

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	
<b>v.</b>	:	<b>Criminal Case No.</b>
	:	
<b>KENNETH JOSEPH OWEN THOMAS,</b>	:	<b>1:21-cr-00552 (CRC)</b>
	:	
<b>Defendant</b>	:	

---

**DEFENDANT THOMAS' MOTION FOR MISTRIAL ON FIRST  
AMENDMENT GROUNDS, WITH PROPOSED CURATIVE JURY  
INSTRUCTION**

Comes now the Defendant Kenneth Joseph Owen Thomas, by and through undersigned counsel, with this motion for mistrial on First Amendment grounds.

The United States is prosecuting the defendant for resisting officers during a civil disorder and obstruction of an official proceeding using almost nothing but First Amendment protected speech and advocacy (cobbled together with evidence that Thomas engaged in some moments of disorderly contact with a few law enforcement officers outside the Capitol on January 6).

The evidence offered at trial by the United States through Special Agent Alexis Brown on May 18 consists almost entirely of political advocacy and persuasive political speech and expression. Among Thomas' admitted statements are "Fight for the American worker," "Stop the steal," "This is Peaceful. This is a

Peaceful Protest,” “Wait until we reach the Capitol because there’s going to be drama,” “Police stand down,” “Honor your oath,” “Traitors,” “We want peace,” “We have the right to life, liberty and the pursuit of happiness,” and “Hold the line.”

Although the First Amendment broadly protects “speech,” it does not protect the right to “fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.” Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand.L.Rev. 265, 270 (1981).

“[T]he line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (plurality opinion); *see also Musser v. Utah*, 333 U.S. 95, 100–103 (1948) (Rutledge, J., dissenting).

And of course, the most protected speech of all is political speech. *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010). A criminal prosecution based on fundamental political advocacy is the most abhorrent prosecution imaginable.

Accordingly, Defendant demands this trial be declared a mistrial, and that a new trial commence based on actual evidence of crime rather than political speech and advocacy.

## PROPOSED LIMITING INSTRUCTION

In the alternative, Defendant asks that the Court give the following curative instruction:

### **Proposed Instruction No. \_\_\_\_ First Amendment Rights**

Every person has the right to petition his or her government, and express ideas and bring their concerns to their legislators. People also have the right to peaceably assemble with others to petition their government. And under the First Amendment, a person has a constitutional right to make violent, hateful or antigovernment statements and threats and may call upon others to act violently, except in rare circumstances where the speaker knows such violent threats have an immediate likelihood of getting others to immediately carry out such violence<sup>1</sup> and reasonably knows that others have the ability and are likely to carry out such threats.<sup>2</sup>

These First Amendment rights apply to every count in the indictment. You may not use the defendant's protected speech, petitioning, advocacy or expression as support for the government's allegations. If you find that the defendant's conduct was First Amendment protected speech, expression, or advocacy, you must find the defendant not guilty.

The United States Capitol is one of America's largest public buildings. It is the headquarters of the federal Legislative Branch of government, where the American people have broad rights to petition, advocate, protest, and meet with members of Congress and staff in order to promote or prevent the advancement of legislation or other congressional acts.<sup>3</sup>

---

<sup>1</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 449, 89 S.Ct. 1827, 1830, 23 L.Ed.2d 430 (1969) (overturning a conviction for violent threatening speech on grounds that the First Amendment protects all but threats of imminent lawless violence and "fighting" words, *Chaplinsky v. New Hampshire*, 315 U.S., at 571–572, 62 S.Ct., at 768–769. The Minnesota Supreme Court erred in its application of the Chaplinsky fighting words test and consequently interpreted the St. Paul ordinance in a fashion that rendered the ordinance facially overbroad.

<sup>2</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down hate crime statute).

<sup>33</sup> *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (the Capitol Grounds are

Dated: May 20, 2023

RESPECTFULLY SUBMITTED  
**KENNETH JOSEPH OWEN THOMAS,**

*By Counsel*

/s/ **ROGER ROOTS**

Roger Roots, Esq.  
John Pierce Law Firm  
21550 Oxnard Street  
3<sup>rd</sup> Floor, PMB #172  
Woodland Hills, CA 91367  
Tel: (213) 400-0725  
Email: [jpierce@johnpiercelaw.com](mailto:jpierce@johnpiercelaw.com)  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I hereby certify that this document is being filed on this May 20, 2023, with the Clerk of the Court by using the U.S. District Court for the District of Columbia's CM/ECF system, which will send an electronic copy of to the following CM/ECF participants. From my review of the PACER account for this case the following attorneys are enrolled to receive notice and a copy through the ECF system.

MATTHEW M. GRAVES  
United States Attorney  
D.C. Bar No. 481052

SAMANTHA R. MILLER  
Assistant United States Attorney  
New York Bar No. 5342175  
United States Attorney's Office  
601 D Street, NW  
Washington, DC 20530  
[Samantha.Miller@usdoj.gov](mailto:Samantha.Miller@usdoj.gov)

SEAN P. McCAULEY  
Assistant United States Attorney  
New York Bar No. 5600523

---

"an area to which access cannot be denied broadly or absolutely."); *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 383, 387 (1989) ("there is no doubt that the Capitol Grounds are a public forum.")

United States Attorney's Office  
For the District of Columbia  
601 D. Street, NW  
Washington, DC 20530  
[Sean.McCauley@usdoj.gov](mailto:Sean.McCauley@usdoj.gov)

*/s/Roger Roots, \_\_\_\_\_*  
Roger Roots, Esq.