

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

v.

BROWN

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Case No. 1:22-cr-170

**DEFENDANT’S BRIEF IN REPLY TO THE GOVERNMENT’S OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS COUNT ONE FOR SELECTIVE
PROSECUTION**

Defendant Trevor Brown, by and through counsel, hereby files this brief in Reply to the Government’s Opposition to Defendant’s Motion to Dismiss Count One for Selective Prosecution.

INTRODUCTION

Ruben Arthur Camacho was sentenced to 48 hours of community service for obstructing a female officer by punching her in the face. According to the statement of facts (Exhibit 1):

On November 15, 2023, at approximately 1920 hours Reporting officer ... and [Community Management Unit] platoon 2 squad 2 arrived on scene at the Democratic National Headquarters located at 430 South Capitol Street SE along with all other CMU assets for a large pro-Palestinian protest that was blocking entrances and trying to gain entry into the building. Upon exiting our squad vehicle, a large crowd of protestors could be seen locking arms and blocking the garage exit of the DNC. A call for help from another officer to help clear the garage as it was going to be the emergency exit of all Congressional members and staff leaving the building. The protestors were actively resisting commands to exit the area and were being forced to leave the area by officers using open hand techniques.

While actively clearing protestors from the area and attempting to move them back, RO witnessed a protestor later identified as Ruben Camacho (D1) being pulled away from the garage when he slipped free from an officer’s grasp turned back towards the garage slamming Officer Beaman (V1) up against the left door of the garage. D1 then struck V1 in the right side of her face with what looked like a loose grip fist causing both V1 and D1 to fall to the ground. A group of officers grabbed D1 and moved him away from the garage pushing him into the crowd of protestors. Without losing sight of D1 and witnessing the assault on V1. RO then rushed into the crowd grabbing D1 and drug him back towards officers while yelling that he is under arrest for assaulting a police officer. D1 refused commands to give me his

hands so with the assist of other officers, he was put on the ground to better control his body movement and hands. While being handcuffed D1 stated that “I was only defending myself.” D1 was placed under arrest at 1940 hours and was searched and placed in the back of a Capitol Police prisoner transport where he was transported to the U.S. Capitol Police Headquarters.

This clearly sets forth facts sufficient for probable cause to indict Camacho for 18 U.S.C. § 111(b), “Assaulting, resisting, or impeding certain officers or employees,” and if Camacho had committed this act on January 6, 2021, he would have been so charged and would be facing up to 20 years in prison.¹ But Camacho protested for Palestine, so he was only charged with a single misdemeanor, in violation of 22 D.C. Code, Section 405(b), which makes it a misdemeanor to assault law enforcement officers engaged in the performance of her official duties.² Exhibit 2. On December 13, 2023, less than one month after the incident, Camacho agreed to enter a guilty plea to a single misdemeanor charge on the conditions that for six months he is (1) not to violate any law or be arrested for probable cause; (2) not to violate any Court Order; (3) to perform 48 hours of community service in Washington, D.C.; and (4) to stay away from 400 Block of South Capitol Street, SE. If Camacho abides by these conditions for six months, “the United States agrees to dismiss with prejudice all of the charges in this case at the time of sentencing.” Exhibit 3.

Two days after the Government opposed Mr. Brown’s motion to dismiss the felony charge against him for selective prosecution, the same Government arrested the former mayor of the South

¹ “Whoever, in commission of any acts described in subsection (a) [including forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with a Capitol Police Officer]... inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.”

² “Whoever without justifiable and excusable cause assaults a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned not more than 6 months or fined not more than the amount set forth in § 22-3571.01, or both.”

See <https://code.dccouncil.gov/us/dc/council/code/sections/22-405>. Like its federal counterpart, the D.C. law also contains a section setting forth an enhanced penalty, section 405(c)(1), if the defendant “commits a violent act that creates a grave risk of causing significant bodily injury to the officer,” which carries a penalty of up to 10 years in prison.” But the United States Attorney chose not to charge Camacho with this provision either.

San Antonio suburb of Von Ormy, Trina Reyes, for Trespassing on January 6, 2021. It goes without saying that Mayor Reyes will not be offered a plea deal for 48 hours of community service.

The Government does not and cannot deny that it is selectively prosecuting January 6 defendants and singling them out for harsher punishment than any protestors in American history. The Government also does not and cannot deny that it treats Black Lives Matter and Free Palestine protestors differently. The Government cannot deny that if Camacho had punched a female officer while wearing a red “Make America Great Again” hat on January 6, 2021, the very same United States Attorneys who charged him with a misdemeanor would have charged him instead with 18 U.S.C. § 231(a)(3) and 18 U.S.C. § 111(b), and perhaps 18 U.S.C. § 1512(c)(2) as well. Similarly, the Government cannot deny that if Trevor Brown had done all of the things that he is accused of doing at a Free Palestine or Black Lives Matter protest – *i.e.* shouting something unspecified while others assaulted officers, he would not have been charged with 18 U.S.C. § 231(a)(3). A great many individuals were yelling and screaming and otherwise encouraging violent protesters during the George Floyd riots and at the protests where Camacho punched a female officer in the face, yet the Government cannot point to a single one that was charged with more than a misdemeanor.³

Nowhere within the Government’s Opposition does it even attempt to deny these facts, because it is undeniable that 18 U.S.C. § 231(a)(3) is uniquely applied to January 6 defendants in a way that it is not applied to similarly situated individuals at other protests.⁴ The data confirms that in the dozens and dozens of riots that occurred over a period of many weeks in the spring and summer of 2020, there is not a single case outside of Washington, D.C. where the Government

³ Brown does not, of course, concede that he was doing anything of the kind. Rather, Brown was attempting to stop others from engaging in violent conduct and yet still finds himself facing a felony charge.

⁴ The Government does not address the data set forth on page 2 of the Motion that shows how January 6 defendants represent over 75% of the charges for the same two year period that included Black Lives Matter Protests.

charged a protestor in a crowd of people who did not commit an actual act of violence⁵ with 18 U.S.C. § 231(a)(3), regardless of whether the individual was using a bullhorn or otherwise yelling support for rioters' conduct.⁶

The Government does not have a problem with this obviously unfair and disparate treatment. It simply argues that the law allows them to apply two distinct standards of justice. "Brown is unable to point to [a] single case in which a January 6 defendant has obtained relief based on a claim of selective prosecution, and indeed, the Government is unaware of any such case." Opp. 8. The Government does not argue that Brown is unable to point to a single similarly situated comparator who was not charged with 18 U.S.C. § 231(a)(3), because Brown can, and in fact pointed to several. They only argue that until now no January 6 defendant has been able to obtain relief.

The Government relies on *United States v. Armstrong*, 517 U.S. 456, 464 (1996) and its progeny, which the Government seems to believe stands for the proposition that the Government can selectively prosecute a class of individuals over the course of years with unbridled discretion and without restraint, because, well, January 6 is different and, *ipso facto*, no defendant can meet its selective prosecution burden. Opp. at 8.

This approach defies common sense and cannot be correct. And in fact, it is not correct. The Government cites seven January 6 cases where defendants were denied dismissal for selective prosecution, but all of those motions were denied prior to August 15, 2023, when the Court of Appeals for the District of Columbia clarified the standard for selective prosecution in *Frederick*

⁵ Mr. Brown is not charged with an actual act of violence, because if he were, according to the January 6 standard he would have been charged with 18 U.S.C. § 111(a) or (b).

⁶ Again, Brown denies that he was in any way encouraging any rioters' violent behavior. The point is simply that even if he had been encouraging violence, during other protests he would not have been charged even with a misdemeanor, whereas in the January 6 context, such encouragement is met with the harshest punishment.

Douglass Found. v. Dist. Of Columbia, 82 F.4th 1122 (D.C. Cir. 2023).⁷ This is the first motion for selective prosecution before the Court since the *Frederick Douglass* decision, and accordingly it is appropriate for the Court to take a fresh look at the issue, especially in light of the Government's promise on January 4, 2024, to continue its quest to arrest every last one of the thousands of peaceful protestors who were within a certain proximity to the Capitol on that fateful day.

Moreover, the most recent decision the Government cites is *McHugh*, which was decided over a year ago, long before the Palestinian protestors engaged in unlawful protests across the Country, from Capitol Hill to college campuses, including assaults on police officers and threats of violence directed at Jews. In addition to the Black Lives Matter protests, and the related riots, that ravaged the Country for months during the summer of 2020 leading up to the last presidential election, the Court now has before it the wave of Palestinian protests leading up to the current election. This new evidence shows a pattern of behavior whereby two groups that are overwhelmingly comprised of Democratic voters – Black Lives Matter and “Free Palestine” – are subject to one standard, whereas one group which was overwhelmingly comprised of Republican voters is subject to a different standard.⁸ This new evidence of a pattern of behavior by the

⁷ See *United States v. Griffin*, 1:21-cr-119 (D.D.C. July 2, 2021); *United States v. Miller*, 1:21-cr-119 (D.D.C. Dec. 21, 2021); *United States v. Judd*, 1:21-cr-40 (D.D.C. Dec. 28, 2021); *United States v. Padilla*, 1:21-cr-241 (D.D.C. Feb 13, 2022); *United States v. Brock*, 1:21-cr-140 (D.D.C. Aug. 31, 2022); *United States v. Rhodes*, 1:22-cr-15 (D.D.C. Aug. 2, 2022); *United States v. McHugh*, 1:21-cr-453 (D.D.C. Mar. 6, 2023).

⁸ The Government implausibly suggests that Mr. Brown never “credibly demonstrates that all members of the January 6 riot articulated (or even shared) a common political viewpoint.” Opp. 9, n.2. This should not be taken seriously. The Government is asking the Court to ignore the sea of “Trump” flags and red “MAGA” apparel that clearly express the general viewpoint of the crowd, as well as the simple fact that the stated purpose of the “Stop the Steal” protest was to support the Republican presidential candidate. Mr. Brown does not need to demonstrate or concede that he or every person in the crowd held the same viewpoint. He need only demonstrate that the crowd “articulated a common political viewpoint” which it clearly did. It is also widely known that Black Lives Matter and Free Palestine are overwhelmingly supported by Democrats. The Government's feigned ignorance is unpersuasive, and under the *Frederick Douglass* standard discussed below irrelevant to this Motion.

Government and its prosecution of protestors based on how they are perceived to vote, coupled with the new standard articulated in *Frederick Douglass*, necessitates a new look as to whether the January 6 defendants can meet their burden.

Finally, two and a half years ago, in *Judd*, Judge Trevor McFadden ended his decision with a warning to the Government:

Justice requires that "like cases be treated alike" and that "there not be one rule for Democrats and another for Republicans." Merrick Garland, Remarks to DOJ Employees on His First Day, (Mar. 11, 2021). Otherwise, prosecutions risk becoming "so unequal and oppressive" as to deny the rights of all. *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Especially during moments of politically charged unrest, the Justice Department must strive for even-handed justice. *Judd raises troubling questions about the Department's adherence to this imperative in Portland*. But for the reasons stated above, he has not carried his burden to justify further discovery into the Government's prosecutions.

United States v. Judd, 579 F. Supp. 3d 1, 9 (D.D.C. 2021) (emphasis added). More recently, on March 26, 2024, Judge McFadden chastised the Government for treating January 6 defendants "as a class," with emphasis in the original. *United States v. Seefried*, 1:21-cr-00287 (TNM), at *5 (D.D.C. Mar. 26, 2024) ("Ultimately, none of the Government's arguments involve any facts specific to Seefried. Instead, they are purely class-based. ... January 6th defendants, as a class, cannot be released during an election year.") (emphasis in original). In December of 2021, Judge McFadden warned the Government that it was dangerously close to the line of selective prosecution. By March of 2024, the Government crossed the line, and therefore the issue is ripe to be reassessed by the Court.

The Court now has before it three-and-a-half years of January 6 prosecutions to compare with not only one but two waves of protests, including violent protests, by Democrat-leaning groups. The Government also has testimony from a Metropolitan Police Officer who experienced January 6 and the Black Lives Matter protests and believes based on his own personal experience

that the Government is targeting January 6 defendants for harsher punishment for political reasons. *See* Motion, 1 Exhibit A (filed under seal). The Government argues that this does not meet the standard of “clear and convincing evidence” of selective prosecution, yet in *Frederick Douglass*, the Court of Appeals for the District of Columbia held that the burden was met with far less evidence. If an established pattern involving two separate waves of protests, each wave consisting of dozens of protests, and each protest involving thousands of similarly situated comparators, plus an admission from a Metropolitan Police Officer, are not sufficient evidence of selective prosecution, then the defendant is left wondering what smoking gun evidence he needs to produce to support his claim.⁹

LEGAL STANDARD

In Mr. Brown’s Motion, he cited the standard set forth in *Frederick Douglass* (Motion, 2-3), but it is worth repeating and elaborating here because the Government does not understand or appreciate the significance of that decision.

Since January 6, 2021, the Court of Appeals for the District of Columbia recognized a plausible allegation of selective prosecution of political protestors when compared with Black Lives Matter protestors who engaged in similar or worse conduct. *Frederick Douglass Found. v. Dist. of Columbia*, 82 F.4th 1122 (D.C. Cir. 2023). The court held that a “selective enforcement

⁹ There is also evidence that the Government is motivated by animus towards “MAGA Republicans and unlawful favoritism towards Black Lives Matter protesters. The President of the United States has stated on several occasions that all “MAGA Republicans” – as opposed to regular Republicans – are extremists and a “threat to democracy.” <https://www.youtube.com/watch?v=-HynbnvloMQ>. On January 7, 2021, before the dust had settled after January 6, he expressed his personal opinion that the “thugs that stormed the Capitol” should be treated more harshly than Black Lives Matter Protestors. <https://www.nbcnews.com/video/joe-biden-black-lives-matter-protesters-would-have-been-treated-differently-at-capitol-demonstrations-99068997831>. But it is not necessary to show such animus, only that there is a pattern of unlawful favoritism that can be simply demonstrated from the simple fact that there is no ongoing investigation of the dozens of devastating Black Lives Matter protests from 2020, yet the Government is still arresting law abiding peaceful protestors to this day, to include the former mayor of a Texas suburb.

claim has two elements: a plaintiff must demonstrate (1) he was similarly situated in material respects to other individuals against whom the law was not enforced, and (2) the selective enforcement infringed a constitutional right.” *Id.*, at 1136.

Mr. Brown is not required to show discriminatory intent or that the selective prosecution was motivated by discriminatory purpose. *Id.* at 1145-46. The court in *Frederick Douglass* clearly distinguished between selective prosecution claims under the Fifth and Fourteenth Amendment’s equal protection on the one hand, and selective prosecution claims under the First Amendment’s freedom of speech on the other. *Id.* at 1145 (“Our conclusion that a First Amendment selective enforcement claim is distinct from an equal protection claim is consistent with decisions from our sister circuits[.]”). The difference is that “[i]n the context of an equal protection selective enforcement claim, a plaintiff must show that others similarly situated were not prosecuted and that the prosecution was motivated by invidious discrimination.” *Id.* at 1147. But with regards to a First Amendment selective prosecution claim, the “motive for discriminating based on viewpoint is irrelevant.” *Id.* at 1146. For a selective prosecution under the First Amendment, the defendant must only show “a pattern of unlawful favoritism.” *Id.* at 1146 (citing *McGuire v. Reilly*, 386 F.3d 45, 64 (1st Cir. 2004) (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002))).

Based on Judge McFadden’s recent decision in *Seefried*, Mr. Brown can also argue a Fifth or Fourteenth Amendment claim of selective prosecution by demonstrating that “the administration of a criminal law is ‘directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive’ that the system of prosecution amounts to ‘a practical denial’ of equal protection of the law.” *United States v. Armstrong*, 517 U.S. 456, 464-65 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)) (emphasis added). But because this is a First Amendment claim, there is no need to do so.

The Government clearly misunderstood or else did not carefully read *Frederick Douglass*, because it devoted an entire section of its Opposition to arguing that “Brown’s motion adduces no evidence of discriminatory motive.” Opp. 13-14.

ARGUMENT

As set forth above, the two elements of a selective prosecution claim are “(1) he was similarly situated in material respects to other individuals against whom the law was not enforced, and (2) the selective enforcement infringed a constitutional right.” *Frederick Douglass*, 82 F.4th, at 1136. Mr. Brown meets both elements.

First, he was similarly situated in material respect to other individuals against whom the law was not enforced. In his Motion he cited numerous similarly situated comparators, including Carubis who shot lasers into the eyes of police officers, Olsen who endangered the lives of law enforcement officers by preventing them from escaping a burning building, and the thousands of protestors who threatened the lives of law enforcement and fire fighters to the point that the decision was made to “let this building burn” rather than “put[ting themselves in jeopardy or danger from this crowd that is clearly agitated.” Mot. 3-5. Camacho can now be added to the list. That Brown cannot find an exact comparator – someone who was charged with a felony for yelling during the previous waves of protests – only highlights the selective prosecution here. Brown has not found such a comparator because there is none. If not a single person was charged with a felony for yelling during a riot in other political contexts and Brown has been, that fact alone establishes selective prosecution.

The Government offers three reasons to justify its disparate treatment of January 6 and the riot in Portland where rioters set fire to a federal courthouse. Mot. 11-2 (citing *Padilla*, 2023 WL 1964214, at *5; *Brock*, 2022 WL 3910549, at *11-12; *Judd*, 579 F. Supp. 1, at 8; *Miller*, 21-cr-

119, Dkt 67, at 3). First, January 6 was different from Portland because although the Portland rioters also attacked a federal building, the Portland rioters were not as bad because they set the federal courthouse on fire at night when only the lives of law enforcement were put at risk, whereas January 6 defendants attacked the Capitol during the day and put members of Congress, their staff, and the Vice President at risk. Second, Portland rioters did not “make it past the building’s outer defenses” or enter the federal building. Third, “the alleged purpose of the January 6h defendants’ actions – obstructing the certification of the Electoral College vote – would also justify differences in prosecutorial behavior, because the Portland rioters are not alleged to have obstructed an official proceeding.”

It should be noted from the outset, that the third reason – the rioters in Portland are distinguishable because they did not want to obstruct an official proceeding – is irrelevant to Mr. Brown because, like the Portland rioters, he is also not “alleged to have obstructed an official proceeding.” Even if he were, that cuts against the Government because it shows that the Government made its prosecutorial decisions based on the political objectives of the rioters. Cutting through the prosecution’s attempts at misdirection, the Government essentially argues that it is justified in charging January 6 defendants for felonies where similar Portland rioters were not so charged because the Portland rioters – who burned down federal buildings and assaulted law enforcement officers – were motivated by anger at perceived racial injustice, whereas on January 6 the protestors and rioters were motivated by a political belief that the election had been “stolen” from former President Trump. This is “quintessential viewpoint discrimination.” *Frederick Douglass*, 82 F.4th, at 1142. This is not to excuse anyone who engaged in violence either during the summer of 2020 or on January 6, 2021, it is simply to say that the Constitution does not permit

the differential prosecution of similarly situated individuals distinguished essentially by their political views or motivations.

As for the Government's other supposed distinguishing factors – the Portland rioters did not enter the courthouse before setting fire to it, and they did so at night – these factors are irrelevant to Mr. Brown's motion which only seeks dismissal of Count One. Unlike his predecessors who argued that they were generally treated unfairly when compared with other protestors, Mr. Brown alleges that the Government selectively enforced 18 U.S.C. § 231(a)(3) against him when compared with similarly situated protestors at Black Lives Matter and Free Palestine protests. The similarly situated comparators that Mr. Brown cites could have been charged with the same crime as he was, but they were not, and the only distinguishing factor between Mr. Brown's conduct and their conduct was the type of protest that they attended. Mr. Brown has not been charged with 1512(c)(2). His alleged crime is obstructing law enforcement officers during a civil disorder, notably by yelling something unspecified. The evidence presented by Mr. Brown clearly shows that the Government has effectively reserved enforcement of 18 U.S.C. § 231(a)(3) specifically for the class of January 6 defendants.

To illustrate this point, there can be no dispute that Carubis met all the elements of 18 U.S.C. § 231(a)(3) when he shot a laser directly into the eye of a police officer responding to a civil disorder. And there can be no dispute that Olsen met all the elements of 18 U.S.C. § 231(a)(3) when he quite literally used his body to physically obstruct police officers responding to a civil disorder. And there can be no dispute that Camacho obstructed a police officer when he punched her in the face. While all three of these men were arrested, the Government only charged them with misdemeanors and did not enforce 18 U.S.C. § 231(a)(3) because that crime is uniquely reserved for the protestors who attended the protest on January 6, regardless of whether the

protestors engaged in any acts of violence themselves.¹⁰ That is “quintessential viewpoint discrimination.”

The Government’s feigned ignorance aside, there is a presumption that January 6 defendants vote Republican whereas Black Lives Matter and Free Palestine defendants vote Democrat.¹¹ This Court has accepted that presumption for the purposes of evaluating selective

¹⁰ The fact that the Government charged some protestors outside of January 6 with the felony – a total of 65 across the country in the two-year period – does not negate Mr. Brown’s argument. These were rare cases where the conduct was extremely egregious. For instance, in Minneapolis, where the riots lasted weeks and where the crowd prevented first responders from extinguishing the fire that consumed a police station, the Government only charged a single man, Matthew Lee Rupert, with 18 U.S.C. 231(a)(3). Rupert can be seen on video “passing out explosive devices he possessed, encouraging others to throw his explosives at law enforcement officers, actively damaging property, appearing to light a building on fire and looting businesses in Minneapolis.” <https://www.justice.gov/usao-mn/pr/federal-criminal-complaint-charges-illinois-man-traveling-minnesota-riot-possession>. The Government recounted in detail the severity of Rupert’s conduct, yet only asked for 8 to 10 years in prison. See *United States v. Rupert*, 20-cr-101 (D. Minn. July 22, 2021), Dkt. 100, at 9. By contrast, the Government asked for more than 15 years in prison for January 6 defendant Patrick McCaughey who assaulted an officer causing the officer to suffer a swollen hand, bloody lip, and contusions on the top of his head. <https://www.politico.com/news/2023/04/07/prosecutors-lengthiest-jan-6-sentence-00091099>. This is more than the 12 years that the Government requested for Montez Terriel Lee, Jr. for burning down a store causing the death of Oscar Stewart. *United States v. Lee*, 20-cr-168 (D. Minn. Nov. 4, 2021), Dkt. 67, at 1-4. The Government’s stated reason for seeking a lesser sentence for a George Floyd protestor whose actions led to a death than for a January 6 defendant whose actions led to an injury was because Mr. Lee was motivated by racial justice. *Id.* at 7. The Government even went on to cite Martin Luther King, Jr. in Lee’s defense: “we’ve got to see that a riot is the language of the unheard.” *Id.* at 7-8. The Government’s stated reason for seeking the longer sentence for McCaughey was because his actions “showed a blatant and appalling disregard for our institutions of government and the orderly administration of the democratic process.” *United States v. McCaughey*, 1:21-cr-40 (D.D.C. April 7, 2023), Dkt. 611, at 32-33. This admission by itself is clear and convincing evidence that the Government impermissibly makes its prosecutorial decisions based on viewpoint.

¹¹ That is not to say that Mr. Brown considers himself a Republican or a Democrat, or in any way concedes or stipulates to his purpose for being at the Capitol on January 6, 2021. It is only to say that January 6 defendants in general are obviously perceived as Republican voters; the Government’s claim is that January 6 defendants sought to overturn the election in favor of the Republican presidential candidate. Regarding Black Lives Matter, according to the Pew Research Center, “more than eight-in-ten Democrats and Democratic leaners (84%) say they support the movement. In turn, 82% of Republicans and GOP leaners oppose it.” <https://www.pewresearch.org/social-trends/2023/06/14/views-on-the-black-lives-matter-movement/>. The same divide between Republicans and Democrats exists when it comes to views

prosecution claims that compare January 6 defendants with each other. *United States v. Griffin*, 549 F. Supp. 3d 49, 58 (D.D.C. 2021). In *Seefried*, Judge McFadden accused the Government of treating January 6 protestors as a separate class based on presumed political beliefs rather than on their individual characteristics and conduct, as did at least one member of the Metropolitan Police Department. Motion, 1, Exhibit A (filed under seal).

The evidence is clear, convincing and at this stage undeniable that the Government has established a pattern of treating January 6 defendants differently than similarly situated comparators, specifically when it comes to the enforcement of 18 U.S.C. 231(a)(3). The fact that the Black Lives Matter rioters burned the federal courthouse at night instead of by day and did not enter the building does not explain why Carubis, who was arrested for obstructing police with lasers, was only charged with misdemeanors and not 18 U.S.C. 231(a)(3). Carubis was accused of obstructing an officer during a civil disorder and Mr. Brown was accused of the same, but only Mr. Brown was charged with the felony.

CONCLUSION

Mr. Brown has met his burden under the clearly articulated standard of *Frederick Douglass*. Carubis did not evade a felony because he shot a laser at police at night. He evaded the felony because he shot the laser at police amongst a group of protestors who were angered by racial injustice and not within a group that believed the 2020 election was stolen. Had he shot the laser in the exact same manner on January 6, he would not only have been charged with a felony, he would probably have been sentenced to a decade or more in prison—and not because of the act

on the Israel/Palestine conflict, with Democrats overwhelmingly making up the ranks of Free Palestine protestors. <https://news.gallup.com/poll/472070/democrats-sympathies-middle-east-shift-palestinians.aspx>.

itself, but because of the perceived viewpoint of the other protestors. This is quintessential viewpoint discrimination and for those reasons Count One should be dismissed.

Dated: May 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being served on opposing counsel via email on

May 24, 2024

/s/ Jonathan Gross