No. 23-7158

In The Supreme Court of the United States

RUSSELL DEAN ALFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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This Petition questions whether two statutes criminalizing "disorderly or disruptive conduct" should be interpreted more broadly than the text contemplates—so broadly that virtually any conceivable conduct, including (as here) an individual's mere physical presence, qualifies.

Neither statute, 18 U.S.C. § 1752(a)(2) and 40 U.S.C. § 5104(e)(2)(D), expressly permits a factfinder to consider the context and effect of a person's conduct in determining whether it is "disorderly or disruptive." But the Court of Appeals, like the district court before it, read into both "a context-sensitive inquiry" that looks to the conduct's effect, rather than its inherent nature. *See* Pet. App. at 10a, 8a-11a. In so doing, the courts below rejected Mr. Alford's textualist interpretation of the two statutes: that only *inherently* disorderly or disruptive conduct is prohibited by § 1752(a)(2) and § 5104(e)(2)(D). Under this interpretation, a person's mere physical presence can be disorderly or disruptive even though it is inherently neither. And the "disorderly or disruptive" adjectives are meaningless surplusage because virtually all, if not all, conduct can qualify.

The government seeks to reframe the issue as a fact-bound request for this Court to sit as a super-appellate court and reassess the sufficiency of the evidence underlying Mr. Alford's convictions. But that reframing ignores that Mr. Alford's challenge to the sufficiency of the evidence rested on a question of statutory interpretation. Because it is the soundness of the lower courts' statutory interpretation that is at issue here, a matter with a well-developed record, Mr.

Alford's petition is an optimal vehicle for this Court to provide crucial guidance to the lower courts as they grapple with hundreds of criminal cases arising out of the events of January 6, 2021, and in future matters.

I. This is a first-impression question of statutory interpretation, not a sufficiency appeal.

The courts below relied on a broad, atextual reading of § 1752(a)(2) and § 5104(e)(2)(D), and that is why this Court can, and should, grant *certiorari* and render the correct and authoritative interpretation of both statutes.

If the question at issue were truly as narrow as the government presents it here—a mere sufficiency of the evidence second-look—the D.C. Circuit could have simply affirmed on the ground that Mr. Alford's convictions on § 1752(a)(2) and § 5104(e)(2)(D) would stand even under his strictly textualist interpretation of the statutes. It did not.

To be sure, the district court (in denying Mr. Alford's Rule 29 motion) and the D.C. Circuit (in affirming the district court's statutory interpretation) weighed the sufficiency of the evidence. But each lower court's sufficiency review rested on the legal premise that "disorderly and disruptive conduct" within the meaning of both statutes was not limited to the conduct's inherent nature, but instead included virtually *any* conduct, depending on the context in which it occurred.

The district court, as the government concedes, plainly found that Mr. Alford's "mere presence inside the Capitol disturbed the public peace or undermined public safety." (Resp. Br. at 5) (citation omitted.) The Court of Appeals ruled likewise. *See* D.C. Circuit opinion at 7 (expressly rejecting Mr. Alford's contention

that § 1752(a)(2) and § 5104(e)(2)(D) "only reach conduct that is inherently disorderly or disruptive"); *see also id*. at 14-15.

Under this interpretative prism, both the district and circuit courts found that § 1752(a)(2) and § 5104(e)(2)(D) could be (and were, in Mr. Alford's case) violated by an individual's mere physical presence. Importantly, neither court took the step the government attempts now, to conclude that Mr. Alford would not prevail even under his textualist reading of the statutes. (*See* Resp. Br. at 12-14.) That makes this Court's consideration of Mr. Alford's case plainly legal in nature, not factual.

II. The government's response does not substantively explain why the lower courts' statutory interpretation should stand.

After being ordered by this Court to respond to Mr. Alford's petition, the government submitted a pleading that largely recounts the D.C. Circuit's holding in a conclusory manner, taking its analyses and conclusion as a given without meaningfully explaining why this Court should leave them undisturbed.

To the extent the government critiques the textualist interpretation favored by Mr. Alford, it summarily characterizes it as lacking "common sense" and faults Mr. Alford for offering "no workable rule for determining, without considering context, what types of conduct are inherently disorderly or disruptive." (Resp. Br. at 9.) The government, and the lower courts, may well believe that Congress should have, and perhaps intended, a context-based analysis that would allow virtually any conduct to qualify as "disorderly or disruptive," depending on its effect. But "Congress did not write the statute that way." *Corley v. United States*, 556 U.S. 303,

315 (2009), (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). *Compare Garner v. Louisiana*, 368 U.S. 157, 165 (1961) (emphasis added) (analyzing Louisiana statute that, as written, expressly criminalized *any* act would "unreasonably disturb or alarm the public"). And in any event, Mr. Alford has articulated a workable interpretative standard: that § 1752(a)(2) and § 5104(e)(2)(D) apply only to conduct that is inherently disorderly or disruptive. *See* Ptr. Br. at 6-11.

Beyond reiterating the D.C. Circuit's analysis, the government's response selectively comments on a few pieces of Mr. Alford's argument within its attempted repackaging of this matter as a sufficiency appeal. For example, the government does not address, in any substantive way, Mr. Alford's showing that the lower courts' statutory interpretation reads out the terms "disorderly or disruptive" entirely, or his related argument that the effects element in § 1752(a)(2) indicates a narrower interpretation of the conduct element. The government offers only an example of a scenario (crying out in pain for medical reasons during a congressional hearing) that it asserts would satisfy the effects element but not the conduct element. (Resp. Br. at 10.) That example does not address the intent element at all, of course—even inherently disruptive or disorderly conduct that actually disrupts a congressional hearing would not violate the statute if the person's act was an involuntary or otherwise unintentional reaction to intense pain. Regardless, this hypothetical does not address, much less rebut, Mr. Alford's statutory analysis that the inclusion of an effects element in § 1752(a)(2) indicates that the conduct element

reaches only inherently disruptive or disorderly acts. And this is the common thread among the government's analogies and hypotheticals with respect to both statutes: they make inapt comparisons (such as screaming at a football game)[1] that do not fully take into account the text as a whole, including other elements of the offenses.

Further, the government attempts to brush aside Mr. Alford's argument that the *noscitur a sociis* canon of statutory construction suggests that "disorderly or disruptive conduct" in § 5104(e)(2)(D) should be conduct of the same nature as the preceding language, which proscribes "loud, threatening or abusive language." (Resp. Br. at 10.) The government again takes Mr. Alford to task for his failure to suggest an "alternative reasonable interpretation of the phrase" that is "consistent with its plain language, is workable, or can be determined in isolation without regard to context." (Resp. Br. at 11.) Putting aside the fact that it is not Mr. Alford's responsibility to explain the statute in a way consistent with how the government perhaps wishes Congress had written it—as opposed to how Congress actually did write it—Mr. Alford has offered such an explanation. As noted in his Petition, the inclusion of *types* of language prohibited by the statute is most logically interpreted to mean that "disorderly or disruptive *conduct*" means conduct that is of a similar,

[1] In this analogy, the government apparently suggests that a football fan, by screaming, would be violating a hypothetical disorderly conduct law that applies to football games, paralleling the reach of the statutes here, which apply only to the Capitol or areas restricted due to a Secret Service protectee's presence. In this example, screaming is, in fact, inherently disorderly or disruptive, so the fan may very well violate that element of the statute. But, if the football statute parallels § 1752(a)(2), he or she has still not violated the effect element absent proof that the screaming had the effect of disrupting the game. If it parallels § 5104(e)(2)(D), the fan can still only be convicted upon proof of intent to impede, disrupt, or disturb the orderly conduct of the football game.

inherent character as "loud, threatening or abusive language." At a minimum, a person's mere physical presence would not qualify.[2]

Finally, the government, as did the D.C. Circuit, cites *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972), for the proposition that "a court must decide whether conduct" is disruptive "on an individualized basis, given the particular fact situation." (Resp. Br. at 9.) This citation is useful for this Court's analysis in that it elegantly demonstrates just how different § 1752(a)(2) and § 5104(e)(2)(D) are from the municipal ordinance it confronted in *Grayned*. That decision concerned a First Amendment challenge to a municipal antinoise ordinance—not a disorderly conduct statute—that was specific to public schools, and it was written more broadly than either § 1752(a)(2) and § 5104(e)(2)(D). The City of Rockford's ordinance proscribed "*any* noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof[.]" *Grayned*, 408 U.S. at 107-08 (emphasis added). Congress did not similarly write § 1752(a)(2) and § 5104(e)(2)(D) to criminalize *any* conduct that impedes or disrupts government or congressional business. But under the government's, and the lower courts', interpretation of those statutes, it may as well have.

[2] Of course, an individual's mere presence is well within the conduct prohibited by another provision of § 1752. *See* 18 U.S.C. § 1752(a)(1). It is also conduct prohibited by other subsections of § 5104(e)(2). *See* § 5104(e)(2)(A) (unlawfully entering or remaining on the House or Senate floor, the Rayburn Room, the Marble Room, and other enumerated areas of the Capitol); § 5104(e)(2)(B) (unlawfully entering or remaining in the House or Senate galleries).

III. The government's arguments against *certiorari* are unavailing.

Aside from its dogged attempt to repackage Mr. Alford's petition as a second-look sufficiency appeal, the government offers little to support its contention that his Petition is unsuitable for this Court's review. As noted, it attempts to argue that Mr. Alford would not prevail even under his textualist reading of the statutes, an analytical step that neither the district nor circuit court took.

The government additionally notes that the D.C. Circuit's decision "does not conflict with any decision of this Court or another court of appeals." (Resp. Br. at 6.) Of course, one of the two statutes, § 5104(e)(2)(D), is specific to the Capitol and its surroundings and could not possibly arise from another circuit. And although § 1752(a)(2) could potentially be charged outside the District of Columbia, it will most commonly occur there given the statute's definition of "restricted building or grounds." Regardless, placing determinative reliance on the lack of a circuit split ignores the reality that this question of statutory construction has the potential to impact hundreds of criminal cases in the lower courts, with potentially hundreds more still to come.[3]

CONCLUSION

There is every incentive for this Court to speak now on this important question of first impression. For the foregoing reasons, and those set forth in Mr.

[3] *See* U.S. DEP'T OF JUSTICE, News Release: "40 Months Since the Jan. 6 Attack on the Capitol" (May 6, 2024) (available at https://www.justice.gov/usao-dc/39-months-since-the-jan-6-attack-on-the-capitol) ("[T]he investigation and prosecution of those responsible for the [January 6, 2021] attack continues to move forward at an unprecedented speed and scale. The Department of Justice's resolve to hold accountable those who committed crimes on January 6, 2021, has not, and will not, wane.").

Alford's petition, he prays that this Honorable Court grant a writ of *certiorari* to the D.C. Circuit Court of Appeals.

Respectfully submitted this 8th day of July, 2024.

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