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BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	Case Number 21-cr-92
Plaintiff,	.	
	.	
vs.	.	
	.	Washington, D.C.
COUY GRIFFIN,	.	March 22, 2022
	.	9:33 a.m.
Defendant.	.	
- - - - -		

TRANSCRIPT OF BENCH TRIAL  
BEFORE THE HONORABLE TREVOR N. MCFADDEN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States:	JANANI IYENGAR, AUSA KIMBERLY PASCHALL, AUSA United States Attorney's Office 555 Fourth Street Northwest Washington, D.C. 20530
For the Defendant:	NICHOLAS D. SMITH, ESQ. David B. Smith, PLLC 7 East 20th Street New York, New York 10003
Official Court Reporter:	SARA A. WICK, RPR, CRR United States District Court for the District of Columbia 333 Constitution Avenue Northwest Room 4704-B Washington, D.C. 20001 202-354-3284

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

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P R O C E E D I N G S

(Call to order of the court.)

COURTROOM DEPUTY: This is Criminal Case 21-92, United States of America versus Couy Griffin.

Counsel, please come forward to identify yourselves for the record, starting with the government.

MS. IYENGAR: Good morning, Your Honor. Janani Iyengar for the United States, and I am here with my colleague Kimberly Paschall.

THE COURT: Good morning, Ms. Iyengar. Good morning, Ms. Paschall.

MR. SMITH: Good morning, Judge. Nick Smith for defendant Couy Griffin.

THE COURT: Good morning, Mr. Smith. Good morning, Mr. Griffin.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: Mr. Smith, are you seeking to recall Inspector Hawa?

MR. SMITH: Judge, can the parties approach the bench to discuss this?

(Bench conference.)

MR. SMITH: The issue is there might be one nit in the testimony of Inspector Hawa that we would like to clean up.

She testified that the vice president had reached the secure location within a few minutes. In the discovery the

1 government produced last night, there's an exact time stamp of  
2 2:00 p.m. -- 2:28 p.m. And it might not be necessary to use the  
3 CCV footage that was produced if the witness can just -- would  
4 recall that the vice president entered the secure location at  
5 that time.

6 THE COURT: Sorry. What's the overall time, then?  
7 How long are you saying? She said three minutes. How long do  
8 you think it took?

9 MR. SMITH: She actually testified a few minutes, and  
10 I asked her whether that meant three, and she didn't respond.  
11 So a few -- I know this might seem hairsplitting. But a few  
12 doesn't necessarily mean three minutes. It could be ten  
13 minutes.

14 THE COURT: So how long do you think it actually took?

15 MR. SMITH: We know how long it took because there's a  
16 time -- in the CCV footage, it shows the vice president entering  
17 the secure location at 2:28 p.m. So it might not be necessary  
18 to use the footage, so long as the witness clarifies that the  
19 vice president did enter the secure location at 2:28 p.m., not a  
20 few minutes after leaving the Senate chamber.

21 THE COURT: Ms. Iyengar, are you willing to stipulate  
22 to this?

23 MS. IYENGAR: Yes, we are, Your Honor.

24 THE COURT: I suggest we don't recall the witness, you  
25 say this on the record, and we establish it that way.

1 MR. SMITH: No objection.

2 (End of bench conference.)

3 THE COURT: Mr. Smith, do you have a clarification to  
4 make?

5 MR. SMITH: Yes, Your Honor.

6 In Inspector Hawa's testimony yesterday, when asked how  
7 long it took the vice president to reach the secure location,  
8 the witness responded "a few minutes."

9 And we are now, I think, with the government's stipulation,  
10 the parties are agreed that the vice president entered the  
11 secure location at 2:28 p.m. on January 6.

12 THE COURT: Okay. Do you agree, Ms. Iyengar?

13 MS. IYENGAR: Yes, Your Honor, we do.

14 THE COURT: Okay. I will take that as stipulated.  
15 Thank you, Mr. Smith.

16 Mr. Smith, does the defense wish to present any evidence?

17 MR. SMITH: No, Your Honor. And the defendant will  
18 not be testifying.

19 THE COURT: Mr. Griffin, if you could come forward,  
20 please, sir.

21 All right. Mr. Griffin, have you had an opportunity to  
22 talk with your attorney regarding whether or not you wish to  
23 testify in this case?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: And have you made a decision about that?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: And what is your decision, sir?

3 THE DEFENDANT: My decision is not to testify.

4 THE COURT: All right. And you understand you have an  
5 absolute right to testify or not to testify?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Mr. Smith, is there anything else you  
8 believe I should be inquiring of your client?

9 MR. SMITH: No, Your Honor.

10 THE COURT: Ms. Iyengar?

11 MS. IYENGAR: No, Your Honor.

12 THE COURT: Thank you, sir. You may have a seat.

13 THE DEFENDANT: Thank you.

14 THE COURT: All right. I think we can move to closing  
15 arguments. Do the parties agree?

16 MS. PASCHALL: Do we perhaps need to take up the MJOA  
17 first?

18 THE COURT: Mr. Smith, I guess my instinct -- this is  
19 a bench trial -- is just to deal with your arguments -- as a  
20 standard that's more favorable to you, I'm just inclined to deny  
21 your MJOA and go straight to closings. I'm happy to hear you if  
22 you would like, but that's -- I don't have a whole lot of  
23 experience with misdemeanor bench trials, but I don't know why  
24 we would do this twice.

25 MR. SMITH: Judge, there's one minor point of law

1 that's a distinction because the standard of appeal -- the  
2 standard of review on appeal may change, depending on whether  
3 the issues are analyzed through certain frameworks. I believe  
4 that for points of law a de novo standard may apply for Rule  
5 29 -- through the Rule 29 vehicle that might not apply after a  
6 trial -- after a judgment.

7 So our plan was to just fold that argument into the closing  
8 argument.

9 THE COURT: That's fine. And as far as I'm concerned,  
10 I think you could appeal any conviction on either ground that  
11 you'd be entitled to, but I don't know that it makes sense for  
12 us to go through this twice.

13 MR. SMITH: Judge, I think we're on the same page.

14 THE COURT: Okay. So I'm inclined to give each party  
15 half an hour, and the government can allocate that between your  
16 opening and rebuttal however you wish.

17 I should also say, so you all know what I -- I think it  
18 would be particularly helpful to hear your thoughts on whether  
19 the defendant knowingly entered a restricted area. I will tell  
20 you, I'm inclined to think the government has shown that he did  
21 enter a restricted area. I think the harder question is whether  
22 he knew he had. And then secondly, the disorderly conduct  
23 allegations, I think you've got some arguments to make there,  
24 Ms. Iyengar.

25 So I would encourage you all to focus on those two areas in

1 particular, but you can do as you wish.

2 Ms. Iyengar.

3 MS. IYENGAR: Yes, Your Honor. Thank you.

4 I did just put together a short PowerPoint that just  
5 contains some of the exhibits I wanted to show the Court. I  
6 provided a copy to Mr. Smith over e-mail this morning. I did  
7 bring a hard copy as well.

8 MR. SMITH: That's fine.

9 MS. IYENGAR: Okay. All right. So now that the Court  
10 has had an opportunity to review the evidence in this case, the  
11 government submits that we have proven each element of each  
12 offense in the Third Amended Information beyond a reasonable  
13 doubt. I understand that the Court has specific concerns about  
14 the elements that you just discussed, but I did just want to go  
15 through each of the elements to show how we established each of  
16 them beyond a reasonable doubt.

17 So I will start with the element which really applies to  
18 both offenses, that the defendant entered or remained in a  
19 restricted building or grounds without lawful authority to do  
20 so.

21 The Court heard testimony from Inspector Erickson, and I  
22 think actually if I could have the monitor. I'm not sure if I  
23 can do it from my end. Great. Thank you so much.

24 So the Court heard testimony from Inspector Erickson. He  
25 testified regarding what the restricted perimeter was, that it



1 had been established. On January 6, there was fencing put up,  
2 which included metal bike racks, as well as snow fencing, and  
3 signs that clearly stated that the area was closed to any sort  
4 of visitor entering.

5 He also testified that -- and Government's Exhibit 33,  
6 which is shown here, that's the Olmstead wall that the Court  
7 referenced, that the defendant was climbing over that wall, and  
8 that wall demarcated the line that was the restricted area.

9 He further testified that the area that the defendant was  
10 climbing over in Government's Exhibit 37 where he was using this  
11 bike rack as a ladder to climb over the wall leading into the  
12 Lower West Terrace, as well as this plywood ramp here, which is  
13 also in Government's Exhibit 37, to access the area underneath  
14 the inaugural stage, those areas were also restricted to public  
15 access.

16 I think it's clear that the defendant knowingly entered  
17 this area, because just as a preliminary matter, again, the  
18 video footage here shows that the defendant was climbing over a  
19 wall to make his initial entry into the restricted area. Any  
20 reasonable person, as Inspector Erickson testified, would know  
21 that they don't have lawful authority to climb over a wall to  
22 enter an area in a government space.

23 Additionally --

24 THE COURT: But the tricky part is, I think I could go  
25 down there today, and like if my hat fell over the Olmstead

1 wall, I think I could jump over the Olmstead wall and get my  
2 hat, couldn't I?

3 MS. IYENGAR: I think that's a possibility, and if  
4 that's all he did and then he just jumped right back over the  
5 wall, I don't think we would even be necessarily having this  
6 conversation right now. But that's not all he did. He  
7 continued further up the west front of the Capitol building,  
8 uses a metal bike rack as a ladder to enter -- to climb over a  
9 second wall, which I think, again, any reasonable person would  
10 know they don't have lawful authority to do, and then climbs  
11 over a plywood ramp in order to get further up the Lower West  
12 Terrace.

13 But this is not a case where we just have to make a  
14 reasonable inference that the defendant knew that he was  
15 entering a restricted area. And I would just point the Court to  
16 the January 7th video that the government entered as  
17 Government's Exhibit 64. He says in that video, "We get down to  
18 the Capitol. They have all of this stuff set up for the  
19 inauguration of Joe Biden on the back side of the Capitol. They  
20 have roped it off. Well, of course, you are going to have these  
21 patriots. D.C. police says you can't step over this."

22 He was made aware that that area was restricted, and he  
23 says it again at the Otero County Commissioners meeting.

24 THE COURT: Sorry. Can you say the exhibit number?  
25 That was 64?

1 MS. IYENGAR: Sure. It was 64.

2 THE COURT: And when did he say that?

3 MS. IYENGAR: That was at 3:45.

4 THE COURT: I'm sorry. When is Exhibit 64?

5 MS. IYENGAR: Oh, that was January 7.

6 THE COURT: Okay. That was down in Roanoke?

7 MS. IYENGAR: That was in Roanoke, yes.

8 THE COURT: Okay. Thank you.

9 MS. IYENGAR: And then in Government's Exhibit 78 --  
10 and I just put up an excerpt of the transcript of Government's  
11 Exhibit 78, which was the video of the defendant speaking on  
12 January 14 at the Otero County Commissioners meeting. He  
13 says, "When they got down to the inaugural side, there was some  
14 fencing up. They were saying that this -- that you couldn't go  
15 any further because this was being reserved for Joe Biden and  
16 his inauguration. Well, you tell a million Trump supporters  
17 that, they are going to go down there. Pretty soon, that crowd  
18 just pushed through."

19 So again, he's acknowledging he was told that this area was  
20 restricted. And in spite of being told that, he entered that  
21 area.

22 That conduct, in conjunction with just what a reasonable  
23 person would understand is lawful conduct or unlawful conduct,  
24 shows that the defendant was entering an area knowing that that  
25 area was restricted to the public, and he entered it anyway.

1           The defense was making an argument, I think through  
2 cross-examination of Inspector Hawa, that there were not Secret  
3 Service agents posted at the perimeter to individually tell each  
4 person who was entering the perimeter you can't enter here  
5 because the vice president is here.

6           That's not what the law requires the government to prove.  
7 It allows for an area that is cordoned off, posted that this  
8 area is restricted in any way. And case law has shown that that  
9 includes having a law enforcement officer there, having signs  
10 that say that the area is restricted, informing people that this  
11 area is restricted through overhead announcements, things of  
12 that nature.

13           And in this case, again, we don't have to rely on  
14 inferences. We have the defendant's own statements that he knew  
15 this area was restricted, and he entered anyway.

16           Okay. So I guess just going back to -- let me just make  
17 sure I'm in the right -- okay.

18           So the government also had to prove that the area was  
19 restricted under 1752(c), that there was a U.S. Secret Service  
20 protectee in the area who was or would be temporarily visiting.

21           The Court heard testimony from Inspector Hawa that the area  
22 was restricted, in part due to the vice president's visit. The  
23 visit was for the purpose of certifying the Electoral College  
24 vote, and therefore, it was temporary.

25           I think there was an attempt by the defense on her

1 cross-examination and the cross-examination of Inspector  
2 Erickson to say that the visit was not temporary. This is an  
3 argument that has been rejected by other judges in this  
4 courthouse on other January 6 cases, including in *United*  
5 *States v. Andries*, which is 21-cr-93, which is a Judge Contreras  
6 decision, where he found that the vice president was, in fact,  
7 temporarily visiting the Capitol since he went there for a  
8 particular purpose, he remained there for a limited period of  
9 time, and it's possible for a person to make a visit to a place  
10 for a business reason.

11 Again --

12 THE COURT: This is the Judge Nichols point? Is that  
13 what you're addressing?

14 MS. IYENGAR: Yes; that's correct, yes.

15 In *United States v. McHugh*, again, Judge Bates similarly  
16 found that the vice president was temporarily visiting for  
17 purposes of 18 U.S.C. 1752, and the citation for that is 2022  
18 WL 296304.

19 This point is clear. There's absolutely nothing in the  
20 record to suggest that the vice president was doing anything  
21 other than temporarily visiting. So the government has  
22 satisfied its burden to prove that there was a Secret Service  
23 protectee temporarily visiting on January 6 at the time that the  
24 defendant made his entry into the restricted area.

25 THE COURT: So you're not relying on the "will be"; is

1 that correct?

2 MS. IYENGAR: We are not relying on the "will be,"  
3 because the reality is he was temporarily visiting. He was  
4 still in the restricted area, and that was the testimony of the  
5 Secret Service agent. He remained in the restricted area  
6 throughout the time that the defendant was within the restricted  
7 area.

8 THE COURT: Do you think the defendant needs to know  
9 that the vice president is there?

10 MS. IYENGAR: No, Your Honor. Our position is that he  
11 does not need to know that, and I think the case law on this  
12 issue bears that out. In *Rehaif*, which I hope I'm pronouncing  
13 that correctly, it talks about this exact issue. So 1752(c),  
14 which places responsibility on the government to prove that a  
15 Secret Service protectee was either in the area, that there was  
16 an event of national significance going on, or that the entry  
17 was made at the White House, those are all requirements that  
18 just create essentially a jurisdictional hook for the federal  
19 government to be able to regulate this kind of behavior and  
20 ensure the safety and security of federal employees like the  
21 people who are protected by the Secret Service.

22 That does not have anything to do with the actual conduct  
23 that the defendant was engaging in. And the statute does not  
24 place a mens rea requirement on knowing that a Secret Service  
25 protectee was there. The only mens rea requirement is that the

1 defendant knew he was entering into a restricted area.

2 Okay. So I guess moving on to -- I think I'm a little bit  
3 out of order here. But I do just want to go back to if the  
4 defendant is trying to make any claim here, and I think there  
5 was an attempt to make a claim that he did not know this area  
6 was restricted, that he was entering the area where he believed  
7 a peaceful protest was going on, didn't realize that he didn't  
8 have the lawful authority to be there, all of that is undercut  
9 by the video footage in this case.

10 And I want to just draw the Court's attention to some  
11 excerpts from the transcripts of the video footage and then show  
12 a couple of clips to the Court as well.

13 So this is an excerpt from 37, Government's Exhibit 37, and  
14 this is Exhibit 37-A. And as the Court can see, as the  
15 defendant is walking up the lawn within the restricted area,  
16 he's saying to people around him, "I'll tell you what. They  
17 better be glad we're not armed out here." And then he says  
18 again, "We could all be armed, you know."

19 And then in Exhibit 40, and this is an excerpt from Exhibit  
20 40-A, the defendant says, "I'm not saying I couldn't climb up  
21 there. I just don't know if I want to put forth the energy to  
22 climb up there." Then the defendant says, "We'll wait till they  
23 get this door broken down." He's clearly making statements  
24 indicating that --

25 THE COURT: Didn't Mr. Struck say he didn't know who

1 said that?

2 MS. IYENGAR: He said he could not recognize the  
3 voice, but I think it's fair, once the Court has an opportunity  
4 to review the video footage, compare it to all the other video  
5 footage that was taken that day, you can hear that it is clearly  
6 the defendant's voice, and I think that's a fair inference for  
7 the Court to make.

8 THE COURT: Okay. Why don't you move to the  
9 disorderly conduct piece.

10 MS. IYENGAR: Sure. Okay.

11 So with respect to the disorderly conduct piece of it,  
12 after the defendant entered the restricted area, there were  
13 multiple points where he was being loud and disruptive, which is  
14 what the government is required to prove regarding the  
15 defendant's conduct, that we're required to prove that the  
16 defendant engaged in conduct that was unreasonably loud and  
17 disruptive under the circumstances.

18 So what we have with the defendant's conduct again is him  
19 climbing over metal bike racks to get to the wall leading into  
20 the Lower West Terrace, climbing over a plywood ramp to get into  
21 the inauguration platform area, which in and of itself is  
22 disruptive.

23 At one point you can see in Exhibit 44, and I can play a  
24 portion of that exhibit, you can see that the defendant is  
25 shouting over the crowd discussing the election being stolen.



1 And let me just play that for the Court.

2 (Video played.)

3 MS. IYENGAR: And I'm just going to pause it at 00:54.

4 So you have that speech that he gives to the camera where  
5 he's shouting into the camera. There also comes a time when the  
6 defendant was engaging with the crowd in a way that was loud and  
7 disruptive.

8 Now, I just want to be clear, we are not prosecuting the  
9 defendant for praying with the crowd. But the issue was the way  
10 in which he was doing it and the place that he was doing it.  
11 He's shouting over a bullhorn into the crowd and actively  
12 engaging with them.

13 And we also heard the testimony from Inspector Hawa that  
14 the mere presence of people in that restricted area created a  
15 security issue for the vice president. That's the reason that  
16 the vice president had to evacuate from the ceremonial office in  
17 the first place and remained evacuated until everybody could be  
18 cleared both from the inside of the Capitol, as well as from the  
19 outside of the Capitol.

20 So this -- all of this conduct in the aggregate is  
21 disruptive conduct -- it's disorderly conduct, I'm sorry, within  
22 the meaning of the statute. So we have met our burden on that  
23 element.

24 THE COURT: What about the fact that he thought that  
25 the certification was over? Maybe you disagree with that. But

1 as I read it, it says, "With intent to impede or disrupt the  
2 orderly conduct of government business or official functions."

3 Don't we have evidence that he thought the certification  
4 had already occurred? And if so, doesn't that kind of create a  
5 problem for you in showing the rest of this subsection?

6 MS. IYENGAR: Well, Your Honor, I mean, he's standing  
7 outside the Capitol building, first of all, in the middle of  
8 what would be a working day. So even if he didn't believe that  
9 he was interrupting the actual Electoral College certification,  
10 there's certainly governmental business that is taking place  
11 within the United States Capitol, and it's reasonable to infer  
12 that he was interfering with whatever business was taking place  
13 within the Capitol building at that time.

14 We do disagree that that was his belief at the time. While  
15 he makes claims that he believed that the vice president had  
16 already certified the election, there's no reason to believe  
17 that he thought that the vice president had already -- that  
18 there was no governmental business going on at that point.

19 And again, it's reasonable at that time of day on a working  
20 day to believe that some other business is taking place inside  
21 the Capitol that is being disrupted.

22 THE COURT: Aren't you putting the burden a little bit  
23 on the wrong side there? Don't you have to show that he did  
24 believe he was impeding government business?

25 MS. IYENGAR: Well, like I said, Your Honor, I think

1 it's reasonable for the Court to infer, based on the time of day  
2 that he was there, the location that he was there, everything  
3 that he could see that was going on around him and the conduct  
4 that he was engaging in, that this was interfering with some  
5 sort of government business that was going on at the Capitol  
6 building. Whether it was specifically to the Electoral College  
7 count or something else, he certainly was interfering with  
8 whatever business was taking place there.

9 THE COURT: Did I mishear you? Did you say you  
10 disagree with the suggestion that he thought, obviously  
11 incorrectly, that the certification had already occurred?

12 MS. IYENGAR: No. I think what I meant to say is we  
13 disagree with the suggestion that he believed that the vice  
14 president was no longer at the Capitol building or had left  
15 already or something of that nature.

16 THE COURT: I see.

17 MS. IYENGAR: So yes. So I believe we have proven the  
18 elements of showing that he was engaging in disorderly conduct,  
19 showing that he was doing so with the intent to impede or  
20 disrupt the orderly conduct of government business inside the  
21 Capitol building.

22 And again, Your Honor, I think just to go back to the video  
23 footage that we saw during the trial, the speech that I just  
24 showed in Exhibit 44 had nothing to do with praying or anything  
25 of that nature. It's talking about the election being stolen.

1 He talks about in Exhibit 64, which is the January 7 video, the  
2 Otero County Commission meeting as well, about entering the  
3 restricted area because he was upset about Vice President Pence  
4 having -- in his view, having certified the election.

5 And in Exhibit 57, which I can show to the Court, and I  
6 will just preview it for the Court, he says that we need to send  
7 a signal that we're not going to put up with this. So his  
8 intention of being at the Capitol grounds was, in fact, to  
9 impede whatever governmental business was taking place at that  
10 time.

11 (Video played.)

12 MS. IYENGAR: And I will just pause that at 00:22.

13 Furthermore, the government submits that it has proved that  
14 the defendant's conduct occurred when or so that his conduct in  
15 fact impeded or disrupted the orderly conduct of governmental  
16 business. Again, Inspector Hawa testified because of the people  
17 that were both outside the building, inside the building, the  
18 vice president had to be evacuated, that was the reason that the  
19 Electoral -- or part of the reason that the Electoral College  
20 certification had to be suspended.

21 So his conduct in the aggregate with all the other  
22 individuals that were outside created a security risk for the  
23 vice president that suspended an official proceeding.

24 THE COURT: So is your position that all these  
25 thousands of people were engaging in disorderly conduct?

1 MS. IYENGAR: Certainly the people that -- well, I  
2 think the people that were within the restricted perimeter.

3 THE COURT: Which were all of these people; right?

4 MS. IYENGAR: I'm sorry? Yes, which are all of these  
5 people who were, again -- I think a person who is just walking  
6 through, that might be a different conversation. But somebody  
7 who was being loud, encouraging people to be armed, climbing  
8 over barricades, that type of conduct is disorderly conduct, and  
9 it is disruptive. And those individuals -- I think Inspector  
10 Hawa's testimony was that the presence of these individuals  
11 itself created a security risk.

12 But in terms of the actual statute, people who are engaging  
13 in actual disorderly conduct like what the defendant was doing  
14 satisfies the elements of the statute here.

15 THE COURT: Yeah, it just strikes me that that doesn't  
16 leave much room between Subsection (1) and Subsection (2).  
17 Presumably, the whole reason for that initial trespassing  
18 section is because having people in that area creates a security  
19 risk.

20 MS. IYENGAR: Correct; yes.

21 THE COURT: I thought Congress was trying to  
22 differentiate between people who -- kind of mere trespassers  
23 versus people who engage in disorderly conduct, do something  
24 beyond -- it's something beyond their mere presence as being  
25 problematic.

1 MS. IYENGAR: Yes, Your Honor. And I think, again, if  
2 this was a case where the defendant was just walking through the  
3 area, wasn't necessarily talking to anybody or doing anything  
4 that was particularly disruptive, we would be having a very  
5 different conversation about (a) (2). That would really be  
6 something that's squarely within the confines of (a) (1), and  
7 that's the reason for that statute existing.

8 But that's not the scenario that we're in with this  
9 defendant. He did engage in disruptive conduct. He was being  
10 extremely loud, climbing over barriers, engaging with the crowd,  
11 and that's what situates him differently from someone whose mere  
12 presence was creating a security risk.

13 THE COURT: Okay. I will give you a few minutes at  
14 the end. Anything else you wanted to say before we hear from  
15 Mr. Smith?

16 MS. IYENGAR: I think I will reserve the rest of my  
17 time for rebuttal, then. Thank you.

18 THE COURT: Thank you.

19 Mr. Smith?

20 MR. SMITH: So, Judge, we're going to move quickly to  
21 the two points that you wanted us to address, but we think the  
22 Court may have learned some new things about the government's  
23 Secret Service restricted area claims yesterday, and we want to  
24 touch on those briefly.

25 Whatever the Court thinks about the cause of these

1       protestors or the embarrassment, I think the evidence -- we  
2       believe the evidence at trial showed that this case is built on  
3       a series of false assumptions and premises.

4             Officer Erickson testified that the restrictions at the  
5       Capitol on January 6 rested on Capitol Police authority, not the  
6       Secret Service's, and were about the Biden inauguration, not  
7       Secret Service protection.

8             Inspector Hawa testified -- her testimony showed that the  
9       Secret Service is the entity that as a matter of fact sets  
10      restricted areas and that as a matter of fact the United States  
11      Capitol Police did restricting here without positive input from  
12      the Secret Service at all.

13            Inspector Hawa testified that if a Secret Service agent  
14      assigned to a restricted area does not know what its size and  
15      scope is, it's probably not as a matter of fact a restricted  
16      area.

17            Well, then Inspector Hawa misidentified the restricted area  
18      several times.

19            Where do these facts fit in here? Officer Erickson and  
20      Inspector Hawa both testified that the vice president has a  
21      permanent office at the Capitol, that Vice President Pence was  
22      there in his capacity as President of the Senate, that the vice  
23      president is, quote, often at the Capitol in his office,  
24      according to Officer Erickson's testimony. The testimony of  
25      both witnesses, Officer Erickson and Inspector Hawa, was that

1 the vice president breaks ties at the Senate and presides at  
2 other proceedings there.

3 The President of the Senate does not, quote, temporarily  
4 visit the Senate. He works --

5 THE COURT: So I think I get your point, Mr. Smith.  
6 Let's think about somebody who scales the wall at Camp David.  
7 Wouldn't this be the same situation, where the walls have been  
8 set up by the Marine Corps, not the Secret Service. The  
9 president is frequently at Camp David, but it's not specifically  
10 mentioned in the statute.

11 Do you think that that person would not be committing a  
12 1752 violation?

13 MR. SMITH: Judge, there's a very specific statutory  
14 reason that would never arise, because there's a special statute  
15 for the securing of Camp David. And we didn't have an  
16 opportunity to brief it in our last briefing, but we would be  
17 happy to brief the Court on that issue. But there isn't a 17 --  
18 I mean, Inspector Hawa cannot be recalled. But there aren't  
19 1752 areas at Camp David because there's a Marine Corps statute  
20 for the restriction of the area. So if one were to enter Camp  
21 David, it's not the official residence in 1752(c)(1)(A), but it  
22 is restricted under a Marine -- under a different statutory  
23 code.

24 THE COURT: I imagine -- in fact, many other  
25 defendants have been prosecuted for kind of Capitol grounds



1 violations here. Again, why couldn't the government prosecute  
2 for both?

3 MR. SMITH: Judge, there's actually never been another  
4 prosecution of someone entering the Capitol grounds and being  
5 prosecuted for 1752 before January 6. This is the first time  
6 it's ever been done.

7 THE COURT: I believe that. My point is, there are  
8 plenty of specific statutes to the Capitol, as I'm sure you're  
9 right there are specific statutes to Camp David.

10 MR. SMITH: We think that argument cuts in our favor.  
11 If there are specific statutes, as I think Officer Erickson  
12 pointed out, that pertain to Capitol Police authority, those  
13 would be the statutes that naturally Congress intended to apply  
14 to the scenario that occurs here.

15 Officer Erickson also testified that whether one has lawful  
16 authority to enter the Capitol Police's restricted area depends  
17 on their purpose. That was very clear in his testimony. If one  
18 were to want to encounter or engage with a member of Congress,  
19 the legal authority one needs is different than if one were to  
20 want to encounter the vice president.

21 The government offered no evidence at all that Mr. Griffin  
22 had one purpose or the other. They're merely alleging he was  
23 there and protesting the election. They don't -- the government  
24 didn't offer any evidence at all as to the legal burden that its  
25 own witness testified matters. What is the purpose? What is

1 the business, in Officer Erickson's words, of the person who is  
2 visiting? That will change the analysis of whether one has  
3 lawful authority. The government presented no evidence on that  
4 standard set up by its witness.

5 Judge, the reason Inspector Hawa could not recognize the  
6 restricted area, the reason Officer Erickson said this is a U.S.  
7 Capitol Police authority area, it's about the inauguration. The  
8 reason the Court saw a bona fide Secret Service area elsewhere  
9 on the Mall with different restrictions around it is because the  
10 Secret Service understands something the prosecution does not:  
11 The vice president works at the Capitol; he does not temporarily  
12 visit it.

13 The government cited a couple of published decisions on the  
14 temporarily visiting issue. There are two of them. Neither had  
15 the benefit of testimony. Judge Bates and Judge Contreras did  
16 not sit in court and listen to a Capitol police officer say this  
17 area was set by the Capitol Police pursuant to Capitol Police  
18 authority. Those judges did not hear a Secret Service agent  
19 testify that as a matter of fact Secret Service sets restricted  
20 areas, not other law enforcement agencies, and that they did not  
21 hear testimony that the vice president has a permanent office  
22 there and is, quote, often there, in the words of Officer  
23 Erickson.

24 That testimony is important because this is a mixed  
25 question of fact and law.

1 I think we heard Ms. Iyengar say that there is no issue or  
2 the defense points to no fact in the record going to the  
3 temporarily visiting issue. That is simply not true. Both  
4 officers, as we just discussed, testified as to the permanent  
5 office of the vice president there, that he often travels there  
6 for various purposes.

7 So, Judge, moving on to the next issue, as the Court points  
8 out, Mr. Griffin had to knowingly enter a, quote, posted,  
9 cordoned off, or otherwise restricted area. Under the canons of  
10 noscitur a sociis and ejusdem generis, quote, otherwise  
11 restricted means a physical demarcation of the area.

12 So this is not just here knowingly. This is also basic  
13 satisfaction of the elements of the statute before one reaches  
14 mens rea.

15 The evidence showed that Griffin did not cross any post or  
16 cordon or receive indication from any law enforcement officer  
17 that the area was restricted.

18 The Court pointed -- the government pointed to generic  
19 montage footage from two hours before Mr. Griffin was in the  
20 area. The Court might recall one point near the Peace Circle a  
21 piece of evidence that showed barriers at 12:50 p.m. It's  
22 undisputed that Mr. Griffin did not reach the restricted area  
23 zone until 2:30.

24 One of the most crucial pieces of evidence in this case  
25 came from the government's own witness. Officer Erickson

1 testified, when asked about the stone wall, that it's not the  
2 wall itself that can be a restricted area boundary under U.S.  
3 Capitol Police restriction authority, because the wall is always  
4 there. If the wall is going to be a restricted area for this  
5 purpose, it has to be posted, cordoned, or signed "Do Not  
6 Enter." It is undisputed there was no sign on the wall.

7 As the Court pointed out, we could go to the Capitol today,  
8 and for First Amendment reasons, as I'm going to discuss later,  
9 jump on the Capitol lawn as much as we like. And it's not just  
10 not illegal; it's your constitutional right.

11 So Officer Erickson then testified that there were green  
12 snow fencings -- snow fencing. Well, what did he say about  
13 this? First, he said it's for the inauguration. Second, he  
14 said -- agreed that the green snow fencing in the area where  
15 Mr. Griffin entered was on the ground and did not have any sign  
16 on it. He testified that a person like Griffin would have no  
17 reason to know of the restricted area without a sign or law  
18 enforcement telling them.

19 Matt Struck, the government's witness, testified no officer  
20 informed them all day that this was a restricted area.

21 THE COURT: What do I do with the fact that we have  
22 statements from your client saying that he had been told?

23 MR. SMITH: So let's say the government had just  
24 offered this argument about Mr. Griffin's statement and there  
25 was no rebutting evidence. You just have two statements from

1 Mr. Griffin the day after -- one day after January 6 and seven  
2 days after. If that were it alone, that would be a respectable  
3 argument, but it wouldn't be beyond a reasonable doubt.

4 What we have in the testimony, in the record is Struck  
5 testifying that Griffin did not encounter law enforcement all  
6 day and that Mr. Struck believes Griffin was referencing social  
7 media posts that he had read after January 6 about law  
8 enforcement encountering protestors.

9 It is undisputed in the record Mr. Griffin did not  
10 encounter any law enforcement. So how could Griffin have known  
11 that he was not allowed to enter the area from law enforcement  
12 if he did not encounter them?

13 Mr. Griffin -- I think Mr. Struck also testified that  
14 sometimes Couy mouths off unfortunately. That's what  
15 Mr. Griffin was doing. He did not hear from law enforcement he  
16 could not enter, and that testimony from Struck alone prohibits  
17 a finding of guilt beyond a reasonable doubt.

18 And those two statements on January 7 and January 14, the  
19 defendant is also referencing other people, Your Honor. He's  
20 not saying, "I heard from law enforcement." He said, "When some  
21 patriots are told by law enforcement." Just that distinction  
22 alone is reasonable doubt. This is Mr. Griffin speaking after  
23 the event, one time seven days after, after all of the media in  
24 the world is drowned with references to police interacting with  
25 protestors.

1           We want to emphasize, Judge, that when Officer Erickson was  
2 referring repeated times to sections of snow fencing around the  
3 west front, he was referencing the -- he was referencing  
4 sections that were either not the area where Mr. Griffin  
5 specifically entered or sections as they existed hours before  
6 Mr. Griffin arrived there. Officer Erickson didn't offer any  
7 testimony about green snow fencing with respect to the area  
8 Mr. Griffin entered except the green snow fencing that was  
9 already down and did not have a sign on it.

10           THE COURT: What about the fact that they were -- your  
11 client was there the day before when they had been up and the  
12 signs were displayed?

13           MR. SMITH: So if Your Honor is referring to the  
14 exhibit where Mr. Griffin is standing in front of an SUV, I did  
15 not even see the snow fencing, and the defendant is facing the  
16 video camera.

17           Also, he was about like maybe 2,000 feet away from the snow  
18 fence. I didn't see any signs posted on the snow fences in the  
19 deep background of that video, and there's no evidence that the  
20 defendant saw them either.

21           So I think there's a critical question that we reach at  
22 this point, which is can the Court presume knowledge of entering  
23 a restricted area beyond a reasonable doubt based on crossing a  
24 stone wall with no "Do Not Enter" sign and no fencing in place  
25 at that area? It can't presume that knowledge because the west

1 front is a public forum. That's the *Jeannette Rankin Brigade*  
2 case. That's the *Lederman* case in the D.C. Circuit. That's  
3 binding authority here.

4 So for the Court to presume knowledge, infer, as the  
5 government says, infer knowledge that he's entering a restricted  
6 area because he entered the lawn of the Capitol would be basing  
7 an inference on constitutional error. He has the right to be  
8 there.

9 THE COURT: But, I mean, don't you have a problem that  
10 he went up to the stage?

11 I think, you know, if we were just talking about the stone  
12 wall, I'm sure you'd be right. But he went over three walls.  
13 He went up this little -- through this door that the government  
14 says he said had to be busted down. He went up to the stage  
15 that -- nobody thinks that random tourists could just kind of  
16 waltz up there; right?

17 MR. SMITH: If nobody thinks that, they don't know  
18 their D.C. Circuit law. The D.C. Circuit held that a protestor  
19 who was on the east Capitol -- east front Capitol steps is in a  
20 public forum, Your Honor. So if there's no --

21 THE COURT: That's not the stage. I'm talking about  
22 the --

23 MR. SMITH: This is the west front. Even if there's  
24 some sort of distinction between -- well, let's go to the west  
25 front. We can go to the *Jeannette Rankin Brigade* which is

1 binding because it was summarily affirmed by the Supreme Court.  
2 The case involved 5,000 protestors who wanted to march toward  
3 the west front steps of the Capitol. No Secret Service statute  
4 was applied, but the chief of police said that they would be  
5 guilty of parading on the Capitol grounds if they were to  
6 approach the steps. This court and then the Supreme Court held  
7 that no, this is a public forum, this is a public forum, and  
8 that overrode restrictions that -- the parading on the grounds  
9 restrictions.

10 But here, the issue is different because if there's no sign  
11 or law enforcement officer telling you you can't be on the west  
12 front of the Capitol steps, what you're left in that vacuum with  
13 is a public forum. It is the case law in this district that the  
14 steps are a forum.

15 THE COURT: They can be restricted; right?

16 MR. SMITH: They can be restricted, but then we're  
17 back to the question of signs.

18 THE COURT: Well --

19 MR. SMITH: We're back to the question of notice.  
20 Officer Erickson testified that -- I asked him, "How would  
21 someone be notified if there's no sign saying do not come in?"  
22 And he said, "From law enforcement." But no law enforcement  
23 spoke -- there's no evidence that law enforcement spoke with  
24 Mr. Griffin in the record.

25 With all these January 6 cases, we're coming to them with



1 the assumption that someone should not be on the Capitol  
2 grounds. That's -- it's a remarkable assumption, because  
3 there's case law going back decades saying that's not true. Not  
4 only are you not prohibited; you have a right.

5 So to say that Mr. Griffin's guilty knowledge should be --  
6 we can infer that based on his exercise of the right that this  
7 court has recognized? That is so remarkable.

8 I mean, it would be one thing if he was being prosecuted  
9 for assaulting someone, for planning to enter the building, for  
10 threatening members of Congress inside. He's being prosecuted  
11 for standing on the steps that this court has held are a public  
12 forum.

13 And the only reason we think this is remarkable is because  
14 of all this -- because of this particular set of facts. But  
15 it's not just about these facts. This is the law.

16 THE COURT: But he's not on the steps. He's on a  
17 stage.

18 MR. SMITH: The stage was set up right on the -- that  
19 is the public forum. If you're saying that entering the --  
20 well, Officer Erickson testified that there was no restricted  
21 area distinction between the stone wall area and the inaugural  
22 platform. He didn't say that one is entering a restricted area  
23 at that point.

24 And the knowledge question goes to the point at which the  
25 defendant made a decision whether or not to enter a boundary

1 line. You have to knowingly enter. The mens rea element  
2 applies to the action of entry, not the action of a decision to  
3 step in a certain place once the defendant has already made a  
4 decision to go into the defined area.

5 So knowingly applies to the decision that Mr. Griffin made  
6 when he's deciding whether to go over the stone wall. Is that a  
7 guilty mind? Well, with no sign there saying get out, stay out,  
8 with no fencing up, the guilty mind assumes that an exercise of  
9 his right is criminal. That can't be the law.

10 And it's not just the law for January 6. There have been  
11 thousands of protestors who would fill up the whole National  
12 Mall who would have mens rea if this were the case.

13 And it's also important to emphasize that a ruling in this  
14 case would not apply to every other single 1752 case as the  
15 government fears. That's simply not true. One of the  
16 government's exhibits that it showed was protestors running  
17 through a barrier that had a "Do Not Enter" sign prominently  
18 disclosed on it. That's a completely different case. And not  
19 all of these cases are the same. The government shows that  
20 exhibit as though -- not really explaining where it is or what  
21 time it is, as though that is going to apply to Mr. Griffin. He  
22 had a completely different mind.

23 So, Judge --

24 THE COURT: But isn't it kind of similar, though? I  
25 mean, if you're saying that his guilty knowledge needs to be

1 judged at the moment he went over the Olmstead wall, what about  
2 that protestor who maybe also went over the Olmstead wall and  
3 first is faced with a clear sign when he's in the building?  
4 Aren't you suggesting that he also would be not guilty?

5 MR. SMITH: So which protestors? What's the  
6 hypothetical?

7 THE COURT: The one that you're describing, someone  
8 who is bursting through a "Do Not Enter" sign but clearly has  
9 been within the restricted area for some time.

10 MR. SMITH: Then we get to time, place, and manner,  
11 Your Honor, because then we have a restriction that is putting  
12 the defendant on notice. Then the question becomes is that a  
13 time, place, and manner restriction consistent with First  
14 Amendment law.

15 But we're not reaching that point. We're saying, do we  
16 assume a guilty mind without any notice on the point of entry  
17 based on the mere fact of crossing a stone wall that surrounds a  
18 public forum? So you -- the Court would be -- the government is  
19 asking the Court to entangle itself inferring knowledge based on  
20 his exercise of something that is a constitutional right without  
21 a time, place, and manner restriction.

22 And that's -- so, Judge, we want to -- on knowledge, we  
23 think there's one thing that -- setting aside Struck and saying  
24 his testimony, uncontested testimony, government witness, that  
25 Mr. Griffin didn't encounter any law enforcement so his

1 statements later were about other people or God knows what,  
2 there's one fact that completely prohibits a finding of guilt  
3 beyond a reasonable doubt on knowledge. The government's  
4 knowledge case rests on the absurdity that Griffin knew a  
5 restricted area its own Secret Service agent did not. The  
6 Secret Service agent could not identify the restricted area.  
7 And yet, Mr. Griffin's knowledge of it beyond a reasonable doubt  
8 is supposed to be found.

9 I've never heard of such a case where the government's own  
10 agent doesn't know what defines the crime, and yet, the  
11 defendant does? That fact alone is not just not guilt beyond a  
12 reasonable doubt. It -- he didn't know. The defendant didn't  
13 know. The Secret Service agent didn't know.

14 On the point about the vice president's presence in the  
15 restricted area, Judge, there's a sworn statement in the record  
16 that says the Capitol Visitor Center is not the same as the  
17 building, and I understand the Court held that the Capitol  
18 Police are not the same as the government, so there was no party  
19 admission.

20 But the government adopted the statement by filing it in  
21 court. The Capitol Visitor Center, particularly the loading  
22 dock under the building, is not the Capitol building. The  
23 undisputed evidence is that Pence left the building at 2:28.  
24 Griffin entered the restricted area, as the government calls it,  
25 at no point before 2:31. Griffin was not in the building or

1 grounds with the vice president.

2 But even if the vice president was in the building, there's  
3 simply no way to find beyond a reasonable doubt that Griffin  
4 knew that fact. And, Judge, the Court does need to find that  
5 fact, and we have a bone to pick with the government's case  
6 citations.

7 The presumption of scienter says that the knowingly element  
8 modifies every element of the crime. That also includes  
9 definitions of what the guilty acts are. That's the *Staples*  
10 case.

11 Ms. Iyengar said that the *Rehaif* case supports the  
12 government. It does not. The *Rehaif* case reversed a conviction  
13 because the Court failed -- did what the government is asking  
14 the Court to do here, which is not to apply the knowingly  
15 element to every element of every actus reus in the crime.

16 *Staples* is unequivocally clear that that requirement, the  
17 presumption of scienter, applies to the definitions in the  
18 statute of the offense itself, of the actus reus.

19 Here, the actus reus is entering a restricted building and  
20 grounds. That means one thing in the statute and nothing else.  
21 It means a place where a protectee is or temporarily will be.  
22 It doesn't mean something else.

23 THE COURT: So you're saying that somebody has to know  
24 that a protectee is there to be --

25 MR. SMITH: They have to know that, because the

1 presumption of scienter says that the mens rea element modifies  
2 every element of the statute, every element, every actus reus.  
3 The actus reus is entering a restricted building and grounds,  
4 and restricted building and grounds has one meaning alone in the  
5 statute, which is a place where a Secret Service protectee is or  
6 temporarily will be visiting under Section 1752(c) (1) (B).

7 THE COURT: So --

8 MR. SMITH: Judge, there is no argument under *Rehaif*.

9 THE COURT: That just feels preposterous in  
10 practicality. President Biden goes home to Delaware, and the  
11 Secret Service have to tell people sorry, you can't come in  
12 here, the president is in here?

13 What kind of security issues is that going to raise if the  
14 Secret Service is required to tell people who is in the  
15 restricted area in order for the restricted area to have any  
16 teeth?

17 MR. SMITH: Well, Judge, we would point to the *Burse*  
18 case where the Fourth Circuit found that knowledge was only  
19 proven because the government informed the defendant many times  
20 that he knew a Secret Service protectee was in the area. That  
21 was --

22 THE COURT: That was also a former version of the  
23 statute that I think had a willfulness --

24 MR. SMITH: Willfully.

25 THE COURT: --which is no longer there.

1           MR. SMITH: That -- fair point, Your Honor. But then  
2 the analytical framework the Fourth Circuit uses to analyze  
3 whether knowledge was found beyond a reasonable doubt was based  
4 on facts going to his -- the defendant's knowledge that a Secret  
5 Service protectee was in the area.

6           But I pose another hypothetical to the Court. Suppose  
7 there's a restricted cordon around a building where a vice  
8 president is visiting and a student has a dissertation due in  
9 two days. He's got to run inside the building. He doesn't know  
10 the president's in there. He runs inside; he runs back out.  
11 Well, you might say that's a bad decision. Is that the kind of  
12 person that Congress intended 1752 to reach, someone who has no  
13 knowledge that the president is even in a place?

14           The point of the statute is to keep -- the whole crime is  
15 to keep people from getting too close to the president. The  
16 guilty mind has to go to what the purpose of the crime is.

17           A student running into a building to get his dissertation  
18 and running back out who doesn't know the president is in there  
19 is not the guilty mind that Congress is talking about. It's  
20 talking about a person who wants to accost someone.

21           And it doesn't -- the statute doesn't require the  
22 government to prove that, but that's the type of guilty mind  
23 we're thinking of, not someone who has no idea this has anything  
24 to do with the president, the vice president, any of the Secret  
25 Service protectees.

1           The sweep of that would reach way too far. We provided  
2           some examples in our opposition to the government's trial brief,  
3           but there are so many examples that would not really make any  
4           sense for not applying the presumption of scienter.

5           And don't forget, Judge. This is a presumption. The  
6           government has to rebut this. They've cited one case, and the  
7           presumption was applied there.

8           I think the Court already pointed out that what the  
9           knowledge -- what the evidence was regarding Mr. Griffin's  
10          knowledge. The government has not offered a single text  
11          message, nothing from Struck's testimony, not one statement of  
12          Mr. Griffin's, even though he was filmed virtually the whole  
13          day, indicating his knowledge that the vice president was in the  
14          building.

15          The government provided some evidence, I think a  
16          January 5th video in front of the SUV, where Mr. Griffin says,  
17          "Pence has a big decision to make tomorrow." Okay. That was  
18          one day before. The evidence the next day shows that  
19          Mr. Griffin believed -- I think there's at least four pieces of  
20          evidence that showed that Mr. Griffin believed that the thing  
21          had been certified about three-quarters of the way on his walk  
22          towards the Capitol.

23          It's the government's burden. They've proven beyond a  
24          reasonable doubt that even though Mr. Griffin believed that  
25          Pence had certified the election, that the whole thing was still



1 in process and that he was still there? They haven't proven  
2 that.

3 The evidence also showed that Mr. Griffin believed that the  
4 setup at the Capitol was for Biden's inauguration, not for Vice  
5 President Pence. That shows a state of mind different than  
6 knowledge that Vice President Pence was there.

7 I think even the statement the government relies on,  
8 Mr. Griffin saying that if you tell some patriots -- if the  
9 police tell some patriots that you can't go to Biden's  
10 inauguration, you know, look and see what happens, whatever, I  
11 don't -- we don't know why the government thinks that evidence  
12 supports its case. It shows that Mr. Griffin does not have  
13 knowledge of the vice president's presence, or it certainly  
14 suggests that he doesn't think that any of this restriction has  
15 to do with the vice president.

16 So, Judge, on Count 2, disorderly conduct, the government's  
17 case is simply unsupported by evidence at all, and this is  
18 really a proper venue for a Rule 29 motion, but it's -- we're  
19 not going to formally file it because the Court can consider it  
20 under the trial standard.

21 Griffin led a prayer at the Capitol. At first, the  
22 government was totally unclear about what exactly were the  
23 actions that constituted disorderly conduct. We will go through  
24 them right now.

25 First, the government said walking up ramps. Well, as the

1 Court pointed out, that collapses any distinction between  
2 entering the restricted area and disorderly conduct.

3 Then the government pointed to some speech before  
4 Mr. Griffin's prayer and said that this is disorderly conduct,  
5 but it said we're not prosecuting him for his speech, it's just  
6 that this speech is disorderly or this type of speech.

7 I'm not really exactly sure what the argument is, Judge,  
8 but in order to prosecute speech here, you need to show -- to  
9 satisfy the *Brandenburg* standard and *Hess v. Indiana*.

10 The government doesn't come close to showing that his  
11 statements, which were not directed towards the crowd, satisfy  
12 the *Brandenburg* test, which is whether speech was directed to  
13 inciting imminent lawless action and likely to produce it.

14 Well, you didn't even hear an argument from the government  
15 on *Brandenburg*, but that's because his speech, which was just  
16 made to a couple of people standing around him, was not directed  
17 toward inciting imminent lawless action.

18 In fact, a couple of seconds later, he addresses the crowd  
19 in a prayer where witness Matt Struck said that he saw people  
20 calm down and more contemplative after Mr. Griffin spoke. That  
21 is not just not disorderly conduct; that's the antithesis of  
22 disorderly conduct.

23 Struck also testified that Griffin did not harm or threaten  
24 anyone that day. He testified that his actions did not put  
25 anyone in reasonable fear for their property or their person.

1 The government comes up with the disorderly conduct definition  
2 that it says any loud speech is disorderly conduct. It doesn't  
3 say where that comes from, but that's because that would be  
4 unconstitutional if there were such a law.

5 Under D.C. law, disorderly conduct is intentionally or  
6 recklessly acting to put another person in reasonable fear for  
7 their person or property or inciting violence. That's D.C. Code  
8 Section 22-1321. And why would it be appropriate to apply the  
9 D.C. Code here? Because Congress did not preempt the field in  
10 Section 1752. We are in the District of Columbia. There's no  
11 reason that Congress -- there's no reason to read 1752 in such a  
12 way that we believe Congress intended to override the local  
13 ordinances and laws of the place where 1752 is being applied.

14 THE COURT: So you think 1752 would be defined  
15 differently, depending on if they were like over in Maryland?

16 MR. SMITH: I'm referring to just the general  
17 principle of preemption, Your Honor.

18 THE COURT: Yeah, I understand that.

19 MR. SMITH: If there's a set of criminal laws that are  
20 applying in a jurisdiction and they're overlapping with a  
21 federal law, we don't assume that -- the normal statutory  
22 interpretation is we're not assuming that Congress intended to  
23 wipe out the understanding of the local laws unless it says so.

24 So if 1752 is applied in a jurisdiction where disorderly  
25 conduct, for example, falls short of the constitutional

1 standard, like the government is proposing -- well, we would  
2 analyze it constitutionally, but if it falls within a  
3 jurisdiction of a place where disorderly conduct is defined a  
4 certain way, why would Congress intend it to be applied  
5 differently? And if they did, they didn't say it.

6 THE COURT: Well, maybe so the Secret Service would  
7 not have to be applying different standards depending on which  
8 side of the Potomac they're on.

9 MR. SMITH: The Secret Service doesn't apply the  
10 disorderly conduct standard.

11 THE COURT: No, they apply this. They've got to --

12 MR. SMITH: They don't apply a standard, Judge. They  
13 just protect the president.

14 THE COURT: Well, they make arrests.

15 MR. SMITH: I actually don't -- well, so, Your Honor,  
16 I think if someone's in a restricted area and they're refusing  
17 to leave, that's a restricted area. I mean, I don't know if  
18 they would decline to arrest -- you can't be disorderly and  
19 disruptive if you're not in the restricted area.

20 But either way, Judge, I think that as a general matter  
21 Congress doesn't preempt local criminal laws unless it says so.

22 THE COURT: All right. You've got five minutes, sir.

23 MR. SMITH: Okay. Judge, we just want to emphasize  
24 that the government's standard of loud noise is not coming from  
25 someplace. Loud noise is not disorderly conduct, because,

1 number 1, it doesn't have a mens rea requirement. You need to  
2 have some kind of intent.

3 The government said that it was Mr. Griffin's intent to  
4 disrupt Congress because he led a prayer, because he said "you  
5 might get more of this," "there might be more of this where  
6 that's coming from."

7 Judge, you can't find guilt beyond a reasonable doubt about  
8 that because Mr. Struck testified that Mr. Griffin's statements  
9 showed that he was there to support free and fair elections.  
10 The Court watched the government's own statements about that  
11 right after -- as he was leaving the Capitol. It saw a  
12 statement from Mr. Griffin saying his purpose in being there was  
13 to ensure a better life for his children. Those aren't the  
14 stereotypical disorderly conduct types of actions.

15 But whatever the standard is, I think Struck's testimony  
16 that Mr. Griffin -- he saw no action on Mr. Griffin's part that  
17 would put anyone in fear of the property or person, I think,  
18 prohibits a finding of guilt beyond a reasonable doubt.

19 Judge, and very quickly, the government referenced  
20 Inspector Hawa's testimony that the mere presence of people  
21 created a risk, people. But the burden is to show that the  
22 defendant's conduct, not people. She testified that Mister --  
23 that Vice President Pence had entered the secure location before  
24 Mr. Griffin had even crossed the stone wall. So Mr. Griffin's  
25 entering the area did not prompt Vice President Pence to leave.

1           But then, Judge, his one person -- the government has not  
2 offered any evidence showing one person's presence standing out  
3 there enhanced the security risk for Vice President Biden. It  
4 would be one thing if Mr. Griffin was inspiring other people to  
5 enter. Then he would be responsible for other people's actions.  
6 But the government hasn't offered any proof of that.

7           THE COURT: What about the idea that he kind of  
8 inspired this chanting right outside the Capitol while people  
9 are trying to conduct business?

10          MR. SMITH: But Struck's testimony was, and the Court  
11 saw, that the prayer calmed people down. It's visible. That's  
12 not bunk. You can watch the video again, Judge, Your Honor, and  
13 you will see that people -- there's a section of the crowd  
14 that's calm and listening to Mr. Griffin. People around are a  
15 sea of noise. That's the opposite of incitement.

16          THE COURT: I thought I saw -- I mean, some people  
17 kneeled, but a lot of other people start, you know, chanting  
18 "pray for Trump"; right?

19          MR. SMITH: We would say chanting can't constitute  
20 disorderly conduct because that would violate the Constitution.

21          THE COURT: You don't think if people came in here and  
22 started chanting during court that would be disorderly conduct?

23          MR. SMITH: The Supreme Court had an interesting  
24 decision a few years ago -- or excuse me, the D.C. Circuit did  
25 called *Bronstein* where the Court drew a distinction between

1 people protesting in courts and at the Capitol. That's also in  
2 the *Jeannette Rankin* case. And there's a fundamental  
3 distinction, which is that a court is not a public forum.

4 THE COURT: Thank goodness for that.

5 MR. SMITH: So maybe when people run into Supreme  
6 Court confirmation hearings and scream, you would say well,  
7 maybe the government would regard that as disorderly conduct,  
8 but it's not. People who do that are not even arrested, much  
9 less charged with 1752 violations. So the government's  
10 statements about disorderly conduct are not very credible.

11 The Capitol steps are a public forum under *Jeannette Rankin*  
12 *Brigade* and *Lederman*, and giving speeches at a public forum  
13 cannot constitute disorderly conduct without incitement. Under  
14 *Brandenburg*, there's no incitement.

15 And then, Judge, I think I just want to emphasize that  
16 there is not only the intent to commit disorderly conduct, but  
17 the defendant's actions have to in fact disrupt the orderly  
18 conduct of business.

19 So there's a factual element here, too. The Court saw no  
20 evidence that Mr. Griffin's actions themselves disrupted  
21 government business. As the Court pointed out, not only did  
22 Mr. Griffin believe that the business had concluded; the session  
23 had recessed about over an hour before Mr. Griffin got there and  
24 wasn't gavelled back in until 8:30 in the evening.

25 So this isn't just about Mr. Griffin's intent. This is

1 about the facts. It was a fact that they were in recess from an  
2 hour before Mr. Griffin arrived there until several hours after  
3 he left. It has shown no evidence, much less beyond a  
4 reasonable doubt, that his actions specifically disrupted  
5 government business.

6 Judge, the final thing we want to say is that someone said  
7 that wisdom is the ability to hold two contradictory ideas in  
8 mind at the same time and not lose your capacity to function.

9 So in this case it can both be true that January 6 was  
10 embarrassing and shameful and that the government has not proven  
11 a 1752 offense specifically for Griffin's prayer and conduct on  
12 the Capitol steps.

13 So we would ask the Court to enter a judgment of not guilty  
14 on both counts.

15 THE COURT: Thank you, Mr. Smith.

16 Ms. Iyengar, brief rebuttal?

17 MS. IYENGAR: Yes, Your Honor. There were just a few  
18 points that I wanted to respond to.

19 Mr. Smith, I think, spent a significant amount of time  
20 talking about where the snow fencing was, if there were any  
21 signs up to put the defendant on notice that this area was  
22 restricted. But that's just not where we are in this case.  
23 Again, like I said in my initial closing, if this was a case  
24 where the defendant had just hopped over the wall and then  
25 hopped right back over, we probably wouldn't even be having this



1 conversation right now.

2 But that's not the case. The defendant went all the way up  
3 the west lawn, onto the Lower West Terrace, onto the  
4 inauguration platform, where the Court rightfully pointed out a  
5 reasonable person would not think they have lawful authority to  
6 be in that area.

7 THE COURT: So can you address, though, his point  
8 about you need to have a guilty mind when you enter the  
9 restricted area? I mean, that feels like the harder -- isn't he  
10 right about that, that you've got to know what you're doing is  
11 wrong when you -- the Olmstead wall, why isn't the Olmstead  
12 wall, that moment being the one that matters?

13 MS. IYENGAR: Again, this is not a case where we're  
14 asking the Court to make an inference about the defendant's  
15 knowledge. He told us what his knowledge was when he entered  
16 the restricted area. He told us in two separate statements, one  
17 that was made in his official capacity as an elected official at  
18 a county commissioners meeting. He knew he was not supposed to  
19 be in that area, and he entered it anyway. He could not have  
20 been any more clear.

21 Mr. Smith's argument about Mr. Struck's testimony regarding  
22 Mr. Struck's belief of the defendant's knowledge should be given  
23 very little weight. The defendant made these statements on  
24 multiple occasions following January 6 that he was well aware  
25 this area was restricted and he entered it anyway. That's clear

1 as day. There's nothing in the record to contradict that, and  
2 that evidence in and of itself shows that the defendant had  
3 knowledge that this area was restricted.

4 THE COURT: How would you evaluate Mr. Struck's  
5 credibility?

6 MS. IYENGAR: Well, I think the questions regarding  
7 his knowledge of what the defendant thought, I don't think we're  
8 really in the realm of his credibility necessarily. Obviously,  
9 it's difficult for one person to know what another person  
10 thought or knew at the time.

11 THE COURT: Sure. But he said they never saw police;  
12 right?

13 MS. IYENGAR: Right. And obviously, that was his  
14 perception of what was going on. But again, we have -- this is  
15 not one off-the-cuff statement that the defendant made while  
16 this was all going on or following the events. These were  
17 multiple statements that he made in what appear to be planned  
18 speeches, again not off-the-cuff remarks, and again a speech he  
19 was making in his official capacity as an elected official  
20 admitting that he knew he was entering a restricted area.

21 So Mr. Struck's perception of what was going on, I don't  
22 think there's any reason for the Court to necessarily, you know,  
23 discredit his testimony on that. That was his perception.

24 But the defendant's knowledge, what was going on in his  
25 mind, that's a completely separate issue, and I think his own

1 words speak to what his knowledge was at that time.

2 And I would also just point out to the Court that the  
3 statute talks about entering and remaining in a restricted area.  
4 And there is substantial evidence in the record regarding both  
5 the defendant and Mr. Struck remaining in the restricted area  
6 here. You can see from the time stamps in the videos that  
7 several hours passed after the defendant crossed over the  
8 Olmstead wall, walked up the lawn, walked up to the inauguration  
9 platform, remained on the inauguration platform, and then came  
10 back down onto the lower area on the Capitol grounds. So not  
11 only did he enter a restricted area, but he also remained in it  
12 for a substantial period of time.

13 I also think with regard to the knowing issue, you know,  
14 this is not -- the defendant's conduct is not taking place in a  
15 vacuum here. It's not like he's one person hopping over a wall  
16 by himself with no one else around him. He can see what's going  
17 on around him, and the Court can see from the video footage the  
18 conduct that people were engaging in around him. People were  
19 scaling walls. You can see in one of the videos that somebody  
20 is trying to break a window.

21 You can also see in Exhibit 43-1 the defendant walking up  
22 the staircase leading up to the inauguration platform. You can  
23 see as he's walking up the staircase he covers his face with a  
24 jacket, and he says, "I love the smell of napalm in the air,"  
25 which I think we can reasonably infer is the defendant reacting

1 to the fact that there are chemical agents being released by law  
2 enforcement to try to disperse the crowd.

3 So he clearly knew he wasn't supposed to be in this place,  
4 and he decided that he was going to be there anyway.

5 THE COURT: Can you address Mr. Smith's argument that  
6 this was a Capitol Police restricted area, not a Secret Service  
7 restricted area?

8 MS. IYENGAR: Well, I think this was an issue that we  
9 litigated previously.

10 THE COURT: As he points out, though, I think there  
11 were -- he got a couple factual points here out of the police  
12 inspectors that we didn't have before.

13 MS. IYENGAR: Sure. But again, I mean, what -- the  
14 testimony that we have from Inspector Hawa is that Secret  
15 Service does this in tandem with Capitol Police, which I think  
16 was the information we had even before this trial began. They  
17 work in tandem to ensure the safety and security of Secret  
18 Service protectees who visit the Capitol building, which seems  
19 logical because that is the police force that is in charge of  
20 the Capitol building and the grounds.

21 The fact that U.S. Capitol Police was in charge of setting  
22 up the perimeter, knew what the perimeter was, and perhaps  
23 Inspector Hawa didn't know exactly that the barriers were placed  
24 on one side of the street versus another side of the street,  
25 that doesn't take away from the fact that, you know, again this

1 was an area that was restricted in part due to the vice  
2 president's visit.

3 Exhibit 6, which was the e-mail from Inspector Hawa to U.S.  
4 Capitol Police saying that Vice President Pence was going to be  
5 visiting the next day, part of the reason for sending that  
6 e-mail was to ensure that the correct safety protocols were in  
7 place for his visit.

8 So regardless of who was physically setting up the barriers  
9 or who was determining what the restricted perimeter was, this  
10 is still a restricted area within the definition that's set out  
11 in 18 U.S.C. 1752.

12 So I also just wanted to address, I guess, the issue  
13 regarding the mens rea requirement that Mr. Smith raised. The  
14 *Staples* case that he keeps referring back to, that reads a mens  
15 rea requirement into the statute in the *Staples* case where there  
16 was no mens rea requirement.

17 That's not the situation that we have here. 1752 sets out  
18 a mens rea requirement that the defendant knowingly entered a  
19 restricted area. It could not be clearer. They don't -- they  
20 purposefully did not require knowledge of a protectee being  
21 present, knowledge of an event of national significance taking  
22 place, knowledge that the person was entering an area that was a  
23 part of the White House grounds. They could have -- Congress  
24 could have done that. They chose not to do that here. They  
25 only required that the mens rea apply to the knowledge that the

1 person was entering a restricted area. So there's no reason to  
2 read a new mens rea requirement into the statute at this point.

3 The point that Mr. Smith raised about *Bursey*, that the  
4 Court in that case discussed the defendant in that case having  
5 knowledge of the president's presence, that was an issue that  
6 was raised by the defendant. He said the government never  
7 proved that I knew that the president was there or going to be  
8 there. The testimony that happened to come out during trial was  
9 that the defendant in fact had made statements indicating that  
10 he knew that the president was going to be there.

11 And the Court was essentially just responding to what the  
12 defendant's argument was saying there is sufficient testimony in  
13 the record to say that the defendant absolutely had knowledge  
14 that a protectee was going to be in that area.

15 The Court did not say that there is this mens rea  
16 requirement that an individual know that a protectee is going to  
17 be in that area in order to be convicted under the statute. And  
18 as the Court noted, that was an older version of the statute.

19 I think I also just wanted to address the disorderly  
20 conduct arguments that Mr. Smith had made. The definition that  
21 I just stated to the Court, that we put in our trial brief, that  
22 definition came directly from the Red Book, that disorderly  
23 conduct is conduct that is unreasonably loud or disruptive.

24 Disorderly conduct does not require someone to incite  
25 people to violence or anything else. It's just as simple as

1 that. It's conduct that is unreasonably loud or disruptive.

2 The record is clear here from watching the video footage of  
3 the defendant's conduct, he absolutely was engaging in conduct  
4 that qualifies as loud and disruptive. He's engaging with the  
5 crowd in a way that is loud and disruptive. And as the Court  
6 pointed out, after he says the prayer that he says to the crowd,  
7 people start erupting in these chants. He makes a speech to the  
8 camera talking about election fraud in a way that is extremely  
9 loud. He climbs over barriers.

10 All of that conduct taken in the aggregate is disorderly  
11 conduct under the statute, and we have met our burden on that  
12 element.

13 I think the only other two points that I wanted to address,  
14 Mr. Smith had started out with this issue of no evidence being  
15 in the record that the defendant didn't have a lawful purpose  
16 for visiting the Capitol that day.

17 Well, the nice thing about this case is we have video  
18 footage of what the defendant and Mr. Struck were doing on the  
19 Capitol grounds on January 6. At no point in time are either of  
20 them making any sort of effort to visit a particular  
21 congressperson or be there for any sort of a lawful purpose.

22 The defendant again also makes several statements following  
23 January 6. On January 7 at the Otero County Commissioner  
24 meeting, talking about what his purpose was for going up to the  
25 Capitol, and it had nothing to do with any sort of lawful

1 purpose of visiting a particular congressperson or anything of  
2 that nature. It was to go -- it was because he was -- the  
3 defendant was upset about the election having been certified.

4 And I think just the last point I wanted to bring up,  
5 Mr. Smith had discussed an affidavit, I believe, from a sergeant  
6 at the United States Capitol Police. And I just wanted to be  
7 clear, that was never entered into evidence. So we would just  
8 ask that the Court not consider that.

9 THE COURT: Can you respond to Mr. Smith's point that  
10 Congress had already been gavelled out of session before the  
11 defendant entered the restricted area and didn't resume until  
12 after?

13 MS. IYENGAR: So I think that goes to -- my  
14 understanding was that went to sort of the disorderly conduct  
15 piece of it.

16 THE COURT: Yes.

17 MS. IYENGAR: So again, as I was saying, I think it  
18 goes sort of both to the issue of whether he was intending to  
19 disrupt and whether he actually disrupted.

20 Taking that second piece first, the testimony we heard from  
21 Inspector Hawa was that not only did the people who came before  
22 the evacuations took place cause the evacuation to occur of the  
23 vice president, but he stayed evacuated in the loading dock area  
24 because people were continuing to breach the security perimeter.  
25 And that included the defendant. So his mere presence in the



1 security perimeter was creating a security issue. But again,  
2 his conduct was also loud and disruptive under the meaning of  
3 the statute. So that element has been satisfied.

4 With respect to his intent to disrupt, again, I think, you  
5 know, this is going on in the middle of the day. You can see  
6 that when the defendant crosses the Olmstead wall it's about  
7 2:31 p.m. This was on a working day at the Capitol building  
8 where I think the Court can infer there was government business  
9 going on.

10 THE COURT: But actually not right then. That's kind  
11 of the weird thing, is because it had already been --

12 MS. IYENGAR: Sure, but I think in terms of the intent  
13 piece of it, whether it was going on right at that moment or  
14 not, that doesn't, I think, really play into what the  
15 defendant's intent was.

16 THE COURT: I see. You're just focusing on --

17 MS. IYENGAR: Correct. So I think in terms of whether  
18 he actually did disrupt, his presence there was just causing a  
19 further disruption of government business by causing the vice  
20 president to remain in the relocation area and not return to the  
21 Senate chamber.

22 In terms of his intent, though, I think again it's fair to  
23 infer there's government business going on at the Capitol. His  
24 presence there in conjunction with everything else that was  
25 going on, that was certainly -- would certainly have disrupted

1 whatever government business was taking place that day.

2 THE COURT: Okay. Thank you.

3 MS. IYENGAR: Thank you.

4 THE COURT: Ms. Iyengar, very well argued and handled  
5 by both parties.

6 Why don't we come back at 11:45.

7 (Recess taken from 10:58 a.m. to 11:51 a.m.)

8 (Call to order of the court.)

9 THE COURT: All right. I want to thank the attorneys  
10 again for their work and careful handling of this case. I've  
11 considered the evidence, the arguments of counsel, and am now  
12 prepared to render judgment in this case.

13 I'm going to lay out a few facts as I find them in seriatim  
14 rather than by witness. I do want to make a few general  
15 credibility findings about the witnesses now, though.

16 All three witnesses struck me as generally credible and  
17 attempting to tell the truth. I did think Mr. Struck didn't  
18 always have a very clear memory of January 6, 2021, on all  
19 points. There were several times when he didn't remember things  
20 or remembered things incorrectly. I'm not sure if this is  
21 because he was focused on taking videos or what, but where some  
22 of his testimony may disagree with my findings, it's because I  
23 believed other evidence over his testimony. I think there may  
24 have also been some points where he was trying to minimize the  
25 conduct or culpability of the defendant and, by extension,

1 himself.

2 I did find both law enforcement officers to be very  
3 credible. I note their long law enforcement history and senior  
4 roles in their respective departments. They both came across as  
5 very conscientious, experienced, and trustworthy.

6 Inspector Hawa was cross-examined on a couple points where  
7 her testimony conflicts either with the facts as I'm about to  
8 find them or with the law. I thought those answers were the  
9 result of some gotcha questions and that she couldn't reasonably  
10 be expected to know the answers or that she had an innocent  
11 misrecollection of those events.

12 To the extent her testimony contradicts the facts as I find  
13 them, I simply find other evidence more believable as to those  
14 points. I certainly don't think she made any intentional  
15 misstatement about a few stray points from over a year ago that  
16 were rather tertiary to her duties on January 6.

17 I find that Mr. Griffin and Mr. Struck traveled together  
18 from New Mexico to attend President Trump's Stop the Steal  
19 Rally. They did not come to create unrest or to break any laws.  
20 Mr. Griffin came in conjunction with his organization, Cowboys  
21 for Trump.

22 They arrived in D.C. by January 5, and Mr. Griffin made a  
23 speech on January 5 in front of the west front of the Capitol.  
24 I'm looking to United States Exhibit 63 for this. At that time  
25 the various barriers on the west front of the lawn were clearly

1 visible, including snow fencing with signs saying that the area  
2 was closed. I think it is likely that Mr. Griffin saw those  
3 barriers.

4 On January 6, Mr. Griffin and Mr. Struck attended the Stop  
5 the Steal Rally on the Mall. Mr. Griffin was dressed in  
6 professional attire and was unarmed, quite unlike many other  
7 people present who came prepared to cause trouble and were  
8 wearing military-type gear and carrying masks and other  
9 paraphernalia.

10 After the rally, they began walking towards the Capitol,  
11 along with many other people. En route to the Capitol, they  
12 heard that Vice President Pence had already certified the  
13 election. That was incorrect, but I think it is relevant to  
14 Mr. Griffin's later conduct and his knowledge.

15 They approached the Capitol via the west front, passing the  
16 Grant statue and the Peace Monument on First Street. I find  
17 that the restricted area for 1752 purposes is identified in  
18 United States Exhibit 2. The Olmstead wall along the First  
19 Street served as part of this restricted area. This is about a  
20 5-foot stone wall that separates the sidewalk from the west  
21 front lawn.

22 At around 2:31 p.m., the defendant entered the restricted  
23 area by climbing over the Olmstead wall. As far as I can tell,  
24 there were not signs indicating it was restricted at that point,  
25 and there were numerous other people climbing the wall and

1 thousands of people inside the wall.

2 The defendant walked towards the Capitol, climbing at least  
3 two other small walls, and walking over the snow fencing which  
4 had either been trampled or removed by numerous protestors who  
5 had preceded him into the area.

6 He then walked up a narrow staircase into the inauguration  
7 stage which had been erected on the west front of the Capitol.  
8 The staircase had a door. The door had been closed. And he or  
9 someone near him said, "We'll wait until they get this door  
10 broken down." That's from United States Exhibit 40.

11 There was OC spray or pepper spray in the area from  
12 officers trying to clear the protestors. Mr. Griffin was  
13 clearly aware of the OC spray, as shown in United States Exhibit  
14 43.

15 He then took a bullhorn and shouted down to the crowd of  
16 protestors on the terrace and lawn below him. He attempted to  
17 lead them in a prayer, which lasted for less than a minute. A  
18 number of people seemed to respond to him, some kneeling as he  
19 instructed them, others beginning to chant "pray for Trump."  
20 This is all shown in United States Exhibit 54.

21 The defendant remained in the restricted area for some  
22 time. U.S. Exhibit 62 shows him being on the terrace or  
23 inauguration stage as late as 4:48 p.m.

24 In subsequent days, Mr. Griffin made several comments about  
25 January 6. On January 7, he made a video while he was down in

1 Roanoke, Virginia, in which he admitted that the area was roped  
2 off for the inauguration and that police indicated people  
3 couldn't enter the area.

4 On January 14, 2021, he spoke at a special meeting of the  
5 Otero County Commissioners where he talked about fencing being  
6 up because the site was "being reserved for Joe Biden and his  
7 inauguration. Well, you tell a million Trump supporters that  
8 that are going down there, pretty soon that crowd pushed  
9 through."

10 I also find that the vice president was in the restricted  
11 area during the entire time in question on January 6. He was  
12 moved shortly before Mr. Griffin entered the restricted area  
13 from his ceremonial office to a loading dock underneath the  
14 Capitol Visitor Center. I find this was all well within the  
15 restricted area for purposes of 1752.

16 I will start with Count 1. Count 1 of the information  
17 charges Mr. Griffin with violating 18 U.S.C. 1752(a)(1). That  
18 provision makes it unlawful to knowingly enter or remain in a  
19 restricted building or grounds without lawful authority to do  
20 so. I find the defendant guilty of Count 1. I also deny the  
21 Rule 29 motion on this count.

22 The statute defines restricted building or grounds in a  
23 number of ways. As relevant here, the term means "any posted,  
24 cordoned off, or otherwise restricted area of a building or  
25 grounds where the president or other person protected by the

1 Secret Service is or will temporarily be visiting."

2 The defendant has raised a few different legal arguments  
3 concerning how 1752(a)(1) works. The first argument is that  
4 only the Secret Service may designate a restricted area.

5 As I noted in a memorandum opinion denying his motion to  
6 dismiss, I think that's an overly narrow reading of the statute.  
7 To quote my previous opinion, the text of the statute "focuses  
8 on perpetrators who knowingly enter a restricted area around a  
9 protectee, not on how it is restricted or who does the  
10 restricting." That's from 549 F.Supp.3d 49, page 54. And I do  
11 incorporate by reference my analysis of the statute here.

12 Moreover, in ruling on the defendant's motion to dismiss, I  
13 was limited to considering the allegations in the information.  
14 Now that I've heard the evidence, it's clear for the defendant  
15 on the legal issue that this evidence wouldn't help him.  
16 Inspector Hawa testified that the Secret Service consulted with  
17 the United States Capitol Police in setting up the restricted  
18 area at issue here. That means this case doesn't squarely  
19 present the question of whether the Capitol Police, acting  
20 independently of the Secret Service, can designate a restricted  
21 area.

22 To the extent that there was conflict between the testimony  
23 of Inspector Erickson, who said the Capitol Police established  
24 the area to protect the inauguration setup, and Inspector Hawa,  
25 who said that the restricted area was set through coordination

1 between the Secret Service and the Capitol Police, I credit  
2 Inspector Hawa's testimony on this point.

3 I think it accords both with 1752 and common sense for the  
4 Secret Service to work with local law enforcement, or in this  
5 case with the Capitol Police, and take advantage of walls,  
6 signage, and other barriers the local law enforcement already  
7 have in place. It especially makes sense here, given the close  
8 working relationship between the Capitol Police and the Secret  
9 Service.

10 I also want to make clear, I think the restricted area was  
11 the Olmstead wall and not subsequent snow fencing. I think the  
12 snow fencing were established as additional, subsequent  
13 barriers, but the Olmstead wall was clearly the restricted area  
14 for purposes of this -- for 1752 and for this case. And to the  
15 extent there was stray testimony to the contrary, I disregard  
16 and disbelieve that testimony.

17 The defense's second argument is that Mr. Griffin cannot be  
18 convicted under 1752(a) unless the government shows he knew a  
19 Secret Service protectee was or would be temporarily visiting in  
20 the restricted building or grounds at issue.

21 I disagree. The definition of the elements of a criminal  
22 offense is entrusted to the legislature, particularly in the  
23 case of federal crimes, which are solely creatures of statute.  
24 That's according to *Liparota v. United States*, 471 U.S. 419,  
25 page 424, from 1985. So determining the mental state required



1 for commission of a federal crime requires "construction of the  
2 statute and inference of the intent of Congress." From  
3 *Staples v. United States*, 511 U.S. 600, page 605, from 1994.

4 Here, the text of 1752, which is the best evidence of  
5 Congress's intent regarding the mens rea, forecloses the  
6 defendant's argument. I find that Congress specifically  
7 included a mens rea requirement in those portions of the statute  
8 laying out the elements of the offense, while excluding that  
9 mens rea requirement in the definitional provision. A defendant  
10 must act knowingly in committing the offense conduct identified  
11 in Subsections (a)(1) through (a)(5). Each of those subsections  
12 begins with the word "knowingly." By contrast, that limitation  
13 appears nowhere in the definitional provision of (c)(1).

14 The textual distinction -- that textual distinction makes  
15 the defendant's primary authorities on this point, *Staples* and  
16 *Rehaif*, distinct in a fundamental way. *Staples* concerned a  
17 statutory provision that was "silent regarding the mens rea  
18 required for a violation," from page 605. So there is no  
19 textual basis for declining to apply a mens rea requirement to  
20 some provisions of the statute and not others.

21 And *Rehaif* involved a statute in which the scienter  
22 required was included in a punishment provision, not in the  
23 provisions making conduct unlawful. So, of course, the Court  
24 found "no basis to interpret knowingly" as applying to the  
25 second offense element, but not the first. That's from page

1 2196 of 139 S.Ct. 2191, from 2019.

2 It's worth noting that *Rehaif* expressly declined to address  
3 a statutory provision like 1752 where "questions may reasonably  
4 arise about how far into the statute the modifier knowingly  
5 extends." Also from page 2196.

6 In sum, the text of the statute makes clear that Congress  
7 did not intend for the scienter requirement to apply to 1752's  
8 definitional provisions.

9 And I should also say, it doesn't make a lot of sense to me  
10 that the government would have to prove somebody knew that a  
11 specific dignitary was there. I can't imagine that a provision  
12 that is looking to protect Secret Service protectees would  
13 require the Secret Service to somehow be telling people and  
14 proving that people knew which protectee was in the restricted  
15 area at what time.

16 The defendant's third argument seems to be that the  
17 relevant restricted area here does not include the loading dock  
18 below the Capitol. In support of that argument, he points to  
19 certain statutory definitions in 40 U.S.C. 5101 and 5102.

20 Those definitions don't limit the restricted area on  
21 January 6. Subsection (c)(1)(B) contemplates that a restricted  
22 area will often be ad hoc and context-specific, set as necessary  
23 to secure a Secret Service protectee. The definition, referring  
24 to "any building or grounds," affords law enforcement  
25 flexibility in establishing a restricted area, reflecting the

1 common sense notion that protectees may need to be secured in a  
2 variety of circumstances.

3 Only Subsection (c)(1)(A) textually refers to areas with  
4 prefixed boundaries, which talks about the White House or its  
5 grounds or the vice president's official residence or its  
6 grounds.

7 The defendant's reliance on *United States v. Jabr* to  
8 support his argument is thus misplaced, because that case  
9 involved (c)(1)(A). *Jabr* looked to other statutory definitions  
10 of the phrase "White House grounds" because that phrase appears  
11 in other statutory provisions and in Subsection (c)(1)(A).

12 In contrast, the phrase "Capitol building" or "Capitol  
13 grounds" is not in Subsection (c)(1)(B). So it isn't obvious  
14 what textual hook there is for incorporating other statutory  
15 definitions of the Capitol building or grounds as a limitation  
16 on the restricted area here.

17 That's all to say that the defendant is incorrect in  
18 attempting to artificially limit the scope of the relevant  
19 restricted area. It is immaterial whether the vice president  
20 was at ground level or in an underground garage. Either would  
21 be a building or grounds where the vice president was  
22 temporarily visiting.

23 Finally, I disagree with Mr. Griffin's argument that the  
24 vice president was not temporarily visiting the Capitol because  
25 he has a ceremonial office and constitutional duties at the

1 Capitol. Mr. Griffin actually elicited very little testimony  
2 about how often the vice president does visit the Capitol. But  
3 regardless, I think the U.S. Capitol fits comfortably within the  
4 definition of 1752(c)(1)(B).

5 I would just point to and incorporate by reference the  
6 thoughtful analysis of Judge Bates in *United States v. McHugh*,  
7 2022 WL 296304, out of this district on February 1st of 2022,  
8 for that issue.

9 I think there's ample evidence that Mr. Griffin knowingly  
10 entered or remained within the restricted area.

11 First, he saw the west front on January 5 complete with  
12 multiple rings of snow fencing with signage. When he crossed  
13 the west front lawn on January 6, he would have seen this  
14 fencing trampled under foot.

15 Two, he crossed over three different walls, including the  
16 Olmstead wall. Each of these were tall enough that he needed  
17 help from others or to rely upon a jerry-rigged ladder or ramp  
18 to get over them. All of this would give -- would suggest to a  
19 normal person that perhaps you should not be entering the area.

20 Third, he then climbed an emergency exit staircase onto a  
21 wooden inauguration stage that had a closed door. Either he or  
22 someone close to him said that the door had to be busted open.

23 Fourth, he smelled OC spray in the area of the terrace  
24 where police had been trying to clear people from the area.

25 Fifth, he also made two statements in the days afterwards

1 admitting that the area had been cordoned off and that police  
2 were telling people to stay away. I think the defense has a  
3 fair argument that these statements don't show he specifically  
4 was told by the police to stay away, but I do think these  
5 statements corroborate the government's argument that he knew he  
6 was in an area he was not allowed to be in.

7 While no one of these factors would alone be conclusive of  
8 a violation, together they show proof beyond a reasonable doubt.  
9 It's certainly not clear to me that Mr. Griffin knew he was  
10 entering a restricted area when he initially climbed over the  
11 Olmstead wall, even though he was, but by the time he was on the  
12 stage, he certainly knew he shouldn't be there. And yet, he  
13 remained. I find this properly makes out a violation of  
14 1752(a)(1).

15 Now for Count 2. That count charges Mr. Griffin with  
16 violating 1752(a)(2), which makes it unlawful to knowingly  
17 engage in disorderly or disruptive conduct in or in proximity to  
18 any restricted building or grounds; with an intent to impede or  
19 disrupt the orderly conduct of government business or official  
20 functions; where the defendant's conduct in fact impedes or  
21 disrupts the orderly conduct of government business or official  
22 functions.

23 I find that the government has failed to carry its burden  
24 as to these elements. However, I would deny the Rule 29 motion.

25 First, the defendant thought the electoral certification

1 had already occurred prior to his entering the restricted area.  
2 I think this is a serious obstacle to the government showing  
3 that the defendant acted knowingly and with intent to impede or  
4 disrupt the orderly conduct of government business. Perhaps he  
5 could have thought, as the government suggests, that other  
6 congressional business would be taking place. But the burden is  
7 on the government to show that, and there's no such evidence.

8 More, as it happens, both chambers were in recess before he  
9 entered the restricted area and during the entire time he was  
10 there. I think this further complicates the government's  
11 argument that he impeded or disrupted the orderly conduct of  
12 government business.

13 In any event, and more fundamentally, nothing showed the  
14 defendant engaged in any disorderly conduct above and beyond  
15 entering a restricted area. That alone cannot show a violation  
16 of 1752(a)(2). The government's video evidence established that  
17 Mr. Griffin progressed to the west terrace, led a prayer, then  
18 departed some time later. I particularly note that he  
19 repeatedly called on people to kneel. Arguably, he was trying  
20 to calm people down, not rile them up.

21 According to the government's trial brief, its compilation  
22 exhibits establish how and when the disruption occurred. But  
23 the defendant is never seen engaging in the kind of property  
24 destruction or physical violence featured so prominently in the  
25 government's montage. As I said at the beginning of the trial,

1 the compilation seems to cut in the defendant's favor, not  
2 against him. There was plenty of disorderly conduct shown in  
3 those films, people fighting with police, throwing things,  
4 damaging property, or attempting to do so. Mr. Griffin did none  
5 of this.

6 Finally, the government offered little evidence going to  
7 the defendant's intention to disrupt Congress, meaning it  
8 offered little evidence bearing on 1752(a)(2)'s core mens rea  
9 requirement.

10 It's true that Mr. Griffin spoke generally about preventing  
11 the election from being stolen by China and referenced being  
12 well armed, but those abstract statements leave more than a  
13 reasonable doubt as to whether he intended for his conduct to  
14 disrupt the certification of the election.

15 I think there are some close questions about whether his  
16 mere presence impeded or disrupted government business, given  
17 that you'd have to aggregate his conduct with the conduct of  
18 others and that both chambers were in recess the entire time he  
19 was there.

20 But I don't need to definitively reach those questions  
21 because I don't think he engaged in disorderly or disruptive  
22 conduct, and I certainly don't think he had the mens rea  
23 necessary for that violation.

24 For all these reasons, I find the defendant guilty of Count  
25 1 and not guilty of Count 2.

1 Mr. Smith, do you wish to go to sentencing today?

2 MR. SMITH: Your Honor, I would actually like to -- I  
3 think we would like to submit something for sentencing first, if  
4 that's okay with the Court.

5 THE COURT: Sure. That's what we normally do. I just  
6 wasn't sure if your client wanted to come back to D.C.

7 Ms. Chaclan, do you have a proposed sentencing date?

8 MR. SMITH: Judge, do you think we might be able to do  
9 a Zoom sentencing, or is that not --

10 THE COURT: No.

11 MR. SMITH: No? Okay.

12 THE COURT: June 17th at 2:00 p.m., does that work for  
13 the government?

14 MS. IYENGAR: Yes, Your Honor, that's good for us.

15 THE COURT: Mr. Smith?

16 MR. SMITH: Yes, Your Honor.

17 THE COURT: Okay. I will set sentencing for June 17  
18 at 2:00 p.m. That will be here in Courtroom 2. I will ask for  
19 the parties to file any memoranda in aid of sentencing by  
20 June 10.

21 I will have a presentence report prepared. Mr. Griffin,  
22 you will be interviewed for that report. You may -- you will  
23 have an opportunity to see the report before it's given to me.  
24 And you will have an opportunity to speak to me at sentencing if  
25 you wish. Your attorney may also be present during the



1 Probation Office interview if you wish.

2 Ms. Iyengar, anything further for the government?

3 Ms. Paschall?

4 MS. PASCHALL: Thank you, Your Honor.

5 We just wanted to inquire whether the Court was going to  
6 order, consistent with the Chief Judge's order about release of  
7 exhibits in these cases to the press and the public, whether you  
8 wanted the government to follow the procedure outlined in the  
9 Chief Judge's order and upload the government's exhibits to the  
10 Dropbox that is accessible to the public.

11 THE COURT: Do you have a position on that?

12 MS. PASCHALL: I don't think we do. We have done so  
13 in the Reffitt case, if that's helpful.

14 THE COURT: Okay. Mr. Smith, do you have a position  
15 on that?

16 MR. SMITH: We have no objection.

17 THE COURT: Okay. I will direct the government, then,  
18 to follow that order.

19 Mr. Smith, anything further for the defense?

20 MR. SMITH: No, Your Honor. Thank you.

21 THE COURT: All right. Thanks, folks. I will see you  
22 in June.

23 (Proceedings adjourned at 12:16 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sara A. Wick

March 30, 2022

SIGNATURE OF COURT REPORTER

DATE