leave regularly form the basis of Unlawful Entry convictions" (*id.* at 2-3).[7] As to the statute's intent element, the government quoted *Ortberg v. United States*, 81 A.3d, 303, 308 (D.C. 2013), explaining that "the mental state with respect to acting against the will of the owner or lawful occupant is not one of purpose or actual

[7] The general-command cases cited by the government include *Berg v. United States*, 631 A.2d 394 (D.C. 1993), *Smith v. United States*, 445 A.2d 961 (D.C. 1982), *Woll v. United States*, 570 A.2d 819 (D.C. 1990), *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966), and *McGovern v. George Washington Univ.*, 245 F. Supp. 3d 167 (D.D.C. 2017), *aff'd sub nom. McGovern v. Brown*, 891 F.3d 402 (D.C. Cir. 2018).

knowledge"; "[r]ather, it is sufficient for the government to establish that the defendant knew or should have known his entry was unwanted" and "that the 'will' of a lawful occupant was objectively manifest through either express or implied means" (G.R. 28 at 4). The government had proved that appellants "knew or should have known that they were remaining on property against the will of the person lawfully in charge," and "[t]hat is all that the [g]overnment was required to prove with respect to [appellants'] intent, knowledge, or understanding" (*id.* at 7).

The Trial Court's Findings and Verdict

Judge Kravitz did not credit Malimon's self-serving testimony, describing "the substance of the testimony" as "frankly . . . shocking" and "jaw dropping" (10/6/22 Tr. 91). The court accordingly "[did not] buy" Malimon's testimony that "she didn't know anything about anything and was just some kind of uninformed ignorant person who was somehow swept up in something that she had no idea what it was" (10/13/22 Tr. 36-37). Malimon's testimony "that she was unaware of what happened on January 6th when she went to [the] Capitol [G]rounds" was "so far beyond belief" that the court "viewed the testimony as probably more incredible than any [the court had] ever heard" (*id.* at 30). Thus, "nothing

in [Malimon's] testimony cast any doubt in [the court's] mind, and certainly no reasonable doubt about the government's proof of any essential elements of the offense" (*id.* at 10).

The trial court found that the following elements applied to the charged offense, D.C. Code § 22-3302(b):

> [(1)] the defendant was present on public property; [(2)] [ ] the defendant was directed to leave the property by the lawful occupant or person lawfully in charge of the property; [(3)] [ ] at the time the defendant was directed to leave the property the defendant did not have lawful authority to remain there; [(4)] [ ] the defendant knew or should have known he or she was remaining on the property against the will of the lawful occupant or person lawfully in charge of the property; and [(5)] [ ] upon being directed to leave the property the defendant refused to leave (10/13/22 Tr. 5).

See D.C. Criminal Jury Instruction 5.401(B) (2021 ed.). The court found that the crowd remaining on the Capitol Grounds on the evening of January 6 "was still rowdy, angry, and potentially combustible" (10/13/22 Tr. 7). It was "eminently reasonable" for the Capitol Police Board to order the Capitol Grounds cleared (*id.* at 6).

The trial court also held that the unlawful-entry statute "does not require proof that in directing [appellants] to leave, the police specified the particular piece of property to [appellants]. In other words, [the statute does not] require proof that a police officer's direction to a person

to leave, specified the particular piece of property the defendant is to leave." (10/13/22 Tr. 7.) The court agreed with the government that it is "sufficient if the police tell the defendant[ ] to leave, particularly where the context aids a defendant's understanding" (*id.* at 7-8). The court acknowledged "the complaints of" appellants, "that they were told they were remaining in violation of the mayor's curfew rather than having been told they were remaining in violation of the order of the . . . Capitol Police Board," but "conclude[d] that the distinction is not legally relevant" (*id.* at 8). As Judge Kravitz explained, "all that is required on this point is proof beyond a reasonable doubt that a person with authority to tell [appellants] to leave the Capitol [G]rounds did so. [Appellants] in this case have not presented anything to persuade me that they had a right to know the correct reason for the order to leave." (*Id.*) And here, the court found "strong evidence that [appellants] actually knew they were being told to leave" (*id.* at 9).

Judge Kravitz found that "[t]he evidence showed quite clearly that": appellants "were on [the] United States Capitol [G]rounds that evening, specifically in the 100 block of Pennsylvania Avenue, [NW]" (10/13/22 Tr. 9); appellants "were directed to leave the property by [MPD] officers who

were acting lawfully at the request of [USCP], the entity lawfully in charge of the United States Capitol [G]rounds" (*id.* at 9-10); neither appellant "had lawful authority to remain on the Capitol [G]rounds at the time they were directed to leave, given the reasonableness of the Capitol Police Board's order closing the entire Capitol [G]rounds" (*id.* at 10); appellants "knew they were remaining on the property against the will of the police, having been told directly by several police officers to leave, having seen the majority of other protesters leave at the direction of the police[,] [a]nd although unnecessary to [the court's] analysis, likely also having heard the official warnings . . . coming from the police cruiser at 7:17, 7:18, and 7:19 p.m." (*id.*); and, finally, appellants "failed to leave, despite what the evidence showed were ample opportunities to leave the area and avoid arrest before the police circle closed around them" (*id.*).

As to the final point, the court found that "several minutes pas[sed] between the warnings [appellants] received and the closing of the circle. A period in which most of the protesters left, but these two [appellants] either expressly refused to leave, as in [Glosser's] case, or affirmatively failed to leave, as in [Malimon's] case. And in which neither [appellant] made any material efforts to leave the area." (10/13/22 Tr. 10-11.)

The trial court therefore found both appellants guilty of unlawful entry on public property (10/13/22 Tr. 11).

SUMMARY OF ARGUMENT

The trial court correctly applied the elements of unlawful entry and did not err in finding that the statute does not require police to specify the particular piece of property that trespassers must leave. Rather, as the court found, a general command to leave may provide sufficient notice, particularly where context aids a defendant's understanding of that notice. Appellants are also wrong to claim that the government was required to prove that they knew or should have known they were on the Capitol Grounds. The mens rea for the statute's "circumstances" element is satisfied where the government presents proof that a defendant "knew or should have known that [they] are remaining on property against the will of the lawful occupant or person lawfully in charge of the property." *See* D.C. Criminal Jury Instruction 5.401(B) (2021 ed.); *Wicks v. United States*, 226 A.3d 743 (D.C. 2020); *Ortberg v. United States*, 81 A.3d 303 (D.C. 2013). A defendant's awareness of the specific property they are being asked to leave may, depending on context, be relevant to that mens

rea element; but it is not itself a stand-alone element that the government must prove to convict.

Even assuming, however, that the government was required to prove that appellants knew or should have known they were on the Capitol Grounds, there was sufficient evidence, viewed in the light most favorable to the government, for a reasonable trier of fact to so conclude. MPD broadcast three very loud and distinctive warning announcements that would have been clearly audible to appellants—who were close to and directly in front of the MPD car speaker—repeatedly emphasizing that they were in violation of a "United States Capitol curfew" in "the 100 block of Pennsylvania Avenue, Northwest." Appellants, who lingered in a parking lot in the shadow of the Capitol Building, surrounded by police and National Guard soldiers, knew or should have known they were on the Capitol Grounds. Moreover, as most other crowd members departed via the 3rd Street exit, and officers repeated directly to appellants that they were in violation of a curfew and needed to leave to avoid arrest, the government established beyond a reasonable doubt that appellants knew or should have known they were remaining against the will of the lawful occupant.

The evidence shows clearly that Malimon did not have a bona fide belief in her right to remain on the Capitol Grounds after police ordered her to leave. The fact that it was MPD—not USCP—ordering her to leave is irrelevant. MPD had actual authority to enforce the law on the Capitol Grounds, and Malimon neither actually nor reasonably believed that it lacked that authority.

ARGUMENT

I. The Trial Court Correctly Applied the Elements of Unlawful Entry.

A. Standard of Review and Offense Elements

This Court reviews de novo whether the trial judge "applied the correct legal standard" at appellants' bench trial. *Williams v. United States*, 887 A.2d 1000, 1000-01 (D.C. 2005).

D.C. Code § 22-3302(b) provides:

> Any person who, without lawful authority, shall enter, or attempt to enter, any public building, or other property, or part of such building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof or his or her agent, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant or of the person

> lawfully in charge thereof or his or her agent, shall be deemed guilty of a misdemeanor . . . .[8]

"The offense of unlawful entry includes not only cases where a person enters property without lawful authority, but also cases where a person who has [already] entered premises . . . subsequently refuses to leave after being asked to do so by someone in charge." *District of Columbia v. Murphy*, 631 A.2d 34, 37 (D.C. 1993).

This Court has twice stated the elements of unlawful entry when committed in the second manner, by remaining on property without authority and refusing to leave. "Where a charge of unlawful entry involves remaining on the premises without authority, the essential elements of the offense are: (1) [t]hat the defendant was present in a public or private dwelling, building or other property, or a part of such . . . ; (2) [t]hat the defendant was directed to leave the property by the lawful occupant or person lawfully in charge of the property; (3) [t]hat at the time s/he was directed to leave the property, the defendant was

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[8] "[T]he relevant language of the statute setting forth the elements of the crime reads much as it did when it was first enacted in 1901"; in 2009, it was "divided into two subsections, distinguishing between unlawful entry of a public building and unlawful entry of a private building," with different penalties prescribed for each. *Ortberg v. United States*, 81 A.3d 303, 306 n.3 (D.C. 2013).

without lawful authority to remain there; and (4) [t]hat upon being directed to leave the property, the defendant refused to leave." *Id.* at 37 n.6. *See also Darab v. United States*, 623 A.2d 127, 134 n.19 (D.C. 1993) ("[T]he government had the burden of proving that: (1) [the defendants] were present at the mosque; (2) they were instructed to leave by the lawful occupant or person lawfully in charge of the mosque; (3) at the time they were instructed to leave, they did not have lawful authority to remain; and (4) upon being directed to leave the mosque, they refused to do so.").

Murphy and *Darab* approved the elements listed in the "Red Book" jury instruction then in effect. *See* D.C. Criminal Jury Instruction ("Red Book") 4.44(B) (3d ed. 1978). In *Ortberg*, the Court approved a revised version of the unlawful-entry instruction, explaining that it "articulates the elements . . . with accuracy and helpful precision." 81 A.3d at 309. Although *Ortberg* dealt specifically with the instruction for the other mode of unlawful entry—"entry without authority," *see* Red Book Instruction 5.401(A)—the two instructions parallel one another. The current instruction for "remaining on premises without authority" includes the following elements:

> (1) The defendant was present in property; (2) the defendant was directed to leave the property by the complainant; (3) the complainant was the lawful occupant or person lawfully in charge of the property; (4) at the time the defendant was directed to leave the property, s/he did not have lawful authority to remain there; (5) s/he knew or should have known that s/he was remaining on the property against the will of the lawful occupant or person lawfully in charge of the premises; (6) upon being directed to leave the property, s/he refused to leave; and (7) the property was public.

Red Book Instruction 5.401(B) (2021 ed.).[9]

Ortberg clarified that unlawful entry has distinct mental state requirements for its "conduct" and "circumstances" elements. *See Wicks v. United States*, 226 A.3d 743, 747 (D.C. 2020); *Ortberg*, 81 A.3d at 307-

[9] By way of comparison, the current Instruction 5.401(A) ("entry without authority") includes the following elements (cleaned up): (1) the defendant entered or attempted to enter property; (2) the defendant entered, or attempted to enter the property voluntarily, on purpose, and not by mistake or accident; (3) s/he did so without lawful authority; (4) the entry or attempt to enter was against the will of the lawful occupant or the person lawfully in charge of the premises; (5) the defendant knew or should have known that s/he was entering against that person's will; and (6) the property was public.

The only difference between the current instruction and the 2009 version approved by *Ortberg* is the final element, which made explicit based on intervening precedent that "the public/private nature of a building or property is an element of the offense of unlawful entry." Red Book Instruction 5.401 comment (2021 ed.) (citing *Wicks v. United States*, 226 A.3d 743 (D.C. 2020), and *Broome v. United States*, 240 A.3d 35 (D.C. 2020)).

08. *Cf. Carrell v. United States*, 165 A.3d 314, 320 n.13 (D.C. 2017) (en banc) (discussing "conduct," "circumstance[ ]," and "result[ ]" elements of a crime). As to conduct, "the physical act"—entering or remaining—"must be purposeful and voluntary[,] not accidental or mistaken." *Ortberg,* 81 A.3d at 308. And as to the circumstance element, "the mental state with respect to acting against the will of the owner or lawful occupant is not one of purpose or actual knowledge. Rather, it is sufficient for the government to establish that the defendant knew or should have known that his entry" or remaining "was unwanted." *Id. See also Wicks*, 226 A.3d at 749 ("[T]he requisite state of mind with respect to the circumstance that [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.").[10]

[10] Malimon confuses the distinct mental states required for unlawful entry's conduct and circumstances elements (M. Br. 26 ("[T]he government was required to prove . . . that [Malimon] was not on [the] Capitol Grounds by accident or mistake—that is, that she knew [or should have known] that she was on [the] Capitol Grounds."). The "physical act . . . must be purposeful and voluntary—not accidental or mistaken." *Ortberg*, 81 A.3d at 308. In other words, Malimon was not forced to remain against her will and did not lack the physical ability to leave the area.

B. The Trial Court Did Not Err.

Glosser claims that the trial court erred in applying the elements of unlawful entry because "the crime . . . requires that the defendant know or should have known the area from which he was told to leave" (G. Br. 24).[11] Glosser both mischaracterizes the trial court's ruling and misstates the law of unlawful entry.

The trial court relied on the Red Book instruction for the elements of unlawful entry:

> [(1)] the defendant was present on public property;
>
> [(2)] [ ] the defendant was directed to leave the property by the lawful occupant or person lawfully in charge of the property;
>
> [(3)] [ ] at the time the defendant was directed to leave the property the defendant did not have lawful authority to remain there;
>
> [(4)] [ ] the defendant knew or should have known he or she was remaining on the property against the will of the lawful occupant or person lawfully in charge of the property; and

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[11] Malimon also asserts that the government was required to prove that she knew or should have known "that she was on [the] Capitol Grounds," although she frames her claim as a sufficiency challenge (M. Br. 26). Because Glosser develops the argument in greater depth, the government principally responds herein to the points raised in Glosser's brief.

> [(5)] [ ] upon being directed to leave the property the defendant refused to leave (10/13/22 Tr. 5).

See Red Book Instruction 5.401(B).[12] As explained, *Ortberg* approved parallel Instruction 5.401(A), which "articulates the elements of unlawful entry with accuracy and helpful precision." 81 A.3d at 309. Moreover, neither defendant objected to the trial court's reliance on Red Book Instruction 5.401(B), nor does either challenge any aspect of it here or attempt to distinguish it from Instruction 5.401(A) and *Ortberg*.

Instead, Glosser puts words in the trial court's mouth, alleging that the court "concluded" that "a defendant could be convicted of Unlawful Entry regardless of his knowledge of the area from which he was told to leave" and "[t]he only knowledge requirement was that the defendant knew or should have known that he was being told to leave" (G. Br. 24 (citing 10/13/22 Tr. at 7-9)). But that is not what Judge Kravitz said. In the section of the trial court's findings cited by Glosser, the court was

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[12] The Red Book Instruction has seven elements. Judge Kravitz condensed the instruction by combining the first and seventh elements ("the defendant was present on public property") and the second and third elements ("the defendant was directed to leave the property by the lawful occupant or person lawfully in charge of the property") of the Red Book instruction. *Compare* 10/13/22 Tr. 5 *with* Red Book Instruction 5.401(B). There is no substantive change, however.

addressing whether the second element ("the defendant was directed to leave the property by the lawful occupant or person lawfully in charge of the property") required proof that police "specified the particular piece of property" (10/13/22 Tr. 7).[13] The court found that unlawful entry does not "require proof that a police officer's direction to a person to leave specified the particular piece of property the defendant is to leave. [It is] sufficient if the police tell the defendants to leave, particularly where the context aids a defendant's understanding." (*Id.* at 7-8.) Later, in discussing the requirement that a defendant "refuse to leave" the property after being ordered to do so, the court reiterated the necessary mental state: the defendant knew or should have known "that he or she was remaining on property against the will of the lawful occupant or person lawfully in charge of the property" (*id.* at 8-9). *Cf. Wicks*, 226 A.3d at 749 ("the requisite state of mind with respect to the circumstance that [Wicks's]

[13] The trial court had requested supplemental briefing on this question: "Does the government have to prove beyond a reasonable doubt that the defendant was ordered to leave the United States Capitol [G]rounds as opposed to ordered to leave the location where they were" (10/11/22 Tr. 166-67).

entry was against the will of the" lawful occupant is that Wicks "knew or should have known that his entry on [the] property was unwanted").

Similar[ly], the trial court never "conclude[d] that the defendant's awareness of the area from which he was told to leave was irrelevant" (G. Br. 26). Such awareness may well be relevant in assessing whether a defendant "knew or should have known that he was entering or remaining on property against the will of the lawful occupant or person lawfully in charge of the property" (10/13/22 Tr. 5, 7-8). That is especially true in cases involving entry onto property, where the Court has often considered the existence of clear demarcations and boundaries to be significant in assessing whether a defendant had the requisite mens rea. *Compare, e.g., Wicks*, 226 A.3d at 750-51 (Wicks did not have "the requisite mens rea regarding the circumstance element that his entry onto the sidewalk . . . adjacent to [Nationals' Park] was 'against the will' of the Washington Nationals"), *with Ortberg*, 81 A.3d at 310 ("the registration desk and distribution of name tags reasonably should have communicated to" Ortberg that his entry into Studio One was against the will of the lawful occupant).

As the trial court apprehended, however, where unlawful entry is committed by *remaining in place* despite direct orders to "leave," awareness of specific boundaries of the property is likely to be less relevant because the defendant is on notice already that they are *currently* in a place where they are not permitted to be—"particularly where the context aids a defendant's understanding" (10/13/22 Tr. 7-8). A factfinder may reasonably infer that a defendant knew or should have known that they were remaining on property against the will of the lawful occupant—"the requisite mens rea regarding the circumstance element," *Wicks*, 226 A.3d at 750-51—where police "direct the defendant[] to leave" the area, regardless of whether they "specify the particular piece of property" the defendant is standing on, but the defendant ignores police orders and remains in place. *See, e.g., Rahman v. United*, 208 A.3d 734, 737 (D.C. 2019) (officer "'told [Rahman] that he 'needed to leave if he's not buying something,' but [Rahman] insisted that 'he's not going nowhere.'"); *Hemmati v. United States*, 564 A.2d 739, 741 (D.C. 1989) (officer told Hemmati that "he would be arrested if he refused

to go," but Hemmati "persisted in refusing to leave until he could meet with the Senator in person").[14]

Glosser rightly acknowledges that "general commands to leave regularly form the basis of Unlawful Entry convictions" that have been upheld by this Court (G. Br. 27). He wrongly suggests, however—without citing any authority—that "such orders are regularly accompanied by notice of a defined area from which the defendant is told to leave" (*id.*). If anything, the reverse is true; defendants are frequently convicted of refusing orders to "leave" without embellishment (or at least none this Court considered pertinent enough to discuss). *See, e.g., Woll v. United*

[14] A defendant's "awareness of the area from which he is told to leave" (G. Br. 26) may become more relevant where they make some effort, in response to the police command, to leave the immediate area. For example, had Rahman left the interior of the McDonald's but loitered in its play area, *cf. Rahman*, 208 A.3d at 737, or had Hemmati left Senator Byrd's office but remained in the corridor outside, *cf. Hemmati*, 564 A.3d at 741; *see also Gaetano v. United States*, 406 A.2d 1291, 1292 (D.C. 1979), there might have been a legitimate question whether they knew or should have known that they remained on property against the will of the lawful occupant. But that is an issue going to the sufficiency of the evidence (addressed *infra*), not whether the trial court correctly articulated the elements of the offense. Moreover, as the trial court recognized, "context" is key in assessing sufficiency (10/13/22 Tr. 7). And here, as the court found, neither appellant "made any material effort[] to leave the area" (*id.* at 10-11).

States, 570 A.2d 819, 821 (D.C. 1990) (defendants refused an order to "leave" the corridor outside an abortion clinic); *Smith v. United States*, 445 A.2d 961, 963 (D.C. 1982) (en banc) (demonstrators in White House tourist line were asked to "leave" and warned that refusal would subject them to arrest). To be sure, context matters in assessing whether a defendant knows or should know that they are remaining against the will of a lawful occupant. *Cf. Ortberg*, 81 A.3d at 310 (examining context including "registration desk and distribution of name tags"). But the trial court clearly understood that and correctly stated the law (10/13/22 Tr. 7-8 ("It appears from the case law . . . to be sufficient if the police tell the defendants to leave, particularly where the context aids a defendant's understanding.")).

Glosser tries to invent a new notice requirement: a defendant must receive "notice of a defined area," either through "sign[s], fence[s], or other boundary marker[s]" or through "the communication of the lawful owner or their agent" (G. Br. 28). But his arbitrary rule rests on the false premise that "actual or imputed knowledge of the *area*" is "a necessary element of Unlawful Entry" (*id.* (emphasis added)). It is not. *See Wicks*, 226 A.3d at 747 ("the elements of unlawful entry are (1) the defendant

entered onto . . . property; (2) the physical act of entry was purposeful and voluntary . . .; (3) the entry was unauthorized . . . ; and (4) the defendant knew or should have known that his entry was unwanted" (cleaned up)).

Finally, Glosser confuses the elements by relying on the inapposite *O'Brien v. United States*, 444 A.2d 946 (D.C. 1982). The issue in *O'Brien* was whether there was a First Amendment-compliant "additional specific factor establishing [O'Brien's] lack of a legal right to remain" on Metro property and distribute leaflets at the top of an escalator. *Id.* at 948.[15] *O'Brien* found such an "additional specific factor" based on a Metro regulation "prohibiting activities within 15 feet of an escalator," and held that the Metro regulation was a valid time, place, and manner restriction

[15] On private property, "[t]he mere demand of the person lawfully in charge to leave necessarily deprives the other party of any lawful authority to remain on the premises." *O'Brien*, 444 A.2d at 948. "In contrast, as to public property, the statute requires: (1) that a person lawfully in charge of the premises expressly order the party to leave, and (2) 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." *Id.* Here, the trial court found that the Capitol Police Board's "eminently reasonable" order to close the Capitol Grounds "given the unprecedented assault on the Capitol [B]uilding a few hours earlier" satisfied the requirement of an "additional specific factor" (10/13/22 Tr. 5-6). Appellants have not challenged that determination.

under the First Amendment, noting that "there existed an alternative area for [O'Brien's] communication a mere 15 feet away." *Id.* at 948-49. It does not appear to have been disputed in *O'Brien* whether the defendant had the requisite mens rea for unlawful entry. *Cf id.* at 947 (O'Brien "refused to cease his activities and advised the officer to either arrest him or leave him alone.").

II. There Was Sufficient Evidence to Convict Appellants, Even Assuming the Government Was Required to Prove that They Knew or Should Have Known They Were on the Capitol Grounds.

Appellants claim that the government presented insufficient evidence that they "knew or should have known [they were] on [the] Capitol Grounds" (G. Br. 31; M. Br. 26). As already discussed, the government was not required to prove that appellants knew or should have known the specific nature of the property they were being ordered to leave. It was enough—as the trial court found—that they knew (or should have known) that they were remaining on property against the will of the person lawfully in charge of the premises (in this case, MPD acting as agent of USCP). *See Ortberg*, 81 A.3d at 308-09; Red Book Instruction 5.401(B). But *even assuming* the government was required to

prove that appellants knew or should have known they were on the Capitol Grounds, there was sufficient evidence to sustain their convictions.

A. Standard of Review

Appellate review of sufficiency-of-the-evidence claims is "deferential." *Rahman*, 208 A.3d at 738.

> [This Court] giv[es] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic fact to ultimate facts. [The Court] accept[s] the trial judge's factual findings after a bench trial unless they are plainly wrong or without evidence to support them, and deem[s] the proof of guilt sufficient if, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 738-39 (cleaned up).

B. Appellants Received Sufficient Notice that They Were on the Capitol Grounds.

Appellants contend that they received insufficient notice they were on the Capitol Grounds. Their complaints are difficult to square, however, with the three "very loud" warning announcements broadcast by MPD (10/3/22 Tr. 148-49). Viewing the evidence in the light most favorable to the government, the announcements were loud, clear,

distinctive, and audible to the remaining crowd members (*see, e.g.*, 10/4/22 Tr. 40, 108-09 (Gutierrez) ("definitely can hear" the "very distinctive" warnings "in the whole block")). The first warning told crowd members that they were "in violation of a curfew of . . . *the United States Capitol*," and that "[i]f [they did] not leave [they were] subject to immediate arrest" (10/3/22 Tr. 147; GX 315 at 19:17:19-36 (emphasis added)). The second warning addressed "[a]ll those unlawfully assembled in the 100 block of Pennsylvania Avenue, [NW]," and again informed them that they were "in violation of . . . *the United States Capitol curfew*" (10/3/22 Tr. 148; GX 315 at 19:18:03-26 (emphasis added)). And the "last and final warning" emphasized that crowd members were "in violation of a curfew in the *100 block of Pennsylvania Avenue, Northwest*" and "subject to immediate arrest if [they did] not disperse" (10/3/22 Tr. 150; GX 315 at 19:19:17-27 (emphasis added)). Crowd members received notice that they were on Capitol property—because they were in violation of the Capitol curfew—and they received notice of the specific block that they were required to leave. And the evidence also showed that crowd members heard the warnings and the "overwhelming majority" complied

and left the Capitol Grounds as directed at 3rd Street, NW (10/5/22 Tr. 72; *see also, e.g.,* 10/4/22 Tr. 44-46)—just not appellants.

The evidence further demonstrated that both appellants were present when the warning announcements were made. Officer Priebe was standing in the police and National Guard line when the warnings were given (10/5/22 Tr. 70-71). Although the officer testified that the warnings sound more "muffled" in her body-worn camera video than they were in person (*id.* at 73-74), they are still plainly audible in the video (GX 301 at 19:17:16-19:19:27). Glosser can be seen meandering directly in front of the line, facing east towards the car speaker and the Capitol, and holding his phone aloft as if filming while all three anouncements play (*id.*). Malimon can be seen passing Glosser and walking right in front of the line while the third warning plays (*id.* at 19:19:26). Malimon, moreover, admitted in her testimony that she was on scene at 7:15 p.m. (10/6/22 at 110)—so she was present for all three announcements. Both appellants received ample notice that they were violating a "United States Capitol curfew" by remaining present "in the 100 block of Pennsylvania Avenue, [NW]."

Because—as already discussed—Judge Kravitz properly relied Red Book Instruction 5.401 (and therefore did not specifically find that appellants knew or should have known they were on the Capitol Grounds), he considered the warning announcements "unnecessary to [his] analysis" (10/13/22 Tr. 10). Evidence is sufficient, however, where "*any* rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc) (emphasis in original). A reasonable factfinder could readily have found that appellants knew or should have known they were on Capitol property based on the warning announcements.[16]

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[16] Since the trial court found the warnings unnecessary to its analysis, it did not (as Glosser wrongly asserts (G. Br. 33-34)) find that the government had not proven beyond a reasonable doubt that Glosser heard the warnings. Instead, the trial court observed in passing that appellants "likely . . . heard" the warnings (10/13/22 Tr. 10). In any event, the government was not required to prove "actual knowledge." *Ortberg*, 81 A.3d at 308. And even if it were, the most appellants would be entitled to is a remand for the trial court squarely to address whether appellants had heard the warnings. *Cf. Carrell*, 165 A.3d at 330 (remanding for trial court to make necessary mens rea finding in bench trial).

Glosser also argues that "the 100 block of Pennsylvania Avenue . . . would have been understood" to mean "that part of Pennsylvania Avenue between First and Second Street"—only the eastern half of the 100 block (G. Br. 34 n.6). That is implausible; as Glosser acknowledges, "Second Street does not intersect Pennsylvania

(continued . . .)

Additional circumstances, viewed in the light most favorable to the government, further demonstrate that appellants knew or should have known they were on Capitol property. The 100 block of Pennsylvania Avenue is not an indistinguishable "public street" (G. Br. 33); it is a large "parking lot" in the shadow of the Capitol, one of the most iconic buildings in the world (10/4/22 Tr. 35; GX 401). And on the evening of January 6, 2021, a small army of police and National Guardsmen were attempting to remove remaining members of the public from that parking lot after a mob besieged the Capitol earlier in the day.[17]

C. Appellants Knew or Should Have Known They Were Remaining on the Capitol Grounds Against the Will of the Lawful Occupant.

There was also sufficient evidence that the defendants knew or should have known they were remaining on the Capitol Grounds against

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Avenue" (*id.*), so the 100 block visually presents as one long, unbroken block between the Peace Memorial and 3rd Street.

[17] Although Malimon testified that she did not know she was on the Capitol Grounds (M. Br. 28), the trial court thoroughly discredited her "shocking" and "jaw dropping" false testimony (10/6/22 Tr. 91; 10/13/22 Tr. 10).

the will of the lawful occupant. *See* Red Book Instruction 5.401; *Ortberg*, 81 A.3d at 305 ("endorsing" this instruction).

In addition to the official warning announcements, individual officers repeatedly admonished appellants to leave (GX 306 at 19:23:25-35; GX 315 at 19:25:15-35). In response, Glosser called the police "Nazis," and Malimon verbally agreed with a belligerent crowd member who shouted that they could "stand here at any time of the fucking day that [they] want[ed]" because "[they] pa[id] for this land" (GX 306 at 19:23:40-50, 19:24:10-25:15). Meanwhile, most other crowd members voluntarily left the Capitol Grounds at 3rd Street (10/4/22 Tr. 143-44; 10/5/22 Tr. 26-27). Appellants easily could have left the same way, but chose not to do so (10/4/22 Tr. 44; 10/5/22 Tr. 41-42; 10/6/22 Tr. 19, 22).[18]

Finally, both appellants claim implausibly that they were "misdirected" (G. Br. 34) or "misinformed" (M. Br. 25) by police because

[18] Glosser relies on the testimony of Officer Quiles to contend that there was confusion at a barrier opening manned by that officer (G. Br. 36). But Glosser points to no evidence that he was present at that opening, and the same officer testified that the exit was "completely open" and officers "were just trying to guide them[,] just telling people to leave," for "at least 20, 30 minutes" (10/6/22 Tr. 19, 22). The officer's testimony, like all evidence in the case, must be viewed in the light most favorable to the government.

MPD invoked the Mayor's curfew in addition to the Capitol curfew when directing crowd members to leave. It would have been misleading if officers had told appellants they could *stay*; here, officers simply relied on an additional, alternative basis for the valid order to disperse from the Capitol Grounds. Moreover, the warning announcements clearly conveyed that crowd members were in violation of a "United States Capitol curfew" along with the "city curfew."

D. Malimon's Bona Fide Belief Claim Fails.

Malimon also challenges her conviction because MPD, not USCP, ordered her to leave the Capitol Grounds (M. Br. 16-25). Although USCP requested MPD assistance on January 6, 2021, and MPD officers therefore had "the same authority on Capitol Grounds as a [USCP] officer" (10/3/22 Tr. 55-57), *see* 2 U.S.C. § 1961(a), Malimon nevertheless claims that she had "a bona fide belief" in her right to refuse MPD orders to leave. This claim is entirely meritless.

The "bona fide belief defense to the crime of unlawful entry" allows that "[w]hen a person enters a place with a good purpose and a bona fide belief in his or her right to enter, that person lacks the requisite criminal intent for unlawful entry." *Darab*, 623 A.2d at 136. The defense must be

"fairly raised by the evidence." *Ortberg*, 81 A.3d at 309. "[This Court has] made clear that 'a bona fide belief must have some justification—some reasonable basis.'" *Wiley v. United States*, 264 A.2d 1204, 1209 (D.C. 2021) (citation omitted); *see also Ortberg*, 81 A.3d at 309 (bona fide belief "must be reasonably held"). Moreover, the belief must be held in "good faith." *Darab*, 623 A.2d at 136. "The clear rule of law" is that "a reasonable belief in an individual's right to remain on property not owned or possessed by that individual must be based in the pure indicia of innocence." *Gaetano v. United States*, 406 A.2d 1291, 1294 (D.C. 1979). Therefore, "[e]vidence of awareness of a request to leave will defeat a bona fide belief claim." *Darab*, 623 A.2d at 137. *See also Jackson v. United States*, 357 U.S. 409, 411 (D.C. 1976) ("[W]hen it became clear to" the defendant that his girlfriend "was ordering him to leave" her apartment, "any grounds for a bona fide belief in his right to remain lapsed.").

Malimon argues that she had a bona fide belief in her right to remain on the Capitol Grounds, notwithstanding the fact that police "informed [her] repeatedly and loudly that [she] was required to leave," because it was MPD giving the order and those officers referenced the city curfew (M. Br. 19, 24). The evidence, however, was easily sufficient

to negate a bona fide belief defense. Malimon did not have an actual—let alone a reasonable—belief that she could refuse police orders to leave.

First, although a bona fide belief must be subjectively held and "based in the pure indicia of innocence," *Gaetano*, 406 A.2d at 1294, Malimon never testified (and there was no other evidence presented by any party) that she believed she could defy MPD orders because she was on the Capitol Grounds.[19] To the contrary, Malimon testified that she was trying to follow police directions, "looking for a way to leave," and "obedient to police officers" (10/11/22 Tr. 43-44). Malimon clearly saw MPD as "the authorities" (10/6/22 Tr. 121 (Q. "Did there eventually come a time when you figured out the authorities wanted you to leave?" A. "Eventually, yes" . . . . Q. "And describe how it is you learned that." A. "That's what the police officer then told me.")). Malimon also testified that she was not "aware" she was on the Capitol Grounds at the time (*id.* at 107). So Malimon cannot assert in "good faith" that she actually

[19] Had she done so, of course, it would have been quite damaging to her other claim that the government did not prove she knew or should have known she was on the Capitol Grounds.

believed MPD lacked authority to order her to leave. *Darab*, 623 A.2d at 136.

Second, even if Malimon actually held such a belief, it would not have been "reasonably held." *Ortberg*, 81 A.3d at 309. MPD had both actual and apparent authority to order Malimon to leave the Capitol Grounds. As the trial court found, MPD officers "were acting lawfully at the request of [USCP], the entity lawfully in charge of the" Capitol Grounds (10/13/22 Tr. 9-10; *see* 10/3/22 Tr. 55-57). *See Woll v. United States*, 570 A.2d 819, 822 (D.C. 1990) ("[T]he person in charge may act through an agent in ordering someone to leave[.]"). And in addition to actual authority, MPD had "clear or apparent authority as 'the lawful occupant' or the 'person lawfully in charge thereof' to order departure." *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981). Reasonable people understand that police officers exercise authority beyond private citizens, particularly on public property. *Cf. Jones v. United States*, 154 A.3d 591, 595 (D.C. 2017) (encounter between private citizen and "visibly armed police officer in full uniform and tactical vest" on public street is not "between equals"). That innate authority is exponentially multiplied where—as here—police deploy en masse, accompanied by soldiers, to

suppress civil disturbance and restore public order. Malimon could not reasonably have believed that the multiagency show of official force she witnessed on the Capitol Grounds on the evening of January 6, 2021, was not exercising the authority of the "person lawfully in charge thereof." *Grogan*, 435 A.2d at 1071.[20]

[20] This is why Malimon's strained hypothetical, involving private property owners who happen to share the first names of the D.C. Mayor and then-Speaker of the House, is completely divorced from the facts of this case (M. Br. 18-19). Imagine instead that criminals burglarize and ransack "Nancy's" home, and she frantically calls 911. The burglars flee as the police arrive and secure the crime scene. "Kristina," who has a true-crime webcast, wanders over to Nancy's driveway and begins filming the scene. Kristina has no bona fide belief in her right to remain on Nancy's property when police order her to leave because she is interfering with their investigation—even if Nancy herself is not present and able to make the same demand.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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(4) Birth date

(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)

(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and (g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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/s/
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22-CM-795 & 22-CM-812
Case Number(s)

August 21, 2023
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellants, Thomas Burgess, Esq., burgetom@gmail.com, and Richard Goldberg, richard.goldberg@goldberglawdc.com, on this 21st day of August, 2023.

/s/
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