STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel*.,
MARCO WHITE, MARK MITCHELL,
and LESLIE LAKIND,

Plaintiffs,

Case No. D-101-CV-2022-00473

v.

COUY GRIFFIN,

Defendant.

BRIEF OF AMICI CURIAE NAACP NEW MEXICO STATE CONFERENCE AND NAACP OTERO COUNTY BRANCH

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

I. STATEMENT OF INTEREST[1]

Amicus Curiae NAACP New Mexico State Conference is one of the State Conferences of the National Association for the Advancement of Colored People ("NAACP"). Amicus Curiae NAACP Otero County Branch is one of the local branches of the NAACP in New Mexico. Founded in 1909, the NAACP is the nation's oldest and largest civil rights organization. It is a non-profit organization founded on the goal of achieving an equitable society for communities of color. The NAACP has long advocated for social justice and civil rights for all, and has always recognized and stressed the importance of exercising the First Amendment rights of free speech, assembly, and to petition the Government for a redress of grievances in a lawful and peaceful manner.

In seeking to justify his participation in the insurrection at the Capitol on January 6, 2021, defendant Couy Griffin claimed at trial that he was merely exercising his First Amendment "right to an opinion and to free speech and to freedom of expression."[2] Griffin also sought to draw a comparison at trial between the January 6, 2021 insurrection and Black Lives Matter protests.[3] In addition, Griffin argued that disqualifying him from holding public office under Section 3 of the Fourteenth Amendment would "disenfranchise voters" and "would subvert the will of the people of Otero County."[4]

---

[1] No party's counsel authored this brief in whole or in part; and no person, party, or party's counsel contributed money that was intended to fund preparing or submitting this brief, which was prepared on a *pro bono* basis.

[2] *See* Trial Transcript, Day One, at p. 40 (Aug. 15, 2022).

[3] *See* Trial Transcript, Day One, at p. 194 (Aug. 15, 2022); Trial Transcript, Day Two, at pp. 71-72, 161-164 (Aug. 16, 2022).

[4] *Griffin v. White, et al.*, No. 22-cv-362 at ECF No. 20, pp. 2-3, 22 (D. N.M. May 18, 2022); Trial Transcript, Day Two, at p. 190 (Aug. 16, 2022).

The NAACP submits this amicus brief in order to explain to the Court why the conduct by Griffin and the other insurrectionists was not protected under the Frist Amendment; why the peaceful, lawful protests and demonstrations in support of civil rights and the Black Lives Matter movement are fundamentally different from the insurrectionist conduct that occurred on January 6th; why Griffin's reliance on *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982)[5] is misplaced; and why the longstanding and persistent efforts to disenfranchise and suppress the votes of people of color, including those residing in Otero County, are fundamentally different from the relief sought by Plaintiffs in this lawsuit under Section 3 of the Fourteenth Amendment.

There is yet another reason why the NAACP has a keen interest in this litigation. As noted by the United States in its successful motion to keep Griffin detained pending his criminal trial, "he has engaged in inflammatory, racist, and at least borderline threatening advocacy" and "is an inflammatory provocateur and fabulist who engages in racist invective…"[6] The Government's brief quoted from a video posted by Griffin on Facebook on July 26, 2020 in which he used abhorrent racist language to criticize those who support performances at football games of "Lift Ev'ry Voice and Sing" – traditionally known as the "Black National Anthem" – as a gesture of solidarity against racial injustice:

> "They want to destroy our country. They want to talk about playing a Black national anthem before football games? I got a better idea, why don't you go back to Africa and form your little football teams over in Africa and you can play on an old beat-out dirt lot and you can play your Black national anthem there. How

[5] *See Griffin v. White, et al*., No. 22-cv-362 at ECF No. 27 p. 14 (D.N.M. June 2, 2022).

[6] *United States v. Griffin*, No. 21-cr-92 at ECF No. 3 pp. 2, 10 (D.D.C. Jan. 19, 2021).

> about that? . . . This is America, we play the national anthem in America today."[7]
>
> In that disturbing video, he also said:
>
> "I watched those [Black Lives Matter] protests on TV and there's a thousand people out there. I bet you probably not 20% of them have a job. It's real easy to go and cuss and say about how bad America is. Why? Because you're not getting a big enough welfare check in the mail?[8]

Griffin said that Black civil rights protestors who "can't embrace America" should "get out of our country" and "go somewhere else."[9] He has posed for pictures with the Confederate flag and has condemned as "vile scum" anyone who characterizes the Confederate flag as "racist."[10]

While Griffin's unabashed and reprehensible racism is not a basis for his disqualification from office, it is nevertheless one of the reasons why the NAACP has a strong interest in the outcome of this vitally important case.

II. ARGUMENT

A. Courts Have Repeatedly Held That The January 6 Insurrectionists' Actions Were Not Protected Under the First Amendment

As demonstrated both in the Plaintiffs' Pre-Trial Brief (pp. 18-19) and in the "Brief of Amici Curiae Floyd Abrams, Erwin Chemerinsky, Martha Minow, Laurence H. Tribe, Maryam Ahranjani, Lynne Hinton, and National Council of Jewish Women in Support of the

---

7 This video excerpt is available at https://twitter.com/RussContreras/status/1287909885955280898

8 This video excerpt is available at https://twitter.com/RussContreras/status/1287941496914640896 (second tweet).

9 *Id*.

10 https://www.staradvertiser.com/2020/07/27/breaking-news/cowboys-for-trump-defends-go-back-to-africa-comments/; https://abq.news/2022/03/cowboys-for-trump-leader-couy-griffins-jan-6-trial-starts-next-week/

Plaintiffs' Action for *Quo Warranto* Relief," Griffin's disqualification from office is warranted because of his insurrectionist conduct on January 6, which was not protected under the First Amendment.

The NAACP will not burden the Court by repeating the same arguments previously set forth in the briefs filed by Plaintiffs and the distinguished First Amendment scholars. Instead, as it will show below, numerous judges in the United States District Court for the District of Columbia have squarely addressed and rejected First Amendment arguments made by Griffin and others in the specific context of criminal prosecutions maintained against those who participated in the January 6 insurrection.

Just as he argued during the trial before this Court, Griffin previously argued in his criminal prosecution that he should be released from custody pending trial because his actions and statements on January 6 were "patently within the bounds of constitutionally protected speech."[11] However, the Court rejected that argument and ordered that Griffin remain in custody pending trial, correctly finding that his conduct was **not** protected under the First Amendment:

> The alleged offense is associated with an organized attempt to stop lawful, democratic processes… Mr. Griffin traveled to D.C. to forcibly prevent the certification of the 2020 presidential election, stating he wanted to stop the election from being "stolen." Mr. Griffin breached the barricades surrounding the Capitol, entering a "posted, cordoned off, or otherwise restricted area." . . . That day, Mr. Griffin stated that if there were another rally at the Capitol on January 20, it would be a "sad day, because there's gonna be blood running out of that building." Mr. Griffin confirmed to a TV reporter that these statements were threats against government leaders. **Threats are not protected under the First Amendment.**

[11] *United States v. Griffin*, No. 21-cr-92 at ECF No. 5 p. 20 (D.D.C. Jan. 27, 2021).

* * *

> Mr. Griffin has demonstrated disrespect for the lawful authority of the U.S. government, weighing heavily in favor of detention. Mr. Griffin twice left New Mexico to travel to Washington, D.C. The first time, he participated in an attempt to disrupt the lawful, democratic process of certifying the results of the 2020 Presidential Election. Mr. Griffin repeatedly denied the legitimacy of the election's outcome. Mr. Griffin made unprotected, threatening statements about returning to Washington on January 20 to rally at the Capitol, which he said would lead to "blood running out of the building." . . . Mr. Griffin's insurrectionist conduct has been building to a crescendo, as he previously stated "the only good democrat is a dead democrat."[12]

Later, after Griffin was found guilty, the Court stressed at the sentencing hearing that Griffin's participation in the January 6 insurrection was fundamentally at odds with his oath of office:

> Sir, as an elected state officer, you've taken an oath to uphold the Constitution. Your actions on January 6 and your statements since then, I believe, are in grave tension with that oath. This is a difficult moment in our nation's history. We need our elected officials to support this country and the peaceful transfer of power, not undermine it.[13]

The Court further found that Griffin's actions and statements in connection with the January 6 insurrection were "undermining our system of laws" and reflect "a disdain for our nation's laws and the criminal justice system."[14]

Numerous other judges presiding over the insurrectionists' criminal cases have repeatedly and consistently held that the First Amendment did not protect their conduct on

---

[12] *United States v. Griffin*, No. 21-cr-92 at ECF No. 10 pp. 3-4 (D.D.C. Feb. 3, 2021) (attached as Exhibit "A") (emphasis added).

[13] *United States v. Griffin*, No. 21-cr-92 (D.D.C. June 17, 2022) at p. 42 (attached as Exhibit "B").

[14] *Id*. at pp. 35, 39.

January 6. For instance, in *United States v. Nordean*, No. 21-cr-175, 2021 U.S. Dist. LEXIS 246752, at *40-41 (D.D.C. Dec. 28, 2021), the Court rejected First Amendment defenses by four "Proud Boys" leaders, holding as follows:

> The Court first turns to the threshold question of whether the conduct with which Defendants are charged is protected by the First Amendment at all…. It is not. Defendants are alleged to have "corruptly" obstructed, influenced, and impeded an official proceeding, and aided and abetted others to do the same-that is, they allegedly "unlawfully entered the Capitol grounds or the Capitol building to . . . stop, delay, and hinder Congress's certification of the Electoral College vote, " and succeeded in doing so….And more specifically, they are charged with conduct involving acts of trespass, depredation of property, and interference with law enforcement, all intended to obstruct Congress's performance of its constitutional duties. **No matter Defendants' political motivations or any political message they wished to express, this alleged conduct is simply not protected by the First Amendment. Defendants are not, as they argue, charged with anything like burning flags, wearing black armbands, or participating in mere sit-ins or protests…. Moreover, even if the charged conduct had some expressive aspect, it lost whatever First Amendment protection it may have had**. *See Grayned*, 408 U.S. at 116 ("[W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment."); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (government may punish physical obstruction); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (The First Amendment does not allow a "group of demonstrators" to "insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."); *United States v. Gregg*, 226 F.3d 253, 267-68 (3d Cir. 2000) ("Activities that injure, threaten, or obstruct are not protected by the First Amendment, whether or not such conduct communicates a message.") (emphasis added).

Likewise, in *U.S. v. Bingert*, No. 21-cr-91, 2022 U.S. Dist. LEXIS 93790, at *37 (D.D.C. May 25, 2022), the Court held:

> This is not expressive conduct. "[W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). The mere fact that defendants were "present at the Capitol to convey [their] disagreement with the results of the 2020

> election" does not render this conduct expressive… "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Other decisions involving the January 6 insurrection reaching the same conclusion include *U.S. v. Grider*, No. 21-cr-22, 2022 U.S. Dist. LEXIS 134673, at *16-17 (D.D.C. July 29, 2022) (unlawful entry onto the Capitol "to corruptly disrupt the quadrennial certification of the votes of the Electoral College" is "not expressive conduct, much less protected expressive conduct… Even were Grider's alleged actions expressive, behavior within the Capitol buildings that prevents "Congress [from] peaceably carry[ing] out its lawmaking responsibilities' is not speech protected by the First Amendment"); *U.S. v. Robertson*, No. 21-cr-34, 2022 U.S. Dist. LEXIS 62726, at *16 (D.D.C. Feb. 25, 2022) ("If Robertson had expressed his views only through social media, he almost certainly would not be here. But he also allegedly took action – entering the Capitol without lawful authority in an alleged attempt to impede the Electoral College vote certification"); *U.S. v. Montgomery*, No. 21-cr-46, 2021 U.S. Dist. LEXIS 246750 at *75 (D.D.C. Dec. 28, 2021) (rejecting defendants' argument that their prosecution for January 6 conduct "criminalize[s] 'verbal interactions with law enforcement' or lawful protests" protected by First Amendment); *U.S. v. Caldwell*, No. 21-cr-28, 2021 U.S. Dist. LEXIS 243756, at *68, *74 (D.D.C. Dec. 20, 2021) (defendants' actions on January 6 "were no mere political protest" and their prosecution "poses little risk of chilling otherwise protected activities;" "the government is not prosecuting protected speech"); *U.S. v. Mostofsky*, No. 21-cr-138, 2021 U.S. Dist. LEXIS 243335, at *36 (D.D.C. Dec. 21, 2021) ("Mostofsky is not being charged for his views or his expression of them; rather, it is his **actions** in entering a restricted area in an alleged effort to impede the Electoral College certification that has landed him under indictment.") (emphasis in original); *U.S. v. Rhodes*, No. 22-cr-15, 2022 U.S. Dist. LEXIS 114264, at *35

(D.D.C. June 28, 2022) (defendants "seem to say that they are being prosecuted for exercising their First Amendment rights of expression. However, '[s]editious conduct can always be punished.'") (*quoting Dennis v. United States*, 341 U.S. 494, 590 (1951) (Douglas, J., dissenting)); *U.S. v. Rhodes*, No. 22-cr-15, 2022 U.S. Dist. LEXIS 137269, at *9 (D.D.C. Aug. 2, 2022) ("These defendants are not, however, indicted purely for their speech or assembly. *Compare Edwards v. South Carolina*, 372 U.S. 229, 237-38 (1963) (reversing conviction for breach of the peace where the defendants did no more than march peacefully on a sidewalk). They are charged with a seditious conspiracy, which is not protected by the First Amendment")); *U.S. v. McHugh*, No. 21-cr-453, 2022 U.S. Dist. LEXIS 18138, at *48 (D.D.C. Feb. 1, 2022) (participant in insurrection on January 6 was being prosecuted for his "conduct, not speech"); *U.S. v. Bozell*, No. 21-cr-216, 2022 U.S. Dist. LEXIS 28075, at *19 (D.D.C. Feb. 16, 2022) ("Bozell is not being prosecuted for exercising his First Amendment rights to peacefully protest outside the Capitol," and his conduct was not constitutionally protected "political expression, assembly and petitioning of the government for a redress of grievances."); *U.S. v. Andries*, No. 21-cr-93, 2022 U.S. Dist. LEXIS 44794, at *44 n. 11 (D.D.C. March 14, 2022) (rejected January 6 defendant's argument that "all he did . . . was make certain statements and engage in protest, which is non-criminal protected expression").

B. Courts Have Also Flatly Rejected Insurrectionists' Efforts to Compare Their Conduct to Black Lives Matter Protests

During his trial before this Court, Griffin repeatedly compared his conduct on January 6 to that of Black Lives Matter protestors. (*See* n. 3, *supra*). However, courts presiding over the criminal trials of the January 6 insurrectionists have uniformly rejected such comparisons. For example, in sentencing one of the insurrectionists, Chief Judge Beryl Howell stated as follows:

> [T]hat comparison makes little sense to me… [T]he goal of a lot of the protests in 2020 were to hold police accountable and politicians accountable for police brutality and murder, in George Floyd's case; and it was to improve our political system. What happened on January 6th is in a totally different category. That protest was to stop the government from functioning at all, to stop our democratic process - - and it worked, at least for a period of time. They are not comparable.

U.S. v. Croy, No. 21-cr-162, ECF No. 63 at pp. 57-58 (D.D.C. Nov. 5, 2021) (attached as Exhibit "C").

Similarly, in a sentencing hearing concerning another insurrectionist, Judge Tanya Chutkan likewise categorically rejected the defendant's attempt to portray his conduct as no different from that by Black Lives Matter protestors:

> **What happened on that day [January 6] was nothing less than the attempt of a violent mob to prevent the orderly and peaceful certification of an election as part of the transition of power from one administration to the next . . . That mob was trying to overthrow the government… That was no mere protest**.
>
> * * *
>
> Now, there are some people who have compared the riots of January 6 with other protests that took place throughout the country over the past year and who have suggested that the Capitol rioters are somehow being treated unfairly. I flatly disagree.
>
> People gathered all over the country last year to protest the violent murder by the police of an unarmed man. Some of those protesters became violent. **But to compare the actions of people protesting, mostly peacefully, for civil rights, to those of a violent mob seeking to overthrow the lawfully elected government is a false equivalency and ignores a very real danger that the January 6 riot posed to the foundation of our democracy**.

U.S. v. Mazzocco, No. 21-cr-54, ECF No. 32 at pp. 24-26 (D.D.C. Oct. 4, 2021) (attached as Exhibit "D") (emphasis added).

Yet another judge rejected a January 6th defendant's argument that he was "the victim of selective prosecution" because he was treated more harshly than protestors in Portland, Oregon who were protesting against police brutality in the Summer of 2020. The court stated as follows:

> [T]here are obvious differences between those, like Miller, who stormed the Capitol on January 6, 2021, and those who rioted in the streets of Portland in the summer of 2020. The Portland rioters' conduct, while obviously serious, did not target a proceeding prescribed by the Constitution and established to ensure a peaceful transition of power … The circumstances between the riots in Portland and the uprising in the Nation's capital differ in kind and degree.

U.S. v. Miller, No. 21-cr-119, ECF No. 67 at p. 3 (D.D.C. Dec. 21, 2021) (attached as Exhibit "E").

The fundamental distinction between Black Lives Matter protests and the January 6 insurrection that was drawn in the foregoing cases was also drawn at the trial of this matter by Dr. Rachel Kleinfeld and Professor Mark Graber. Dr. Kleinfeld testified that "Mr. Griffin was an insurrectionist. He was not a protestor" because "he shared [the] objective of using intimidation to prevent the transfer of Presidential power" and he "likely knew there was a substantial threat of violence, and he helped to create that threat." Trial Transcript, Day Two, at pp. 99-100 (Aug. 16, 2022). She explained that although some of the Black Lives Matter protests caused property damage, "when a protest uses violence, it backfires." *Id*. at p. 138. She explained further that Black Lives Matter protests were fundamentally different from the insurrection on January 6 because "violence and intimidation [were] brought to bear to affect the orderly transition of power in our country." *Id*. at pp. 163-164. Likewise, Professor Graber testified concerning the difference between a protest and an insurrection, explaining that in a protest "people may be there for their own private or personal reasons. Finally and most

important, an insurrection **requires violence, force, intimidation.**" *Id*. at p. 56 (emphasis added).

Also relevant here is *U.S. v. Little*, No. 21-cr-315, 2022 U.S. Dist. LEXIS 44791 (D.D.C. March 14, 2022), where the Court found that a sentence of 60 days imprisonment was warranted for a defendant's "participation in the unsuccessful insurrection at the United States Capitol on January 6, 2021" and noted that, just as Griffin has done, the defendant "continued to deflect responsibility for the violence onto Antifa [and] Black Lives Matter. . ." *Id*. at *1, *6. The Court stressed:

> [C]ontrary to his Facebook post and the statements he made to the FBI, the riot was not "patriotic" or a legitimate "protest"… **[I]t was an insurrection aimed at halting the functioning of our government**.

Id. at *6 (emphasis added).

Numerous other courts have likewise recognized that the conduct at the Capitol on January 6 in which Griffin participated constituted an "insurrection." *See, e.g., U.S. v. Grider, supra*, 2022 U.S. Dist. LEXIS 134673, at *1 ("This criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 2021"); *U.S. v. Bingert, supra*, 2022 U.S. Dist. LEXIS 93790, at *1 ("The Government charged each defendant with eight different offenses related to their participation in this unsuccessful insurrection"); *U.S. v. Munchel*, 567 F.Supp.3d 9, 13 (D.D.C. 2021) ("Defendants face criminal charges for participating in the unsuccessful insurrection at the Capitol on January 6, 2021"); *U.S. v. Puma*, No. 21-cr-454, 2022 U.S. Dist. LEXIS 48875, at *7 (D.D.C. March 19, 2022) (noting that numerous motions to dismiss indictments "filed by Capitol insurrection defendants" have been denied by the courts).

C. Griffin's Reliance on *NAACP v. Claiborne Hardware* is Misplaced

As noted above (*see* n. 5, *supra*), in his unsuccessful federal court lawsuit seeking to enjoin this action, Griffin relied upon *NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1982). However, that reliance is clearly misplaced, as *NAACP v. Claiborne Hardware* actually undermines, rather than supports, Griffin's baseless First Amendment argument.

That case arose from an April 1, 1966 meeting of several hundred members of a local branch of the NAACP which launched a boycott of white merchants in Claiborne County, Mississippi in an effort to obtain "equality and racial justice." *Id*. at 907. While the meeting itself was a non-violent event involving lengthy speeches on unity and equality and peaceful picketing, there were alleged threats and boycott-related acts of violence that occurred in the ensuing months and years. A group of white merchants filed suit more than three years after the April 1, 1966 meeting, alleging that the NAACP and boycott leaders were liable for the violence and damage that occurred during the course of the boycott. The Supreme Court rejected this argument, stating as follows:

> [T]he boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable" … Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition - - **rather than through riot or revolution** - - petitioners sought to change a social order that had consistently treated them as second-class citizens.

Id. at 911-12 (emphasis added).

Claiborne Hardware involved constitutionally-protected efforts to obtain "racial equality and integration" (*id*. at 889), which is a far cry from an all-out, violent assault on the nation's Capitol and the democratic process by insurrectionists seeking to prevent the transition of power to a duly-elected President. The Supreme Court emphasized that "[t]he First

Amendment does not protect violence." *Id*. at 916. Nor is the incitement of violence protected by the First Amendment:

> "If that language had been followed by acts of violence, a substantial question would be presented whether [the speaker] could be held liable for the consequences of that unlawful conduct. In this case… the acts of violence… occurred weeks or months after the [April 1, 1966] speech."

Id. at 928.

In *Claiborne Hardware*, the Supreme Court explained that a speechmaker can be held liable for the unlawful conduct of others where: (1) "[the speaker] authorized, directed, or ratified specific tortious activity"; (2) "[the speaker's] public speeches were likely to incite lawless action… that in fact followed within a reasonable period" and (3) "the speeches might be taken as evidence that the speaker gave other specific instructions to carry out violent acts or threats." *Id*. at 927. As proven at trial, on January 6, Griffin illegally breached multiple security barriers and occupied restricted Capitol grounds, and he also endorsed and incited the violence taking place. By encouraging violent upheaval and lawlessness, and inciting immediate brutal violence against police officers and destruction of property on Capitol grounds, Griffin's insurrectionist conduct was wholly unlike the NAACP's peaceful and constitutionally-protected protests for racial equality in *NAACP v. Claiborne Hardware*.

D. Griffin's Disenfranchisement Argument is Specious

Finally, Griffin's argument that disqualifying him from holding public office would "disenfranchise voters" and "subvert the will of the people of Otero County" (*see* note 4, *supra*) is patently frivolous. Throughout its 113-year existence, one of the NAACP's core missions has been to protect minorities' right to vote and to combat voter disenfranchisement and suppression. Thus, the NAACP is acutely aware of what constitutes voter disenfranchisement, which bears no resemblance to what is at issue here. Where, as here, a public official

participates in an insurrection against the Government of the United States, he forfeits his right to hold public office. He is responsible for his own actions, and his removal from office does not constitute an impermissible "disenfranchisement" of voters.

In *Greene v. Raffensberger*, No. 22-cv-1294, 2022 U.S. Dist. LEXIS 70961, at *57 n. 18 (N.D. Ga. April 18, 2022), which involved a challenge to the candidacy of Congresswoman Marjorie Taylor Greene because of her alleged support of the January 6 insurrection, the Court rejected an argument similar to the one advanced by Griffin:

> Plaintiffs' counsel also suggested at oral argument that the challenge proceeding [under Section 3 of the Fourteenth Amendment] could infringe upon the rights of Plaintiff's supporters to cast their votes for Plaintiff as the candidate of their choice… Plaintiff's voters still would not have a First Amendment right to vote for a disqualified candidate… *see Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (finding that "[a] voter has no right to vote for a specific candidate").

See also Thournir v. Meyer, 909 F.2d 408, 412 (10th Cir. 1990) ("Candidacy itself is not a fundamental [constitutional] right which is comparable to the right to vote; therefore, burdens inflicted upon candidates are not to be measured by the same yardstick applied to burdens affecting voters.").

Griffin's argument that his disqualification from office would supposedly "subvert the will of the people of Otero County" is truly ironic, because he participated in an insurrection on January 6 that sought to subvert the results of the 2020 Presidential election, which Joe Biden won by 7 million more popular votes and 74 more electoral votes than President Trump. A number of Otero County voters are members of amicus curiae NAACP Otero County Branch, and Griffin sought to subvert the will of those voters and many other Otero County citizens when he improperly refused to certify the results of the June 7, 2022 New Mexico

primary election. Even after the New Mexico Supreme Court entered an Order on June 15, 2022 directing the Otero County Commission to meet again to certify the results,[15] Griffin persisted in his refusal to vote for certification without offering any justification:

> My vote to remain a no isn't based on any evidence, it isn't based on any facts. It's only based on my gut feeling, my own intuition, and that's all I need.[16]

It is clear that the flagrant disregard for the rule of law that Griffin displayed during the insurrection on January 6, which was criticized by the Court at Griffin's June 17, 2022 sentencing hearing (*see* p. 5, *supra*), has remained unabated.

---

[15] *Maggie Toulouse Oliver, Secretary of State v. The Otero County Commission*, No. S-1-SC-39426 (N.M. June 15, 2022).

[16] https://sourcenm.com/2022/06/17/otero-county-votes-2-1-to-approve-primary-results/

III. CONCLUSION

For the reasons set forth above, amici curiae NAACP New Mexico State Conference and Otero County Branch NAACP support the Plaintiffs' request that this Court disqualify Griffin from holding public office pursuant to Section 3 of the Fourteenth Amendment.

Respectfully submitted,

August 23, 2022

/s/ Burt M. Rublin
Burt M. Rublin (pro hac vice pending)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
rublin@ballardspahr.com
215-864-8116

and

August 23, 2022

/s/ Sonia Maria Gipson Rankin
Sonia Maria Gipson Rankin
Associate Professor of Law
The University of New Mexico
Albuquerque, NM 87131
sonia.rankin@law.unm.edu
505-277-1266

Attorneys for Amici Curiae
NAACP New Mexico State Conference
and NAACP Otero County Branch

I hereby certify that a true and correct copy of the foregoing was served upon all parties and counsel of record via this Court's Odyssey electronic file and serve system this 23rd day of August, 2022.

/s/ Sonia Maria Gipson Rankin

EXHIBIT "A"

AO 472 (Rev. 11/16; DC 1/19) Order of Detention

UNITED STATES DISTRICT COURT

for the

District of Columbia

United States of America v. Couy Griffin *Defendant*	)	Case No. 21-mj-92 (ZMF)

ORDER OF DETENTION PENDING TRIAL

Part I - Eligibility for Detention

Upon the

- ☐ Motion of the Government attorney pursuant to 18 U.S.C. § 3142(f)(1), or
- ☑ Motion of the Government or Court's own motion pursuant to 18 U.S.C. § 3142(f)(2),

the Court held a detention hearing and found that detention is warranted. This order sets forth the Court's findings of fact and conclusions of law, as required by 18 U.S.C. § 3142(i), in addition to any other findings made at the hearing.

Part II - Findings of Fact and Law as to Presumptions under § 3142(e)

☐ **A. Rebuttable Presumption Arises Under 18 U.S.C. § 3142(e)(2)** *(previous violator)*: There is a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of any other person and the community because the following conditions have been met:

☐ **(1)** the defendant is charged with one of the following crimes described in 18 U.S.C. § 3142(f)(1):

- ☐ **(a)** a crime of violence, a violation of 18 U.S.C. § 1591, or an offense listed in 18 U.S.C. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed; **or**
- ☐ **(b)** an offense for which the maximum sentence is life imprisonment or death; **or**
- ☐ **(c)** an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. §§ 801-904), the Controlled Substances Import and Export Act (21 U.S.C. §§ 951-971), or Chapter 705 of Title 46, U.S.C. (46 U.S.C. §§ 70501-70508); **or**
- ☐ **(d)** any felony if such person has been convicted of two or more offenses described in subparagraphs (a) through (c) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (a) through (c) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; **or**
- ☐ **(e)** any felony that is not otherwise a crime of violence but involves:
  (i) a minor victim; **(ii)** the possession of a firearm or destructive device (as defined in 18 U.S.C. § 921); **(iii)** any other dangerous weapon; or **(iv)** a failure to register under 18 U.S.C. § 2250; ***and***

☐ **(2)** the defendant has previously been convicted of a Federal offense that is described in 18 U.S.C. § 3142(f)(1), or of a State or local offense that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed; ***and***

☐ **(3)** the offense described in paragraph (2) above for which the defendant has been convicted was committed while the defendant was on release pending trial for a Federal, State, or local offense; ***and***

☐ **(4)** a period of not more than five years has elapsed since the date of conviction, or the release of the defendant from imprisonment, for the offense described in paragraph (2) above, whichever is later.

☐ **B. Rebuttable Presumption Arises Under 18 U.S.C. § 3142(e)(3)** *(narcotics, firearm, other offenses)*: There is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community because there is probable cause to believe that the defendant committed one or more of the following offenses:

- ☐ **(1)** an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. §§ 801-904), the Controlled Substances Import and Export Act (21 U.S.C. §§ 951-971), or Chapter 705 of Title 46, U.S.C. (46 U.S.C. §§ 70501-70508);
- ☐ **(2)** an offense under 18 U.S.C. §§ 924(c), 956(a), or 2332b;
- ☐ **(3)** an offense listed in 18 U.S.C. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
- ☐ **(4)** an offense under Chapter 77 of Title 18, U.S.C. (18 U.S.C. §§ 1581-1597) for which a maximum term of imprisonment of 20 years or more is prescribed; **or**
- ☐ **(5)** an offense involving a minor victim under 18 U.S.C. §§ 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425.

☐ **C. Conclusions Regarding Applicability of Any Presumption Established Above**

☐ The defendant has not introduced sufficient evidence to rebut the presumption above, and detention is ordered on that basis, with the evidence or argument presented by the defendant summarized in Part III.C.

☐ The defendant has presented evidence sufficient to rebut the presumption, but after considering the presumption and the other factors discussed below, detention is warranted for the reasons summarized in Part III.

OR

☐ The defendant has not presented sufficient evidence to rebut the presumption. Moreover, after considering the presumption and the other factors discussed below, detention is warranted for the reasons summarized in Part III.

Part III - Analysis and Statement of the Reasons for Detention

A. After considering the factors set forth in 18 U.S.C. § 3142(g) and the information presented at the detention hearing, the Court concludes that the defendant must be detained pending trial because the Government has proven:

☐ By clear and convincing evidence that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community.

☑ By a preponderance of evidence that no condition or combination of conditions of release will reasonably assure the defendant's appearance as required.

B. In addition to any findings made on the record at the hearing, the reasons for detention include the following:

☑ Weight of evidence against the defendant is strong

☐ Subject to lengthy period of incarceration if convicted

☐ Prior criminal history

☐ Participation in criminal activity while on probation, parole, or supervision

- ❒ History of violence or use of weapons
- ❒ History of alcohol or substance abuse
- ❒ Lack of stable employment
- ❒ Lack of stable residence
- ❒ Lack of financially responsible sureties
- ❒ Lack of significant community or family ties to this district
- ❒ Significant family or other ties outside the United States
- ❒ Lack of legal status in the United States
- ❒ Subject to removal or deportation after serving any period of incarceration
- ❒ Prior failure to appear in court as ordered
- ❒ Prior attempt(s) to evade law enforcement
- ❒ Use of alias(es) or false documents
- ❒ Background information unknown or unverified
- ❒ Prior violations of probation, parole, or supervised release

C. OTHER REASONS OR FURTHER EXPLANATION:

The defendant's evidence/arguments for release:

Mr. Griffin stated that he has a family, gainful employment, and constituents whom he serves as an elected county official in New Mexico. Mr. Griffin asserted that his criminal record involving a 25-year-old DUI is insignificant. Additionally, Mr. Griffin made three main arguments. First, he challenged the use of his statements cited by the government as grounds for detention. Mr. Griffin argued that his statements are protected under the First Amendment and that the Court is barred from considering them in a pretrial release decision. *United States v. Lemon*, 723 F.2d 922, 928 (D.C. Cir. 1983). Mr. Griffin also argued that the statements offer no evidence of serious risk of flight or obstruction of justice. Mr. Griffin did not bring firearms to Washington, D.C., and the second rally he alluded to never occurred. Second, Mr. Griffin argued that the government did not sufficiently allege the requisite mens rea because it did not particularly allege his knowledge with respect to the statutory definition of "restricted buildings or grounds." § 1752(a)(1), (c)(1). Finally, Mr. Griffin asserted that he respects the authority of this Court and its power to impose conditions on his release. Mr. Griffin noted that the government does not allege his involvement in any organized attempt to overthrow the government, and defendants charged with misdemeanors arising out of the Capitol incident have often received pretrial release.

Nature and circumstances of offense(s):

This factor weighs heavily in favor of detention. As Chief Judge Howell noted in *United States v. Barnett* , the title of the offense does not "properly capture the scope of what [Mr. Griffin] is accused of doing here." The alleged offense is associated with an organized attempt to stop lawful, democratic processes. That Mr. Griffin left the Capitol area when asked does not mitigate the nature of the alleged offense, as entry itself establishes the crime. Mr. Griffin's actions and statements surrounding the alleged offense provide evidence of his state of mind. Mr. Griffin traveled to D.C. to forcibly prevent the certification of the 2020 presidential election, stating he wanted to stop the election from being "stolen." Mr. Griffin breached the barricades surrounding the Capitol, entering a "posted, cordoned off, or otherwise restricted area . . . of a building or grounds where [a] person protected by the Secret Service"—the Vice President—was located. 18 U.S.C. § 1752(c)(1)(C). That day, Mr. Griffin stated that if there were another rally at the Capitol on January 20, it would be a "sad day, because there's gonna be blood running out of that building." Mr. Griffin confirmed to a TV reporter that these statements were threats against government leaders. Threats are not protected under the First Amendment. Mr. Griffin understood the national significance of the certification process and that the Vice President was involved.

The strength of the government's evidence:

The government's evidence is strong and weighs in favor of detention. "[W]here the evidence of guilt is stronger, the defendant is more likely to flee." *United States v. Kent*, No. 20-cr-209, 2020 WL 7353049, at *4 (D.D.C. Oct. 26, 2020), aff'd (Nov. 5, 2020). Mr. Griffin admitted that he passed a barricade surrounding the Capitol building during the incident. Mr. Griffin later described the fencing around the Capitol and understood it was intended delineate between permissible First Amendment space and restricted space. The government obtained video evidence of Mr. Griffin on the west front of the steps to the U.S. Capitol, past the line of fencing and barricades. Mr. Griffin boasted that he "climbed up on top of the Capitol building" during the incident.

The defendant's history and characteristics, including criminal history:

Mr. Griffin is an elected official in his home county, which inures to his benefit. The court recognizes that he has a life in New Mexico and that he has little criminal history. Nevertheless, Mr. Griffin has demonstrated disrespect for the lawful authority of the U.S. government, weighing heavily in favor of detention. Mr. Griffin twice left New Mexico to travel to Washington, D.C. The first time, he participated in an attempt to disrupt the lawful, democratic process of certifying the results of the 2020 Presidential Election. Mr. Griffin repeatedly denied the legitimacy of the election's outcome. Mr. Griffin made unprotected, threatening statements about returning to Washington on January 20 to rally at the Capitol, which he said would lead to "blood running out of that building." The second time, Mr. Griffin acted on these statements and returned to the Capitol area. That the rally never occurred does not inure to his benefit, because the government's military presence prevented it. Mr. Griffin's insurrectionist conduct has been building to a crescendo, as he previously stated "the only good democrat is a dead democrat."

The defendant's dangerousness/risk of flight:

Consideration of dangerousness does not fit squarely with an analysis of detention based on serious risk of flight or risk of obstruction of justice. Mr. Griffin has repeatedly denied the legitimacy of the U.S. government, shown disdain for its officials, and indicated a lack of respect for the rule of law. The mere fact that he has not expressed such disrespect for the judicial branch does not detract from these findings. The evidence overwhelmingly suggests that Mr. Griffin would not respect the authority of this Court as a branch of the same U.S. government that he has disrespected and denied. Therefore, there is no combination of conditions that would reasonably assure his appearance. For the same reasons, Mr. Griffin poses a risk of obstruction of justice. He has already threatened two Congressmembers, both of whom are witnesses/victims in this case. Mr. Griffin's brazen disrespect for legal authority favors detention to ensure he does not interfere with potential witnesses or jurors.

Part IV - Directions Regarding Detention

The defendant is remanded to the custody of the Attorney General or to the Attorney General's designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant must be afforded a reasonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility must deliver the defendant to a United States Marshal for the purpose of an appearance in connection with a court proceeding.

Date: 02/03/2021

2021.02.03 15:53:36 -05'00'

United States Magistrate Judge

EXHIBIT "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * *	
UNITED STATES OF AMERICA,	Criminal Action No. 21-00092
Plaintiff,	
vs.	
COUY GRIFFIN,	Washington, D.C. June 17, 2022 2:03 p.m.
Defendant.	
* * * * * * * * * * * * * * * * * *	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE TREVOR N. McFADDEN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:
JANANI IYENGAR, ESQ.
KIMBERLY L. PASCHALL, ESQ.
UNITED STATES ATTORNEY'S OFFICE
FOR THE DISTRICT OF COLUMBIA
555 Fourth Street, Northwest
Eleventh Floor
Washington, D.C. 20530

FOR THE DEFENDANT:
NICHOLAS D. SMITH, ESQ.
DAVID B. SMITH, PLLC
108 North Alfred Street
First Floor
Alexandria, Virginia 22314

FOR U.S. PROBATION:
HANA FIELD

REPORTED BY:
LISA EDWARDS, RDR, CRR
Official Court Reporter
United States District Court for the
District of Columbia
333 Constitution Avenue, Northwest
Room 6706
Washington, D.C. 20001
(202) 354-3269

the passionate politicians' rise. But do you see the responsibility that you have? You are an elected official.

THE DEFENDANT: That's correct.

THE COURT: People do listen to you in a way that they don't listen to other people.

THE DEFENDANT: That's correct.

THE COURT: And I think passion is great. But I also -- but the Government's concern that frankly I share is you're an elected official who has -- it seems like you're kind of throwing fuel on the fire here at a difficult moment for our country. And I don't care what your politics are, your views on me or anything else.

THE DEFENDANT: Sure.

THE COURT: But when you're encouraging these kind of undermining our systems of laws, I've got to take that seriously.

THE DEFENDANT: But that's the last thing I want to do. I don't want to undermine our system of laws. I would never try to undermine.

Now, I might disagree with the laws. But that's why I have run for office and climbed into a legislative position on the county level, so I have maybe a voter influence on those, you know. But that's politics, you know.

And unfortunately, in America today, if you stand

they were doing.

Frankly, in many ways, this case feels a lot less about what you actually did on January 6 than all the things that you've said about it before and afterwards. I think sometimes, sir, you're probably your own worst enemy here, including with your tweets. It's really your comments after January 6th, the kind of suggestions about the violence at the Capitol, suggesting that you would return with firearms and implying some sort of federal conspiracy has targeted you that are so disturbing. They do suggest a very real and continued lack of contrition or acceptance of responsibility. They also -- I think Ms. Iyengar is right that they suggest a disdain for our nation's laws and the criminal justice system. And that's very concerning as well.

You know, I would be the last person to suggest there's anything wrong with you wanting to pray with people; and I think there were probably a lot of people who needed prayer on January 6th. But, sir, from your experience as a pastor, you know better than I do that you need to follow the law. You need to obey the law when you're trying to help people.

And I don't even hear you suggesting that God was ordering you to violate the law here. I don't think there's any suggestion that trespassing statutes are somehow against

I'm not going to try to hold that against you or kind of second-guess what the New Mexico authorities might decide in that situation.

I've also -- I think the acceptance of responsibility here is hard. I appreciate what you've said today, sir. I appreciate your concerns and agreement about the problems with the violence there. And you certainly have the right to say what you think and to continue to proclaim your innocence. I mean, that of course is your right, and I'm not holding that against you. It also does kind of complicate a suggestion that you're somehow completely remorseful for what has happened.

Sir, as an elected state officer, you've taken an oath to uphold the Constitution.

THE DEFENDANT: That's right.

THE COURT: Your actions on January 6 and your statements since then, I believe, are in grave tension with that oath. This is a difficult moment in our nation's history. We need our elected officials to support this country and the peaceful transfer of power, not undermine it.

Of course, the First Amendment protects your right to say what you want and you are perfectly free to disagree with me or anyone else. But I urge you to consider the oath that you have taken and the responsibility you have as an

EXHIBIT "C"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 21-162
vs.	)	
	)	
GLENN WES LEE CROY,	)	November 5, 2021
	)	9:24 a.m.
Defendant.	)	Washington, D.C.
	)	

* * * * * * * * * * * * * * * * *

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES:

FOR THE GOVERNMENT: CLAYTON HENRY O'CONNOR
DOJ-CRM
1301 New York Ave NW
Washington, DC 20530
(202) 616-3308
Email: clayton.Oconnor@usdoj.gov

JORDAN ANDREW KONIG
U.S. Department of Justice
P.O. Box 55
Ben Franklin Station
Washington, DC 20044
(202) 305-7917
Email: jordan.a.konig@usdoj.gov

FOR THE DEFENDANT: KIRA ANNE WEST
NICOLE ANN CUBBAGE
712 H Street, Northeast
Washington, DC 20002
(202) 236-2042
Email: kiraannewest@gmail.com

ALSO PRESENT: CRYSTAL LUSTIG, Pretrial Officer

Court Reporter: Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

briefing, Ms. West. And I -- you know that old motto that moms tell their kids: Two wrongs don't make a right.

MS. WEST: Yes.

THE COURT: So if he's offended by what he saw in terms of some of the protests in the summer of 2020 because of the violence and criminal conduct that occurred with looting businesses, burning buildings -- which is what he describes in his letter -- you know, okay, well, why should he go and repeat that behavior if he thought it was so wrong?

MS. WEST: As I said --

THE COURT: That argument -- that comparison makes little sense to me, so I wasn't even going to talk about it, because it makes so little sense to me, until you brought it up. And I know your papers are replete with it, as is his letter; but two wrongs don't make a right, it's as simple as that.

My experience with prosecutions in the summer of 2020 -- I only speak from my experience -- is that -- is that people were brought to me facing felony charges.

MS. WEST: I understand, Your Honor.

THE COURT: And not that many cases I think, as most of them were processed in superior court.

Anyway -- so I don't know that there is much more to be said. I do think that the goal of a lot of the

protests in 2020 were to hold police accountable and politicians accountable for police brutality and murder, in George Floyd's case; and it was to improve our political system.

What happened on January 6th is in a totally different category.

MS. WEST: I agree. I agree.

THE COURT: That protest was to stop the government from functioning at all, to stop our democratic process -- and it worked, at least for a period of time. They are not comparable.

So -- but let's go back to this case.

MS. WEST: There are two videos, Your Honor, that you mentioned.

The first one, Exhibit No. 3, you talked about the two windows that were broken, and that he went into the doors when he first entered the Capitol. I watched that video multiple times. There were at least 400 -- I think I put 700 in my brief; and then I went back and said I better start counting. There were at least 400 people ahead of him.

According to Mr. Croy, he did not understand or see the violence until weeks later of what really happened at the Capitol; and even today we're seeing more things about the violence. And there is a --

EXHIBIT "D"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	CR No. 21-0054 (TSC)
	.	
v.	.	
	.	
MATTHEW CARL MAZZOCCO,	.	Washington, D.C.
	.	Monday, October 4, 2021
Defendant.	.	10:05 a.m.
. . . . .		

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	KIMBERLEY C. NIELSEN, AUSA U.S. Attorney's Office 555 Fourth Street NW Washington, DC 20530 (202) 252-7566
For the Defendant:	ROBBIE L. WARD, ESQ. 530 Lexington Avenue San Antonio, TX 78215 (210) 758-2200
Court Reporter:	BRYAN A. WAYNE, RPR, CRR U.S. Courthouse, Room 4704-A 333 Constitution Avenue NW Washington, DC 20001 (202) 354-3186

Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription

In addition to the guidelines and policy statements, I must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the types of sentences available, the need to avoid sentence disparity, and the need to or provide restitution. And I've considered all these factors at length in preparation for this sentencing.

These cases arising out of the riots of the Capitol on January 6 are particularly difficult because, although many of the defendants like Mr. Mazzocco were charged with and pleaded guilty to misdemeanors, the Court, like many others in this district, does not view the crimes that were committed on that day as anything petty.

Many of my colleagues have spoken eloquently -- and now I'm going to talk about the nature and circumstances of the offense. Many of my fellow judges have spoken out about the gravity of the violent riot that took place on January 6. I add my voice to theirs.

What happened on that day was nothing less than the attempt of a violent mob to prevent the orderly and peaceful certification of an election as part of the transition of power from one administration to the next, something that has happened with regularity over the history of this country. That mob was trying to overthrow the government.

They erected hangman's scaffolding. They broke down doors

and barriers. They destroyed property in Congress. They fought law enforcement, who were outnumbered that day, resulting in the injury and death of police officers. They broke down doors and barriers. They paced the hallways, calling out and searching for the Speaker of the House and the Vice President, and one can only surmise what they were going to do with them had they found them. They soiled and defaced the halls of the Capitol and showed their contempt for the rule of law.

That was no mere protest. And even though Mr. Mazzocco was not fighting with the officers, even though he was telling people not to steal stuff, he was inside and his presence was part of the mob. A mob isn't a mob without the numbers. The people who were committing those violent acts did so because they had the safety of numbers, one of whom was Mr. Mazzocco.

Now, there are some people who have compared the riots of January 6 with other protests that took place throughout the country over the past year and who have suggested that the Capitol rioters are somehow being treated unfairly. I flatly disagree.

People gathered all over the country last year to protest the violent murder by the police of an unarmed man. Some of those protesters became violent. But to compare the actions of people protesting, mostly peacefully, for civil rights, to those of a violent mob seeking to overthrow the lawfully elected government is a false equivalency and ignores a very real danger

that the January 6 riot posed to the foundation of our democracy.

The actions that took place on January 6 were watched with horror, not just by citizens of the District of Columbia, who were terrified, but citizens of the United States, people living in this country, and people all over the world who look to this country as an example of the rule of law.

In this Court's opinion, the treatment has been far more lenient than other defendants who regularly appear in our courts. To start with, the majority of the rioters, including Mr. Mazzocco, were allowed to leave the scene of their crime, unarrested and unharmed, and return to their homes, where, once they realized the trouble they were in, they immediately commenced -- he immediately commenced to conceal, destroy, or minimize his participation in his wrongdoing.

Then Mr. Mazzocco, like hundreds of others who participated in the riots, was charged with petty misdemeanors, despite his deliberate, premeditated decision to come to the District to try and stop the transfer of power.

And once he was charged, Mr. Mazzocco was released and allowed to remain in his home, to be with his family, to continue to work or look for work, and go about his daily life because of the COVID pandemic. He has never even had to come to this court to answer for his crimes. And, finally, although he was charged with four counts, Mr. Mazzocco was allowed to plead

EXHIBIT "E"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. GARRET MILLER, *Defendant.*	Criminal Action No. 1:21-cr-00119 (CJN)

ORDER

Garret Miller, a January 6 defendant, claims that he is the victim of selective prosecution. Pointing to the Department of Justice's charging decisions (or lack thereof) for rioters in Portland, Oregon, he asks the Court to compel discovery and grant an evidentiary hearing on his claim. *See* Motion for Discovery and for an Evidentiary Hearing ("Mot."), ECF No. 32. But the evidence Miller points to is not enough. The Court will thus deny his Motion.

The Executive Branch has "broad discretion" in "enforc[ing] the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quotation omitted); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016). But that discretion has its limits. The Fifth Amendment prohibits the federal government from pursuing criminal charges against a citizen that amount to a "'practical denial' of equal protection of law." *Armstrong*, 517 U.S. at 465 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)). A claim of "selective prosecution" guards against this illegality. *Id.*

Miller must make two showings, each by "clear evidence," to establish his claim of selective prosecution. *See Att'y Gen. of U.S. v. Irish People, Inc.*, 684 F.2d 928, 932 (D.C. Cir. 1982). He must demonstrate both that the prosecution had a "discriminatory effect" and that it arose from "discriminatory intent." *Armstrong*, 517 U.S. at 465. Producing evidence of such

discriminatory effect and discriminatory intent often requires discovery. *See* Jonathan J. Marshall, *Selective Civil Rights Enforcement and Religious Liberty*, 72 Stan. L. Rev. 1421, 1448 (2020).

To get discovery on his claim, Miller must offer "some evidence" tending to show both a discriminatory effect and discriminatory intent. *United States v. Bass*, 536 U.S. 862, 863 (2002). If the standard sounds familiar to the one for *proving* a selective-prosecution claim, it should. The Supreme Court has adopted this "correspondingly rigorous" standard to guard against costly resource allocation and the disclosure of sensitive information. *Armstrong*, 517 U.S. at 468; *United States v. Khanu*, 664 F. Supp. 2d 28, 31 (D.D.C. 2009). The some-evidence standard "is only slightly lower" than the clear-evidence standard. *United States v. Hare*, 820 F.3d 93, 99 (4th Cir. 2016) (quoting *United States v. Venable*, 666 F.3d 893, 900 (4th Cir. 2012)) (quotation marks omitted); *United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018) (noting that the some-evidence "standard was intentionally hewn closely to the claim's merits requirements"); *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) ("The standard for discovery is correspondingly rigorous, . . . but of course not identical to the standard applied to the merits."); *United States v. Lewis*, 517 F.3d 20, 25 (1st Cir. 2008) ("The evidentiary threshold that a defendant must cross in order to obtain discovery in aid of a selective prosecution claim is somewhat below 'clear evidence,' but it is nonetheless fairly high.").

Miller submits that he "has become familiar with how the Department of Justice has handled the bulk of the 18 U.S.C. § 231(a)(3) and 18 U.S.C. § 111 charges arising out of the Portland riots, which took place during the summer of 2020," Mot. at 5, and suggests that his treatment on identical charges, *see* Superseding Indictment, ECF No. 30, at 2–3, is discriminatory. In support of his position, he points to Portland cases that were either dismissed, are headed towards dismissal, or have received "extremely favorable plea agreements." *Id.* at 8–16. Yet

despite his efforts, Miller has produced inadequate evidence of either discriminatory effect or discriminatory intent to obtain discovery here.

As to discriminatory effect, a defendant like Miller who seeks discovery must adduce "some evidence that similarly situated defendants . . . could have been prosecuted, but were not." *Armstrong*, 517 U.S. at 469; *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000). Whether others qualify as similarly situated hinges on whether the "circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect" to the comparator. *Rossotti*, 211 F.3d at 145 (quoting *Irish People, Inc.*, 684 F.2d at 946). But there are obvious differences between those, like Miller, who stormed the Capitol on January 6, 2021, and those who rioted in the streets of Portland in the summer of 2020. The Portland rioters' conduct, while obviously serious, did not target a proceeding prescribed by the Constitution and established to ensure a peaceful transition of power. Nor did the Portland rioters, unlike those who assailed America's Capitol in 2021, make it past the buildings' outer defenses. And Miller has failed to point to any Portland case that is similar to this one and in which the government made a substantially different prosecutorial decision. The circumstances between the riots in Portland and the uprising in the Nation's capital differ in kind and degree, and the Portland cases (and the government's prosecutorial decisions) are therefore not sufficiently similar to this case to support Miller's request for discovery.

As for improper prosecutorial motive, Miller must present a credible showing that the Government chose to prosecute "at least in part because of, not merely in spite of," his protected characteristic. *Wayte v. United States*, 470 U.S. 598, 610 (1985); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) ("[T]he discriminatory-purpose element requires a showing that discriminatory intent was a 'motivating factor in the decision' to enforce the

criminal law against the defendant," which can be "shown by either direct or circumstantial evidence."). Yet Miller points to no evidence of discriminatory intent other than "personal conclusions based on anecdotal evidence." *Armstrong*, 517 U.S. at 470. He contends that the government treated the Portland rioters favorably once President Biden assumed office. Mot. at 19. But speculation is not enough. That the government allegedly dismissed cases against some (but not all) Portland rioters, or offered others (but not all) favorable plea deals, does not without more show the federal government is pursuing its claims against Miller and others like him because of a difference in politics. The government also has pointed to substantial differences in the evidence available to it with respect to the two groups. The January 6 attack happened in broad daylight, and much of what occurred was captured on video (whether from the Capitol, law enforcement officers, or the rioters themselves). In Portland, much of the illegal activity occurred at night and there is substantially less video evidence of what unfolded during the assault.

Accordingly, it is

ORDERED that the Motion for Discovery and for an Evidentiary Hearing, ECF No. 32, is **DENIED**.

DATE: December 21, 2021

CARL J. NICHOLS
United States District Judge