SUPPLEMENTAL ORAL ARGUMENT NOT YET SCHEDULED

SUPPLEMENTAL BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-3015

UNITED STATES OF AMERICA, Appellee,

v.

RODNEY CLASS, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Cr. No. 13-0253 (RWR)

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee hereby states as follows:

Parties and Amici

The parties to this appeal are appellant, Rodney Class, and appellee, the United States of America.

Rulings Under Review

Appellant appeals two rulings: (1) an April 16, 2014, Memorandum Opinion and Order in which the Honorable Gladys Kessler denied multiple motions by appellant to dismiss the indictment (see Joint Appendix ("JA") JA 70 - 100); and (2) an October 27, 2014, oral ruling by the Honorable Richard W. Roberts denying appellant's additional motions to dismiss the indictment on Second Amendment grounds (JA 142 -151).

Related Cases

Appellee is unaware of any pending related cases. This case was argued before the Court on May 5, 2016, and an unpublished judgment

affirming appellant's conviction was issued on July 5, 2016. The Supreme Court reversed on February 21, 2018. *Class v. United States*, ___ U.S. ___, 138 S.Ct. 798 (2018).

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), appellee states that all pertinent statutes and regulations other than those attached to appellee's initial brief, filed February 22, 2016, are contained in the Addendum to the initial opening brief of Amicus Curiae filed November 20, 2015.

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ISSUES PRESENTED

I. Whether appellant has shown that the Second Amendment immunizes him from prosecution for Possession of a Firearm on Capitol Grounds pursuant to 40 U.S.C. § 5104(e)(1), where: appellant left two fully loaded handguns, a fully loaded rifle, and numerous rounds of ammunition concealed in his vehicle that was unlawfully parked in a permit-only lot reserved for employees of the U.S. House of Representatives, within the boundaries of the Capitol Grounds and around the corner from the Rayburn House Office Building; restrictions on firearms possession in such sensitive areas do not implicate core Second Amendment concerns; the restrictions affected appellant's ability to possess firearms only in a limited geographical area where he had no right to be; the firearms restriction furthers the important safety interests of lawmakers, employees, and visitors to the Capitol Grounds; and appellant could have enjoyed an undiminished right to possess a firearm by avoiding the Capitol Grounds.

II. Whether appellant has established that 40 U.S.C. § 5104(e) gives constitutionally insufficient notice of its boundaries, where the boundaries are defined by reference to the marked streets of the District

of Columbia, and where the parking lot at issue is within the street boundaries expressly set forth at 40 U.S.C. § 5102(c)(1)(C).

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COUNTERSTATEMENT OF THE CASE[1]

This appeal follows appellant's unconditional guilty plea to Unlawful Possession of a Firearm on Capitol Grounds under 40 U.S.C. § 5104(e)(1).

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[1] Appellee adopts and incorporates by reference its initial brief (hereafter cited as "USBrf") and supplemental appendix (hereafter cited as "SA"), both of which were filed February 22, 2016. Appellee summarizes some of the background information set forth in its initial brief to provide context to the arguments in this supplemental brief.

Background of the Offense

According to the government's uncontested proffers in pretrial pleadings: On May 30, 2013, at approximately 11:30 a.m., appellant parked his Jeep Rubicon in a permit-only parking lot on the southwest side of the Capitol near the U.S. Botanic Garden (JA 101, 124, 162).[2] The parking lot, located on Maryland Avenue, S.W., between First and Third Streets, was reserved for use by employees of the House of Representatives (JA 125 n.1). Signs warned that parking was for permit-holders only and there were other visible indicators of restricted access, including a guard station and street barriers (*id.*). The Capitol was within eyesight (*id.*).

Appellant chose that parking area because it gave him ready access to House and Senate office buildings (JA 129) ("It was an easy walk through."). After parking there, he walked to the Capitol and House and

[2] Citations to "JA." are to the joint appendix previously filed by *Amicus* on November 20, 2014. Appellant's November 4, 2015, opening brief and *Amicus's* opening brief, filed November 20, 2015, will be cited as "AppOpenBrf" and "AmOpenBrf," respectively. Appellant's Rebuttal, filed February 29, 2016, and Amicus's Reply brief, filed March 17, 2016, will be cited as "App.Rebut" and "AmReply," respectively. Appellant's Supplemental Opening Brief will be cited as "AppSuppBrf."

Senate office buildings where he had paperwork purporting to appoint him a "Private Attorney General" stamped at the offices of various committees and Members of Congress (*id.* at 125).

While appellant was in the Capitol and congressional office buildings, a United States Capitol Police Special Agent noticed appellant's Jeep, which did not have a parking permit, parked in the permit-only parking area (JA 125, 162). Through the windows of the Jeep, the agent saw a machete strapped to the roll bar and what appeared to be a holster in the map pocket of the driver's-side door (*id.*). A records search for the registered owner of the Jeep uncovered appellant's name and photograph (*id.*).

At approximately 1:30 p.m., appellant left the Capitol building and walked back to the parking lot (JA 125). As he approached the Jeep, Capitol Police officers asked him if his name was Rodney Class and whether the Jeep belonged to him (*id.*). Appellant confirmed his name and his ownership of the Jeep (*id.*). A consensual frisk revealed that appellant did not have any weapons on his person; he told the officers that there were weapons in the Jeep (*id.* at 102).

Shortly thereafter, the officers arrested appellant on a charge of carrying a dangerous weapon (JA 103). A warrant-based search of the Jeep uncovered two loaded pistols, a loaded rifle, over 200 rounds of ammunition, 15 knives, and three axes (*id.*). In his plea proffer, appellant admitted that at least one of the loaded pistols was in a bag in the passenger area (JA 162-63).[3]

In a subsequent interview, appellant told FBI agents that he went to the Capitol and the congressional office buildings to have a "Commission by Declaration" signed; he was a "Constitutional Bounty Hunter" and a "Private Attorney General"; and he traveled around the country with his guns and other weapons to enforce the federal criminal code against judges who, in his opinion, had broken the law (JA 126). Appellant also said that he planned to take his weapons with him to bring

[3] During the May 5, 2016, oral argument, undersigned counsel stated that appellant pled guilty to "carrying" the pistol into the Maryland Avenue parking lot. See Oral Argument Record of May 5, 2016 ("Oral Arg. Rec.") at 31:20 to 31:40. That was incorrect. Appellant may have admitted facts from which it could be inferred that he carried the pistol in the legal sense, i.e., by having the pistol readily available, but he did not admit to carrying it on his person when he was in the lot. *See Brown v. United States*, 30 F.2d 474, 475 (D.C. Cir. 1929) (collecting cases interpreting carrying on or about the person as meaning on the person or within ready accessibility).

charges against a federal judge in Pennsylvania, but he did not intend to use the weapons against the judge (*id.*).

The Motions Proceedings

Judge Kessler's April 2016 Order

On April 7, 2014, the Honorable Gladys Kessler held a hearing to address 36 pre-trial motions filed by appellant, pro se (JA 52-69). Following that hearing, the court issued a 31-page order disposing of all but four of those motions (JA 70-100). The court deferred a decision on some of the issues because the government had not filed a full response (JA 99-100). The court directed the government to file additional "substantive responses" to four of appellant's motions, "insofar as they challenge the sufficiency of the grand jury indictment and the legality of [appellant's] prosecution under the Second, Fourth, Fifth and Fourteen[th] Amendments and Article IV of the United States Constitution" (JA 99-100; see also JA 83, 85, 92, 95). On May 1, 2014, the government filed an omnibus response to the issues identified in the April 16 order (JA 101-121). On May 23, 2014, before the deferred issues were decided, the case was reassigned to then-Chief Judge Richard W. Roberts (JA 12, Entry 94).

Chief Judge Roberts's October 2014 Oral Ruling

Chief Judge Roberts intended to conduct a hearing on all outstanding motions on October 27, 2014, the first trial date (SA 60; JA 18, Entry 139).[4] The hearing could not proceed, however, because appellant deliberately failed to appear (SA 59-60). Appellant had sent a letter to the court stating, among other reasons, that he "will no longer be appearing in a public court due to a lack [of] civilian due process and thus personal jurisdiction" (SA 68).

Given appellant's absence, the district court addressed only those pending motions and claims that did not appear to require an evidentiary hearing or argument (SA 69-70). In particular, the court addressed appellant's Second Amendment claims on the existing record, and denied them because the Capitol Grounds were a sensitive place; firearms restrictions in such places were presumptively lawful; and appellant had

[4] In addition to the issues deferred by Judge Kessler in the April 16, 2014, order, which included appellant's Second Amendment claims, Chief Judge Roberts had before him the government's October 8, 2014, Motion for Jury Instruction on Intent (JA 124-135; see JA 18, Entry 146) and October 21, 2014, Motion for Jury Instruction on Capitol Grounds (JA 136-140; see JA 20, Entry 156)). Appellant had not responded in writing to either of those motions by the time of the October 27, 2014, motions hearing.

not proffered or presented any evidence to overcome that presumption (SA 74). Although the government was prepared to present evidence, the court did not feel comfortable hearing witnesses in appellant's absence; ultimately, appellant's stand-by counsel, the prosecutor, and the court agreed that an evidentiary hearing should not take place without appellant (SA 62-63, 76-78). The court issued a bench warrant and suspended all further proceedings until appellant was returned to court (SA 80).

Appellant was arrested on the bench warrant in North Carolina, where he resided, on October 29, 2014, and returned to the district court on November 4, 2014 (JA 21). Plea discussions began almost immediately, and no further hearings on appellant's motions took place. On November 21, 2014, appellant pleaded guilty Unlawful Possession of a Firearm on Capitol Grounds, in violation of 40 U.S.C. § 5104, pursuant to an agreement with the government (JA 22-23, Entries for 11/06/2014, 11/10/2014, & 11/21/2014; SA 87-133; see also USBrf 12-15).

SUMMARY OF ARGUMENT

Appellant acknowledges that the Second Amendment does not bar Congress from prohibiting firearms in the Capitol building and

congressional office buildings. His as-applied claim turns on whether the Second Amendment gives him the right to possess firearms in a restricted parking lot reserved for congressional employees on the Capitol Grounds in close proximity to the Capitol and the Rayburn House Office Building.

Appellant has not established that the firearms provision of the Capitol Grounds security statute, as applied to him, violates the Second Amendment. Although this Court has recently held that the Second Amendment protects the right to bear arms outside the home, the Maryland Avenue parking lot at issue here remains a "sensitive place" in which firearms restrictions are presumptively lawful. Appellant has not rebutted that presumption. Moreover, any infringement on his right to bear arms is de minimis because the firearms restriction applies only in a limited area, appellant was not entitled to park in that area under any circumstance, and appellant could protect an undiminished right of self-defense by not entering that area. Furthermore, the firearms restriction survives scrutiny given Congress's significant proprietary interest in protecting the safety of the lawmakers, staff, and members of the public on the Capitol Grounds, and given the minimal effect of the firearms restriction on appellant's right to bear arms in lawful self-defense.

Appellant's due process vagueness challenge fails because the statute defining the scope of the Capitol Grounds gives him fair notice that the Maryland Avenue parking lot is part of the Capitol Grounds and thus subject to the Capitol Grounds security statute's restrictions on firearms. Because the statute is not vague as applied to appellant, he cannot claim that it may be vague as to others in other circumstances. In any event, the Court should reject appellant's cursory arguments that the statute defining the scope of the Capitol Grounds is vague in all its applications.

ARGUMENT

I. As Applied to Appellant, the Capitol Grounds Security Statute Does Not Violate the Second Amendment.

A. Standard of Review and Legal Principles

Statutes are presumed to be constitutional. *INS v. Chadha*, 462 U.S. 919, 944 (1983). The party challenging the statute "bears the burden of demonstrating its unconstitutionality." *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 198 (2001) (citation omitted); *accord United States v. Stevens*, 559 U.S. 460, 473 (2010) (facial challenge); *Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014) (as-applied and facial

challenges). In reviewing a constitutional challenge to a statute, this Court "must consider all legal issues de novo." *Wrenn v. District of Columbia*, 864 F.3d 650, 656 (D.C. Cir. 2017).

When a regulation is challenged under the Second Amendment, this Court first determines "whether a particular provision impinges upon a right protected by the . . . Amendment." *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*"). Although the extent to which the Second Amendment protects the right to carry a firearm in public was an open question at the time of the initial briefing in this case (USBrf 35-36), this Court subsequently held that "the individual right [of law-abiding persons] to carry common firearms beyond the home for self-defense . . . falls within the core of the Second Amendment's protections." *Wrenn*, 864 F.3d at 661. However, that "general[ ]" right is subject to limits such as those identified by the Supreme Court as "'longstanding' – including bans on possession [of firearms] by felons or bans on carrying near sensitive sites." *Id.* at 659 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626, 635 (2008) ("*Heller I*")). If the conduct in question falls outside the scope of the

Second Amendment's protections, then that should "end the matter." *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013).

If the challenged law does implicate the interests protected by the Second Amendment, the Court proceeds to determine whether the provision "passes muster under the appropriate level of constitutional scrutiny." *Heller II*, 670 F.3d at 1252. The appropriate level of scrutiny "'depends on the nature of the conduct being regulated and the degree to which the challenged law burdens [the asserted] right.'" *Id.* at 1257 (internal citation omitted). "[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify." *Id.*

B. The Capitol Grounds Security Statute Is Presumptively Lawful as Applied to Appellant.

The Supreme Court held in *Heller I*, that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U.S. at 626. Such "regulatory measures" are "presumptively lawful."

Id. at 627 n.26. At the May 5, 2016, oral argument, Amicus, whose arguments appellant had adopted, confirmed that appellant was not challenging the presumptive lawfulness of firearms restrictions inside buildings, presumably including inside the Capitol building and inside the surrounding House and Senate office buildings. See generally Oral Argument Record of May 5, 2016 ("Oral Arg. Rec.") at 17:20 to 18:05. Amicus also agreed that the firearms provision could constitutionally apply to a "curtilage," "a reasonable amount of distance away from those buildings." *Id.* See also AmOpenBrf 45 n.12 (White House lawn properly treated as sensitive place). Amicus acknowledged that the government's interest in banning firearms in those locations would be greater, and the individuals' interest in defending themselves would be less. Oral Arg. Rec. at 17:23 to 18:05.

Appellant does not challenge the firearms restriction insofar as it barred him from carrying his weapons into the Capitol and the congressional office buildings that he visited. Rather, for purposes of this appeal, appellant complains only of the restriction on leaving those weapons in the parking lot while he visited congressional offices. Appellant had no right to be in the restricted parking lot at all, however.

Like any member of the public, he was not authorized to park there under any circumstance.[5] That should end the Court's inquiry because, as Amicus conceded previously, "[t]here is no Second Amendment right to carry a weapon in a location where you are not allowed to be in the first place" (AmOpenBrf 45 n.12).

As appellant notes (AppSuppBrf 22), government buildings qualify as sensitive places because of who works there and what is done there. Senators, Representatives, and their staff members have been targeted because of their work as lawmakers.[6] Indeed, this Court observed almost 50 years ago that the Capitol Grounds security statute was "enacted to protect the national legislature at the very seat of its operations."

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[5] Being unable to park and leave his weapons in that lot would not have interfered with appellant's ability to go to the Capitol or congressional offices. He acknowledges that he could have parked a block away, off the Capitol Grounds, which would have allowed him to avoid the firearms provision's restrictions.

[6] The 2011 assault on former Congresswoman Gabrielle Giffords, which gravely injured her, killed a staff member, and killed or injured several other people was committed by an obsessed constituent. See https://www.nytimes.com/2011/01/09/us/politics/09giffords.html (accessed 07/10/18). The more recent 2017 assault on Republican congressmen and congressional staff at an Alexandria, Virginia, baseball field was reportedly motivated by extreme animosity toward their political party. See https://www.nytimes.com/2017/06/14/us/steve-scalise-congress-shot-alexandria-virginia.html (accessed 07/10/18).

Jeanette Rankin Brigade v. Chief of the Capitol Police, 421 F.2d 1090, 1093 n.3 (D.C. Cir. 1969); *see also id.* at 1094. At the same time, Congress had an obligation to allow public access to its workplace because of the public's First Amendment right to assemble and petition government leaders "for redress of grievances." *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 585 (D.D.C.), *aff'd* 409 U.S. 972 (1972); *see also id.* at 584 (the "fundamental function of a legislature in a democratic society assumes accessibility to [popular] opinion"). The firearms provision thus serves to protect lawmakers in their workplace and the public, especially those who gather to exercise their First Amendment rights.

Government-owned parking areas that exclusively serve those government workplaces should be treated the same as the government workplaces for Second Amendment purposes. Congress, acting as a proprietor and employer managing its own business, has a heightened interest in maintaining safety and security on the premises, just like private property owners or businesses, many of which restrict or prohibit firearms possession. *Cf. Adderly v. Florida*, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the

property under its control for the use to which it is lawfully dedicated."). As applied to appellant,[7] the firearms provision of the Capitol Grounds security statute is presumptively lawful because the Maryland Avenue lot in which appellant possessed his loaded and unsecured firearms is effectively adjacent to the Rayburn House Office Building and the Capitol and serves those buildings by providing parking exclusively for congressional staff (JA 125 n.1).[8] Because the Maryland Avenue lot is close enough to the Capitol and buildings in which Congress and its staff work, e.g., the Rayburn House Office Building, individuals armed with firearms at that location pose a potential threat.[9] Those House employees

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[7]As the initial opening brief by Amicus makes clear, appellant challenges the firearms provision of the Capitol Grounds security statute only as applied to him. AmOpenBrf 16, 30, 32. Amicus reaffirmed that limit on appellant's claim at the May 5, 2017, oral argument. See Oral Argument Record of May 5, 2017 ("Oral Arg. Rec.") at 14:35 to 14:40.

[8] Tour buses also may be observed loading and unloading passengers in that lot. Using the lot for this purpose also serves important government interests by facilitating orderly and safe public access to the Capitol and other sensitive buildings.

[9] It is unnecessary to determine how far a safety perimeter, or curtilage, around the Capitol and congressional office buildings could reasonably extend because the Maryland Avenue lot is essentially across Independence Avenue from the Rayburn House Office Building (see SA 136), and any firearm carried onto the lot could pose a risk to the congressional employees who are allowed to park there. It also makes no

who are authorized to park in that lot are particularly vulnerable. In the district court, appellant admitted that he parked in that lot because it was close to congressional office buildings (JA 129).

The district court correctly held that appellant had not overcome the presumption that the Capitol Grounds – at least that part at issue here – qualified as a sensitive place for Second Amendment purposes (SA 74).[10] Appellant nonetheless asserts (at 8, 17, 23) that the Maryland

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difference that a shot fired from one of appellant's handguns or his rifle might not have had the range to harm someone at the Rayburn Building or the Capitol. "'[T]he validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case.'" *Hodge v. Talkin*, 799 F.3d. 1145, 1166 (D.C. Cir. 2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989)).

[10] Appellant asserts that the district court erred because it concluded that the "entirety of the Capitol Grounds is a sensitive place" (AppSuppBrf at 3). In context, the district court's decision is fairly understood to hold that the firearms provision was constitutionally applied to appellant's conduct in the Maryland Avenue lot. Appellant never complained that the federal statute affected him at any place or time other than the Maryland Avenue parking lot on May 30, 2013. In its response to appellant's Second Amendment claims, the government argued that the district court "need not – and should not – decide any broad constitutional claims" because "[t]he prospect of other, potentially invalid applications of these firearms provisions does not assist [appellant]" (JA 111). See also USBrf 37 n.20 (constitutional overbreadth doctrine does not apply outside First Amendment claims).

Avenue lot cannot be considered a sensitive place because it is publicly accessible, there are no barriers or signs prohibiting firearms, and no government business is conducted in the lot itself.[11] Those arguments are not persuasive.

The presumptive exclusion of "sensitive places" from Second Amendment protection in *Heller I*, 554 US at 626, does not turn on the presence of armed guards, security measures, or restricted public access. To the contrary, *Heller I* included "schools and government buildings" among the non-exhaustive examples of places subject to "presumptively lawful" firearms restrictions. Traditionally, schools have not been secured by metal detectors or armed guards, or totally inaccessible to parents, volunteers, or other members of the public attending school events such as football games. Although the U.S. Capitol and

[11] Appellant contends that the government cannot justify prohibiting firearms on the Maryland Avenue lot because 16 states permit non-law-enforcement officers to carry firearms in their state capitol buildings (AppSuppBrf 16-17). However, the state survey on which appellant relies undercuts his point. Of the 44 states that replied to the survey, 28 apparently restrict the carrying of firearms in their capitol buildings to law-enforcement personnel. See Vt. Legislature, Advisory Cmte. on Capitol Security, Allowance of Handguns Within U.S. State Capitol Buildings (Oct. 15, 2013), available at http://tinyurl.com/odpqgej.

congressional office buildings have security guards and metal detectors, the absence of such measures in other government buildings does not make those sites less sensitive. Given that many government sites provide direct services to the public (e.g., post offices, Social Security offices, motor vehicle departments, city registrars' offices), public access is the norm, and the balance of security measures and public access will vary.

Cases that have upheld the prohibition on firearms in government parking lots have not done so because of the presence of special security measures or restricted public access. In *Bonidy v. United States Postal Service*, 790 F.3d 1121 (10th Cir. 2015), the unsecured post-office parking lot was deemed a "sensitive place," even though the lot was publicly accessible and intended to be used by the public. *Id.* at 1125. Nor has the conduct of business in the lot been essential. To be sure, in *United States v. Dorosan,* 350 F. App'x 874 (5th Cir. 2009), the Fifth Circuit held that the parking lot was a sensitive place because post office business was conducted there, i.e., mail trucks were sometimes loaded and unloaded in the lot. *Id.* ** 1. While a finding that government work is actually conducted at a particular site strengthens the rationale for treating it as

a sensitive place, nothing in *Dorosan* suggests that such a finding is required.[12] Presumably, the loading and unloading of mail made the lot sensitive because of the need to protect the post office employees who were handling the mail. There is a similar need to protect the safety of congressional employees who park in the restricted Maryland Avenue lot.[13]

The primary reason that the Capitol Grounds security statute does not violate the Second Amendment is that appellant has not shown that its firearms provision has more than a de minimis effect on the right to

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[12] That was not the only rationale for upholding the conviction in *Dorosan*. *See* 350 Fed.Appx. at ** 1 (government was not exercising police power but acting in its role as a proprietor/employer, and the burden on Second Amendment rights was de minimis because Dorosan, a postal employee, was not required to park in the lot in question and could have parked elsewhere).

[13] Appellant asserts, without record foundation, that "tourists frequently park [in the Maryland Avenue lot] by mistake" or "accidentally" (AppSuppBrf 25, 19), and suggests that the public was allowed to park in the lot in the evenings and on weekends (*id.* at 5). There no record evidence to support those assertions, Had appellant not prevented development of the record at the October 27, 2014, evidentiary hearing by deliberately failing to appear, this evidence would have been developed. In any event, the assertions are irrelevant to this case. Appellant did not park there by mistake; he chose that lot because it was close to congressional office buildings and he had parked there before (JA 129). He also parked there in the middle of the day on a weekday (SA 162).

carry a firearm, particularly as applied to him. *See Heller II*, 670 F.3d at 1255 & n. **. As this Court noted in *Wrenn*, "bans on carrying only in small pockets of the outside world (e.g., near 'sensitive' sites, *Heller I*, 554 U.S. at 626-27 . . .) impose only lightly on most people's right to 'bear arms' in public." 864 F.3d at 662. "'[W]hen a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places . . . .'" *Id.* (quoting *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012)); see USBrf. 51. Because the burden of the firearm provision on appellant is similarly de minimis, "it does not implicate [his] [S]econd [A]mendment right," and "is therefore constitutional." *Heller v. District of Columbia*, 801 F.3d 264, 274 (D.C. Cir. 2015) ("*Heller III*") (finding that, although regulation requiring long guns to be registered is not longstanding, and therefore not presumptively lawful, it is nonetheless constitutional because it has only a de minimis effect on Second Amendment rights).

C. Even If the Firearms Provision Impinged on Second Amendment Rights, It Passes Constitutional Scrutiny.

Even if this Court were to assume that the firearms provision impinged on Second Amendment rights, it would still be constitutional under the appropriate level of scrutiny.

The level of scrutiny applied to a law that allegedly violates the Second Amendment "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens that right." *Heller II*, 670 F.3d at 1257 (internal quotation marks and citation omitted). A law "that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification," perhaps equivalent to the standard of strict scrutiny applied in the First Amendment context. *See id.* But, as this Court has observed, courts do not apply strict scrutiny, even when "fundamental, preferred rights" are involved, when the burden on the right is "only incidental." *Id.* (quoting Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 698, 700 (2007)).

1. At Most, Intermediate Scrutiny Applies.

As shown supra at 19-20, any burden on Second Amendment rights imposed by the firearms provision would be incidental, especially as it affected appellant. While on the Grounds, the need to carry a firearm in self-defense would be minimized because appellant would be less likely to encounter other people with weapons and the Grounds are closely monitored by the Capitol Police (as the facts of this case demonstrate). Indeed, appellant's own actions belie the suggestion that he believed that he needed to carry firearms to defend himself on the Capitol Grounds. By leaving his firearms in the Jeep and walking through the Grounds unarmed, he showed no fear of harm in that area. Moreover, he could have enjoyed an undiminished right to carry arms in self-defense by avoiding the Capitol Grounds. *See Moore*, 702 F.3d at 940. Because the firearms provision does not substantially burden appellant's Second Amendment rights, the Court should employ at most intermediate scrutiny.

Appellant contends nonetheless that the Court should apply strict scrutiny to the firearms provision because it allegedly makes it "virtually impossible for [him] to travel anywhere near the Capitol with a firearm

for self-defense" (AppSuppBrf 10). Appellant was not prosecuted for carrying firearms while traveling near the Capitol; he was prosecuted for carrying and storing firearms in the two-block portion of Maryland Avenue, S.W., that is a part of the Capitol Grounds reserved for parking by congressional employees.

To the extent that appellant now argues that the firearms restriction impinges on his "right to travel," travel near the Capitol is already restricted for reasons that have nothing to do with the firearms provision. Exercising its proprietary interest, Congress has limited "[p]ublic travel in, and occupancy of, the United States Capitol Grounds . . . to the roads, walks, and places prepared for that purpose."[14] 40 U.S.C. § 5103. Other provisions reduce public travel in the area. For example, although there may be other parking lots within the Capitol Grounds (see AppSuppBrf 21), the public may not park in those lots, just as they were

[14] Congress's proprietary interest explains what transformed the Maryland Avenue lot into a sensitive place in 1980 (see AppSuppBrf 25).That was the year that that portion of Maryland Avenue became part of the Capitol Grounds and subject to Congress's proprietary interest, use, and control. By incorporation into the Capitol Grounds, the lot automatically became the responsibility of the United States Capitol Police and subject to the Capitol Grounds security statute.

not permitted to park in the Maryland Avenue lot. See https://www.visitthecapitol.gov/plan-visit/getting-capitol (advising that the nearest public parking facility is at Union Station and there are a few metered parking spots along the Mall). Practically speaking, most of the streets and sidewalks within the Capitol Grounds cannot be used for general travel, not because of congressional action, but because they dead end at the Capitol or the lawns at the east and west ends of the Capitol (see SA 136). In particular, the two-block segment of Maryland Avenue, S.W., that forms the lot at issue in this case does not lead anywhere.[15] For the most part, there are no nearby residences, restaurants, stores, or other businesses, which reduces the need for the general public to travel on or near the Grounds on a regular basis (see SA 136). This is especially true about the location of the Maryland Avenue lot.

[15] A driver entering the Maryland Avenue lot from Third Street, S.W., can go no farther than the bottom of the hill on the west side of the Capitol before either turning around and leaving by Third Street, or turning left from Maryland Avenue and proceeding to Constitution Avenue to the north. See SA 136.

2. The Firearms Provision Survives Constitutional Scrutiny.

Appellant does not dispute that Congress has a significant interest in protecting the safety of the elected representatives and staff who must work on the Capitol Grounds and the members of the public who may visit there, either as vacationers, protestors, or petitioners. See USBrf 52-54. *See also United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing that a "general interest in preventing crime is compelling"). He focuses instead on whether there is a "substantial relationship" or "reasonable fit," *Heller II*, 670 F.3d at 1262, between those significant interests and the firearms restrictions imposed by the Capitol Grounds security statute. AppSuppBrf 15.

Where intermediate scrutiny applies, the government must show a "tight 'fit' between the [regulation] and an important or substantial governmental interest, a fit 'that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Heller II*, 670 F.3d at 1258 (quoting *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989)). "The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved

less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest." *Ward*, 491 U.S. at 782-83. Congress should have additional flexibility when operating as the proprietor of a government "business," rather than "regulating private activity." *Bonidy*, 790 F.3d at 1127.

The firearms provision, like the postal regulation at issue in *Bonidy*, is sufficiently narrowly tailored, particularly as applied to the Maryland Avenue lot, because it "applies only to [a] discrete parcel[ ] of land owned by [the Congress], and affects private citizens only insofar as they are doing business with [Congress] on [congressional] property." *See Bonidy*, 790 F.3d at 1127; *accord GeorgiaCarry.Org, Inc., v. U.S. Army Corps of Engineers*, 38 F. Supp. 3d 1365, 1377 (N.D. Ga. 2014), *aff'd* 788 F.3d 1318 (11th Cir. 2015).

Appellant contends (at 18) that the government's interest in making the Maryland Avenue parking lot safe is not as substantial as its interest regarding other parts of the Capitol Grounds and, therefore, the firearm provision should be more narrowly tailored. We have shown supra, at 13-19, why the interest is the same. Moreover, appellant fails to afford adequate deference to the legislature's policy choices. "'In the

context of firearm regulation, the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks.'" *Schrader,* 704 F.3d at 990 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (further internal quotation marks and citation omitted)); *see also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994). In any case, appellant's alternative legislative proposals do not establish the invalidity of the firearms provision enacted by Congress.

Appellant's proposal (at 18) to prohibit only the actual discharge of a gun on Capitol Grounds would not further Congress's interest in preventing the physical or psychological injury that a weapon could cause. *See United States v. Mahin*, 668 F.3d 119, 127 (4th Cir. 2012) (Second Amendment does not preclude governments from enacting "preventative measures"). Although punishing the discharge of a weapon may have a certain deterrent effect, it would not address the dangers posed by the mere presence of firearms in the vicinity of a political forum, workplace, and tourist destination.

Appellant also proposes (at 18) to bar firearms only in the Capitol and congressional office buildings, and the areas between those buildings, including parking lots, that are not "publicly accessible." That proposal would be virtually impossible to implement and still accomplish the objective of keeping firearms away from the places where Congress works. Like the Maryland Avenue lot, many of the non-public parking areas line streets on the Capitol Grounds. They could not be secured against public access without restricting all pedestrian and vehicular traffic in those areas. The same is true of the "areas" – i.e., the sidewalks and streets, including Independence and Constitution Avenues -- between congressional office buildings and the Capitol traversed by congressional staff and elected officials.

Appellant does not explain how the United States Capitol Police could implement his proposal (at 18) to bar only the possession of firearms by people who intended to cause harm. How would United States Capitol Police officers determine in advance whether someone carrying a gun intended to harm any of the people under their protection or intended only to use it, if needed, in self-defense?

Similarly unworkable is appellant's proposal (at 18) to allow weapons to be carried by people who already have gun permits or to issue special permits for carrying on the Capitol Grounds. This regulatory regime would divert Capitol Police resources away from protecting Congress and the public to administering a permit-vetting or permit-issuance system. The cost of administering such a system for the hundreds of thousands of people who may visit the Capitol Grounds for a few hours and never return would outweigh any possible benefit, and would not achieve the government's security goals as effectively as a total prohibition on carrying firearms during those brief visits. *See also Bonidy*, 790 F.3d at 1127 ("Consistent with the Supremacy Clause, the USPS and other federal agencies need not stop every customer at the government's property lines to inquire whether each has a valid, active firearms license under state or local law.")

Finally, as noted in our initial brief, the proposal (at 19) to prohibit firearms only during certain events or when Congress is in session is unrealistic and unnecessary. See USBrf 54-55. This proposal also fails to acknowledge the safety needs of congressional staff who actually use the

Maryland Avenue lot and do not stop working in their Washington offices when Congress is in recess.

Appellant's Second Amendment challenge thus fails.

II. The Statute Defining the Capitol Grounds Is Not Void for Vagueness.

Appellant has not rebutted the government's showing that the statute defining the Capitol Grounds gives fair notice that the Maryland Avenue parking lot is part of the Capitol Grounds and thus subject to its firearms restrictions.

A. Standard of Review and Legal Principles.

The Due Process Clause bars enforcement of a criminal statute on vagueness grounds only if the statute "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Hodge*, 799 F.3d at 1171 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008) (evaluating for vagueness a criminal statute that implicated First Amendment expressive conduct)). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has

been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306.

"'The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants.'" *United States v. Bronstein*, 849 F.3d 1101, 1106 (D.C. Cir. 2017) (quoting *Bouie v. Columbia*, 378 U.S. 347, 355 n.5 (1964)).

Whether the language of a statute gives fair notice is a legal question subject to de novo review. *Bronstein*, 849 F.3d at 1106.

B. The Statute Gives Fair Notice That Firearms Are Prohibited In the Parking Lot Where Appellant Carried and Left His Guns.

Although appellant at times suggests that the statute defining the Capitol Grounds is facially void for vagueness (see, e.g., AppSuppBrf 4, 33), his primary claim is that it does not clearly include the Maryland Avenue parking lot in the definition of Capitol Grounds, and thereby failed to warn him that carrying firearms in that lot is a crime under 40 U.S.C. § 5104. See AppSuppBrf 37 ("The very premise of [appellant's]

argument is that the law is vague as applied to *his* conduct.")(emphasis in original). He has not met his burden of showing that the law is unconstitutionally vague as applied to him. *See Edwards,* 755 F.3d at 1001.

In our initial response, we showed that the statute gives sufficient notice in two ways, one generally and one specifically with respect to the Maryland Avenue lot. The Capitol Grounds generally can be defined by first referring to a 1946 map recorded at a specific location in the Office of the Surveyor of the District of Columbia, and then by determining whether the area indicated in that map has been supplemented by subsequent laws. 18 U.S.C. § 5102(a).[16] Although the 200 block of Maryland Avenue, S.W., where the lot is located, was not part of the

[16] To support his argument that 40 U.S.C. § 5102(a) does not provide sufficient notice, appellant cites out of context the government's pre-trial motion that addressed whether the judge or the jury should decide whether the 200 block of Maryland Avenue was within the Capitol Grounds (AppSuppBrf 33-34). The purpose of that motion was to demonstrate to the district court that the definition of the Capitol Grounds was a question of law for the court to determine, not a question of fact to submit to the jury. The step-by-step analysis of the statutes that added the Maryland Avenue lot to the Capitol Grounds was intended to explain the legal history of the adoption of that parcel, not to suggest that all those steps were necessary for an ordinary citizen to understand what the Capitol Grounds encompassed.

Capitol Grounds in 1946, it was included among a number of parcels of land that were added by statute to the Capitol Grounds in 1980. See JA 137 (citing Public Law 96-432). That statute specifically referred to the inclusion of "(5) that portion of Maryland Avenue Southwest from the west curb of First Street Southwest to the east curb of Third Street, Southwest" (JA 137).

Although determining the current boundaries of the Capitol Grounds solely by reference to 40 U.S. § 5102(a) may require extra steps and examination of sources outside of the statute, that alone does not make the statute unconstitutionally vague. *See, e.g., Klein v. San Diego Cty.*, 463 F.3d 1029, 1039 (9th Cir. 2006) (statute prohibiting picketing within 300 feet of dwelling not unconstitutionally vague because would-be picketers could obtain tax assessment maps to estimate distance to dwellings).[17] *See also Johnson v. United States*, ___ U.S. ___, 135 S. Ct.

[17] *Doe v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015), cited by appellant (at 34), is not to the contrary. In that case, registered sex offenders were prohibited from coming within 1,000 feet of certain school-owned real properties, but there was no reliable way to identify those properties or to determine where their property lines were. *Id.* at 684. The district court invalidated the challenged regulation after finding, in part, that it would be unacceptably "difficult . . . to parse through school-owned real

2551, 2561 (2015) ("'[T]he law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'") (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

Moreover, other provisions of § 5102 make specific reference to the inclusion within the Capitol Grounds of the 200 block of Maryland Avenue, S.W. A few years after the block containing the Maryland Avenue lot was incorporated into the Capitol Grounds by Public Law 96-432, the National Garden of the U.S. Botanic Garden and surrounding grounds were also expressly incorporated in the Capitol Grounds. The inclusion of the Botanic Gardens was codified in § 5102(c)(1)(C), which defines the "surrounding grounds" as:

> (C) *all grounds bounded by the curblines of* First Street, Southwest on the east; Washington Avenue, Southwest to its intersection with Independence Avenue, and Independence Avenue from such intersection to its intersection with Third Street, Southwest on the south; Third Street, Southwest on the west; and *Maryland Avenue, Southwest on the north*.

40 U.S.C. § 5102(c)(1)(C).

Appellant contends that this language does not include the Maryland Avenue lot because it says that the incorporated grounds

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property" to determine which properties were used for purposes that would trigger the requirement that the registered offender stay away. *Id*.

"extend from the U.S. Botanic Garden only to Maryland Avenue's northern "*curbline*[ ]" (AppSuppBrf 38) (emphasis in original). We agree that the statute incorporates within the Capitol Grounds that area between the Botanic Gardens on the south and the "northern curbline" of Maryland Avenue; we disagree that this reasonable construction excludes Maryland Avenue itself from the area expressly included in the Capitol Grounds. As the various maps provided by the parties show, the relevant portion of Maryland Avenue, S.W., runs on a diagonal from Third Street, S.W., on the west, to First Street, S.W., on the east; the Avenue's southern curbline abuts the U.S. Botanical Garden, and its northern curbline abuts Union Square (see SA 136; AppSuppBrf Addendum "SA 9"). Therefore, when § 5102(c)(1)(C) refers to an area that extends from the Botanic Garden to the northern curbline of Maryland Avenue, it necessarily is referring to Maryland Avenue itself. That is where appellant parked.

Section 5102(c)(1)(C) thus gave constitutionally fair notice that the Maryland Avenue lot is part of the Capitol Grounds and therefore subject to the firearms restrictions contained in the Capitol Grounds security statute. "The Constitution is most demanding of a criminal statute that

limits First Amendment rights; yet even there it requires only a reasonable specificity to provide fair notice, and not that a person contemplating a course of behavior know with certainty whether his or her act will be found to violate the proscription." *DiCola v. Food & Drug Admin.*, 77 F.3d 504, 508-09 (D.C. Cir. 1996) (internal citation and quotation marks omitted); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972) (concluding that the term "adjacent" in a criminal ordinance set "a sufficiently fixed place" in which certain actions were prohibited); *Cox v. Louisiana*, 379 U.S. 559, 568 (1965) (holding that the "lack of specificity in a word such as 'near'" did not render the statute unconstitutionally vague). We note as well that appellant does not dispute that there were also signs in the lot plainly stating "Authorized Permit Parking Only;" therefore, regardless of whatever else appellant might have been prohibited from doing on that lot, he was on notice that he could not park there.

C. The Absence of an Actual Notice Requirement Does Not Make the Statute Constitutionally Void for Vagueness.

Appellant continues to complain that he did not receive notice that guns were prohibited in the Maryland Avenue parking lot because no

signs were posted warning him of that restriction (AppSuppBrf 34-35, 37). If he is suggesting that the Constitution requires actual notice, he is mistaken. "To provide [constitutionally] 'fair notice,' '[g]enerally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.'" *Bronstein*, 849 F.3d at 1107 (quoting *Texaco, Inc.*, *v. Short*, 454 U.S. 516, 532 (1982)). "Citizens are charged with generally knowing the law." *Id.* Although, as appellant notes (at 36-37), a vague statute may be saved by the presence of an actual notice requirement, actual notice is not required to uphold a statute against a vagueness challenge. *See, e.g., Klein*, 463 F.3d at 1039 (holding that regulation without an actual notice requirement was not unconstitutionally vague, because the statute was clear and its scope was ascertainable). Ignorance of the law generally is not a defense to criminal prosecution. *See Cheek v. United States*, 498 U.S. 192, 199 (1991); *accord Bronstein*, 849 F.3d at 1107.

Washington Mobilization Committee v. Cullinane, 566 F.2d 107 (D.C. Cir. 1977), cited by appellant at 35, does not hold otherwise. As we argued in our earlier brief, *Cullinane* is inapposite because it involved

the use of ad hoc police lines to restrict access to otherwise public places (USBrf 59). This Court upheld the regulation that authorized the use of such lines, finding that due process would not be violated as long as the movable and temporary lines were clearly marked and notice of the restricted access was given. 566 F.2d at 118. Such measures are not required with respect to the boundaries in this case because they are fixed, and discernable from the statutory language.

Appellant also asserts that the statute imposed strict liability on him because it does not require scienter and he did not in fact know that he was on Capitol Grounds (AppSuppBrf 36-37).[18] Neither assertion makes the statute constitutionally invalid. *See, e.g., Powell v. Texas*, 392 U.S. 514, 535-36 (1968) (stating that the Supreme Court has never adopted a constitutional doctrine of mens rea, but left such decisions to the states).[19] As noted above, the inclusion of a mens rea requirement

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[18] We infer that, by scienter, appellant means a specific intent to violate the law. Although such specific intent is not required, we agree that the statute requires the government to prove that appellant knew that he was carrying firearms, i.e., that firearms were readily accessible to him, when he entered the lot (JA 131 n.5).

[19] *But cf. Staples v. United States*, 511 U.S. 600, 618 (1994) (as a matter of statutory interpretation, in light of common-law tradition, offenses not requiring mens rea are generally disfavored).

may protect a statute from a due process vagueness challenge, but it is not otherwise required.

D. Appellant Has Not Shown That the Statute Is Facially Void for Vagueness.

Appellant also asserts in cursory fashion that the entire statute defining the Grounds is facially unconstitutional because it does not clearly define its boundaries (AppSuppBrf 3, 33). "Traditionally, [a defendant] could succeed on a [facial vagueness] claim 'only if the enactment [wa]s impermissibly vague in all of its applications.'" *United States Telecom. Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 735-36 (D.C. Cir. 2016) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)).[20] For that reason, "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Moreover, one to whom a statute clearly applies – as here – "cannot complain of the vagueness of the law as applied to the conduct of others."

[20] Although the Supreme Court in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015), has expressed "some skepticism" about the no-set-of-circumstances principle, *U.S. Telecom*, 825 F.3d at 735, this Court has continued to apply it. *See Crooks v. Mabus*, 845 F.3d 412, 417 (D.C. Cir. 2016) (distinguishing *Johnson*).

Hodge, 799 F.3d at 1172 (internal quotation marks and citation omitted). Appellant has not met his burden of showing that the statute defining the Capitol Grounds is facially unconstitutional. *See, e.g., Stevens*, 559 U.S. at 473.

Appellant cannot meet the "impermissibly vague in all of its applications standard" here because 40 U.S.C. §§ 5101, 5102 and 5104 together clearly identify the vast majority of the buildings and property that are currently incorporated into the Capitol Grounds.[21] The 1946 map specifically referenced in Section 5102(a) identifies the bulk of the property within the Capitol Grounds, including, inter alia, the lawns on the east and west sides of the Capitol, the property leading from the Capitol toward Union Station on the Senate side of the Capitol, and the property underneath most of the current congressional office buildings (AppSuppBrf SA 8). The Library of Congress building and grounds are

[21] Appellant's facial challenge, even if it had merit, would not affect application of the Capitol Grounds security statute to the buildings on the Grounds. The security statute, 40 U.S.C. § 5104(e), expressly applies to the "Capitol Grounds *and Buildings*." The term "Capitol Buildings" is separately defined by 40 U.S.C. § 5101 to include, inter alia, the Capitol, the Senate and House Office Buildings and garages, and the Capitol Power Plant. There is nothing imprecise about those designations.

expressly incorporated into the Capitol Grounds by 40 U.S.C. § 5104(d), and the U.S. Botanic Garden and its grounds are incorporated by § 5104(c). The borders of most of these sites are defined by surrounding streets, making it possible for anyone with a map to understand the scope of the statute. *See Klein*, 463 F.3d at 1039.

The only relief appellant seeks is vacatur of his conviction (AppSuppBrf 40).[22] In asking the Court, in effect, to declare the Capitol Grounds security statute unconstitutional because the Grounds are not adequately defined, appellant "implicates 'the gravest and most delicate duty that [courts are] called on to perform': invalidation of an Act of Congress." *Hodge*, 799 F.3d at 1157 (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring). If a "constitutional flaw" is found in a statute, wholesale invalidation is not the preferred remedy; rather, it is preferable "to limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 321 (2006). Among

[22] Although appellant has raised non-constitutional claims on appeal, see, e.g., AppOpenBrf 19-23, 27-28, those claims do not survive his guilty plea. The Supreme Court held only that appellant's Second Amendment and Due Process claims were not waived by the fact of the plea. *See Class v. United States*, 138 S. Ct. 798, 802 (2018).

the options noted by the Supreme Court is "to enjoin only the statute's unconstitutional applications while leaving the others in force, *see United States v. Raines*, 362 U.S. 17, 20–22 . . . (1960), or to sever its problematic portions while leaving the remainder intact, *United States v. Booker*, 543 U.S. 220, 227–229 (2005)."

Should this Court conclude that the statute defining the Capitol Grounds is unconstitutionally vague or that it violates the Second Amendment as to the Maryland Avenue lot, that would not require the entire statute to be invalidated. A more narrow remedy should be applied. *See, e.g., Hodge*, 799 F.3d at 1149-50 (noting that Supreme Court, in *United States v. Grace*, 461 U.S. 171 (1983), held that law restricting public displays on the Supreme Court "grounds" could not constitutionally be applied to public sidewalks forming the perimeter of the grounds, but "left for another day the constitutionality of the statute's application to the rest of the grounds").

CONCLUSION

Appellant has failed to establish that, as applied to him, the Capitol Grounds security statute violates the Second Amendment or the Due Process Clause. If this Court finds the factual record insufficient, or too ambiguous to permit resolution of any claim,[23] appellant cannot prevail. Appellant has the burden of showing that the firearms provision of the Capitol Grounds security statute is unconstitutional as to him. See supra

[23] As Justice Alito observed in his dissent, appellant made a number of factual allegations in support of his Second Amendment and due process claims. *Class*, 138 S.Ct. at 816 n.4 (noting that, as presented by Amicus, appellant's Second Amendment argument depends on facts such as "[appellant's] own personal characteristics, including his record of mental health and law abidingness, as well as characteristics specific to the Maryland Avenue parking lot, including, inter alia, its distance from the Capitol Building, the extent to which it is unsecured, the extent to which it is publicly accessible, what business typically occurs there, who regularly congregates there, and the nature of security screening visitors must pass through upon entering," and his due-process vagueness argument depends on facts such as "an assessment of how difficult it would be for an average person to determine that the Maryland Avenue lot is part of the Capitol Grounds, which turns on the extent to which the lot is publicly accessible, how heavily trafficked it is and by what types of vehicles, whether there are signs indicating it is part of the Capitol Grounds or that guns are prohibited and where such signs are located, and whether there are security gates or checkpoints nearby"). Appellant did not establish any of these facts in the district court. Moreover, at oral argument, Amicus represented that appellant would proceed with his constitutional claims "on the facts as they exist, the record as it sits right now" (Oral Arg. Rec. 13:58 to 14:04).

9-10. He not only neglected to make a record to support his claims, but he abandoned his opportunity to do so by deliberately failing to appear in court on the first day of trial, when the district court and the government were prepared to proceed with an evidentiary hearing. Even if this Court were to excuse appellant's default, however, remand, rather than reversal, is appropriate.

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this brief contains 9,123 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, Jessica Ring Amunson, Esq., jamunson@jenner.com, and Leonard Powell, Esq., leonardpowell@jenner.com, on this 12th day of July, 2018.

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