UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	
	)	**Criminal No. 1: 21-cr-626 (PLF)**
DEREK COOPER GUNBY	)	
	)	
Defendant	)	
	)	

DEFENDANT GUNBY'S RULE 29 MOTION FOR ACQUITTAL

NOW COMES Defendant Derek Cooper Gunby, by counsel, with this Motion for Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. After the Government put on evidence and testimony for two full days, the Government rested at the end of the day yesterday, November 6. Under no test or analysis has the Government provided sufficient evidence for the trial to continue, especially with regard to the most serious charge (Count 1).

Count 1 alleges that Gunby "attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is; a proceeding before Congress, specifically, Congress' certification of the electoral College vote as set out in the Twelfth Amendment . . ." Yet the Government has not provided sufficient (if any) evidence to support any of the elements required for conviction. No reasonable jury—even viewing the evidence and testimony in the light most favorable to the prosecution—could convict Gunby of this crime.

Of course there are several videos admitted into evidence, and such videos containing images of countless individuals, including Gunby, saying and doing various things on January 6, 2021. But none of the videos (or texts, or social media posts) show Gunby acting corruptly to "obstruct, influence, and impede" an official proceeding.

For starters, the electoral count certification on January 6 **was not an official proceeding whose outcome could have been obstructed, influenced, and impeded**. The Government's own final witness, Officer Mark Gazelle, admitted that the outcome of the certification vote count was already predetermined, and that all the hundreds of demonstrators at the Capitol on Jan. 6 did not—and could not—alter or change the outcome in any way. Officer Gazelle testified that neither Congress nor the American voters have any say in the counting of the electoral votes.

Officer Gazelle testified that the American people had already given all the input that was possible, in their separate state-level elections and political campaigns. The January 6 vote count was a ceremony only. And no one could 'corruptly obstruct' the ceremony by illegally bribing, threatening, or forcing any member of Congress to do or not do anything. The January 6 ceremony involves no fact-finding, no legislating and no determination of an outcome that was subject to politicking or "influence."

The only possible quirk in such a vote count, according to all the evidence presented, is the possibility that a pair consisting of a Senator and a Representative

might object to a given State's ballot. But the laws and provisions introduced by the Government indicate that the only proper objections are to form, and that Congress can only consider the form of such objected-to ballots during a two hour period. At the end of any two-hour period, a vote is immediately called.

The Government's evidence showed that on January 6, 2021, there were objections to just one State's ballot; that of Arizona. At the time Congress went into recess between 2:13 pm and around 2:30 pm, the two houses of Congress were preparing to hold their two-hour "break out" sessions regarding Arizona's votes.

Significantly, the Secret Service's "Head of State" agenda/schedule was flexible regarding the end-time deadlines for the Vice President's certification on Jan. 6, 2021. However, all the Government's evidence and testimony showed that the ultimate outcome of the certification (i.e., that Joe Biden would ultimately be certified as President) was predetermined. (And judicial notice would illustrate that Arizona's electoral votes were insufficient to change the outcome in any case.)

This means that all the hundreds of Trump supporters who surrounded the Capitol on Jan. 6 were **merely protesting the certification**. Gunby had no ability—even if he was accompanied by millions of other protestors—to alter, "influence," or "impede" the certification.

Gunby's own recorded statements, introduced by the Government illustrate that Gunby protested Biden's certification. (In fact, Gunby denied that Biden was the legitimate president even after Biden's inauguration; and Gunby urged others to

join him.) But this is all political advocacy, petitioning for redress of grievances, and **protected speech, under the First Amendment**.

Secondly, Gunby's mere act of being present, or of entering the Capitol—without more—did not (and could not) obstruct, influence, and impede any proceeding of Congress. Gunby barely entered the Capitol at all, and immediately left when he recognized a police line and pepper balls informing him to leave.

Third, the Government has provided no evidence that Gunby acted corruptly on Jan. 6.

Not only did the video, text, and photographic evidence provide no evidence that there was an official proceeding, or that Gunby altered the proceeding, or that Gunby intended to obstruct, influence, or impede an official proceeding. But the Government's own evidence shows that Gunby acted in good faith in any case. Specifically, the case agent in this trial, John Dias, candidly conceded, repeatedly, that nothing in Gunby's state of mind was deceptive or corrupt. Gunby arrived at the Capitol on Jan. 6 at the behest of the President of the United States. And all evidence shows Gunby relied in good faith on claims that the 2020 presidential election had been stolen.

Even if Gunby was wrong about the election being stolen, he had a right to his political opinion and to express it. Missing from the Government's evidence is anything that might support a claim that Gunby acted or spoke falsely or deceptively.

Indeed, Gunby did what every American should do if they believe an election was stolen. Gunby went to D.C. to attend a speech by the President, and followed the President's suggestions regarding going to the Capitol building. Gunby was engaging in his civic duty as a concerned American.

Moreover, the entirety of the Government's case consists of nothing more than a showing of First Amendment protected political advocacy on the part of Gunby. Recently, the D.C. Circuit, in *United States v. Fischer*, 64 F.4th 329, 350 (D.C. Cir. 2023), addressed the applicability of the Section 1512(c) statute to January 6. The Court split three ways in addressing some issues but not other issues. Judge Pan issued an opinion purporting to be issued on behalf of a majority of a panel of the United States Court of Appeals for the District of Columbia reversing Judge Nichols' rulings. *See United States v. Fischer*, 64 F.4th 329, 350 (D.C. Cir. 2023). Judge Walker, however, issued a concurring opinion, along with Judge Katsas who issued a dissenting opinion. *Id.* at 351–85.

The term "corruptly" as used in 18 U.S.C. § 1512(c)(2) has been defined in different ways by different courts. But the analysis regarding political demonstrations such as those on January 6 must recognize the strong rights of people to express and petition government, at the Capitol and elsewhere.

The Government's construction of § 1512(c)(2) is essentially that people may never intrude or influence any meeting, event, or proceeding wherever any agency, division, or branch of government gathers. This would be a rule fit for an authoritarian, totalitarian regime. This cannot be the law under the First

Amendment.

COUNT TWO MUST ALSO BE DISMISSED

Similarly, the Government has failed to present sufficient evidence to support Count 2 ("Violently entering and remaining in a restricted area.") Not only did the Government present no evidence of signs, barricades or fencing seen by Gunby, but the evidence is resounding that Gunby immediately obeyed and complied with orders to leave the Capitol building. Officer Wright testified that as soon as Wright began firing pepper balls in the direction of protestors in the Parliamentarian hallway, the crowd (including Gunby) immediately left the building.

Gunby can be heard on Government exhibits saying either "Time to get out" or "Trying to get out." And another voice, or perhaps Gunby's voice, can be heard saying "Let us out!" Gunby was in the Capitol for only 3 minutes; and he immediately left upon being informed he was trespassing.

This is blackletter trespassing law. Police may not simply arrest someone immediately for being in the wrong place. They must announce that an area is restricted, and give reasonable time for the trespasser to depart. (There is much case law on this; especially state-level case law.) The statute in this case criminalizes "entry ***and*** remaining"; not merely entry. The Government presented no evidence that Gunby "remained" upon being warned by pepperballs and a police line that Gunby was in a restricted area.

THERE IS NO EVIDENCE GUNBY COMMITTED 'DISORDERLY CONDUCT'

The Government also failed to support Counts 3 and 4, which penalize "disorderly conduct." The Government presented no evidence whatsoever that

Gunby jumped up and down, shouted unreasonably loudly, or was otherwise disruptive or disorderly.

GUNBY DID NOT PICKET, PARADE, OR DEMONSTRAT IN THE CAPITOL.

For the same reasons, there must be acquittal on Count 5. The Government presented no evidence that Gunby picketed, paraded, or demonstrated in the Capitol.

Dated: November 7, 2023

Respectfully Submitted,

/s/ John M. Pierce
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CERTIFICATE OF SERVICE

I, John M. Pierce, hereby certify that on this day, November 7, 2023, I caused a copy of the foregoing document to be served on all counsel through the Court's CM/ECF case filing system.

/s/ John M. Pierce
John M. Pierce