UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Case No. 22-cr-92 (DLF)**
v.	:	
	:	
BRIAN GLENN BINGHAM,	:	
	:	
Defendant.	:	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO CHANGE VENUE

Defendant Brian Glenn Bingham, who is charged in connection with the events at the U.S. Capitol on January 6, 2021, has moved to transfer venue in this case to the Middle District of Alabama. *See* ECF No. 56 at 1. Defendant fails to establish that he "cannot obtain a fair and impartial trial" in this district, Fed. R. Crim. P. 21(a), and this Court should deny his motion.[1]

[1] Judges on this Court have denied motions to change venue in dozens of January 6 prosecutions, and no judge has granted a change of venue in a January 6 case. *See, e.g., United States v. Ballenger*, 640 F.Supp.3d 34 (D.D.C. 2022) (JEB); *United States v. Nassif*, 628 F.Supp.3d 169, 185-88 (D.D.C. 2022) (JDB); *United States v. Ramey*, No. 22-cr-184, Minute Entry (D.D.C. Jan. 30, 2023) (DLF); *United States v. Eckerman, et al.*, No. 21-cr-623, Minute Order (D.D.C. Jan. 26, 2023) (CRC); *United States v. Pollock, et al.*, No. 21-cr-447, Minute Entry (D.D.C. Jan. 25, 2023) (CJN); *United States v. Gossjankowski*, No. 21-cr-0123, 2023 WL 395985 (D.D.C. Jan. 25, 2023) (PLF); *United States v. Adams*, No. 21-cr-212, ECF No. 60 (D.D.C. Jan. 24, 2023) (ABJ); *United States v. Rhine*, No. 21-cr-0687, 2023 WL 372044 (D.D.C. Jan. 24, 2023) (RC); *United States v. Oliveras*, No. 21-cr-738, 2023 WL 196679 (D.D.C. Jan. 17, 2023) (BAH); *United States v. Sheppard*, No. 21-cr-203, 2022 WL 17978837 (D.D.C. Dec. 28, 2022) (JDB); *United States v. Samsel, et al.*, No. 21-cr-537, ECF No. 227 (D.D.C. Dec. 14, 2022) (JMC); *United States v. Gillespie,* No. 22-cr-60, ECF No. 41 (D.D.C. Nov. 29, 2022) (BAH); *United States v. Barnett*, No. 21-cr-38, ECF No. 90 (D.D.C. Nov. 23, 2022) (CRC); *United States v. Bender, et al.*, No. 21-cr-508, ECF No. 78 (D.D.C. Nov. 22, 2022) (BAH); *United States v. Sandoval*, No. 21-cr-195, ECF No. 88 (D.D.C. Nov. 18, 2022) (TFH); *United States v. Vargas Santos*, No. 21-cr-47, Minute Entry (D.D.C. Nov. 16, 2022) (RDM); *United States v. Nordean, et al.*, No. 21-cr-175, ECF No. 531 (D.D.C. Nov. 9, 2022) (TJK); *United States v. Eicher*, No. 22-cr-38, 2022 WL 11737926 (D.D.C. Oct. 20, 2022) (CKK); *United States v. Schwartz, et al.*, No. 21-cr-178, ECF No. 142 (D.D.C. Oct. 11, 2022) (APM); *United States v. Brock*, 628 F.Supp.3d 85 (D.D.C. 2022) (JDB), *aff'd*, No. 23-3045, 2023 WL 3671002 (D.C. Cir. May 25, 2023); *United States v. Jensen*, No. 21-cr-6, Minute Entry (D.D.C. Aug. 26, 2022) (TJK); *United States v. Seitz*, No. 21-cr-279, Minute Order (D.D.C. Aug. 17, 2022) (DLF); *United States v. Strand*, No. 21-cr-85, ECF No. 89 (D.D.C. Aug. 17, 2022) (CRC); *United States v. Williams*, No. 21-cr-618, ECF No. 63 (D.D.C. Aug. 12, 2022) (ABJ); *United States v. Herrera*, No. 21-cr-619, ECF No. 54 (D.D.C. August 4, 2022)

FACTUAL BACKGROUND

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session was halted until law enforcement cleared the Capitol of hundreds of unlawful occupants to ensure the safety of elected officials.

At approximately 2:42 p.m. on January 6, Defendant unlawfully entered the Capitol building and made his way to an area just outside the Speaker's Lobby, which leads directly to the House chamber. While there, Defendant took photographs and shouted at police officers guarding the entrance to the Speaker's Lobby, where another rioter had just been shot by law enforcement. Several minutes later, Defendant engaged officers in a physical altercation as those officers tried to clear the crowd out of the Capitol building. Despite verbal commands by officers to leave the building, Defendant confronted, grabbed, pushed, and struck a D.C. Metropolitan Police Department officer. As the Defendant continued the altercation, several other officers came to assist and were eventually able to push Defendant out of a doorway. Later that same day, Defendant exchanged Facebook messages saying, "I got to manhandl[e] 5 cops and live to tell." A few days later, he sent additional

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(BAH); *United States v. Garcia*, No. 21-cr-129, 2022 WL 2904352 (D.D.C. July 22, 2022) (ABJ); *United States v. Rusyn, et al.*, No. 21-cr-303, Minute Entry (D.D.C. July 21, 2022) (ABJ); *United States v. Bledsoe*, No. 21-cr-204, Minute Order (D.D.C. July 15, 2022) (BAH); *United States v. Calhoun*, No. 21-cr-116, Minute Order (D.D.C. July 11, 2022) (DLF); *United States v. Rhodes, et al.*, 610 F. Supp. 3d 29 (D.D.C. 2022) (APM); *United States v. Williams*, No. 21-cr-377, Minute Entry (D.D.C. June 10, 2022) (BAH); *United States v. McHugh*, No. 21-cr-453, Minute Entry (D.D.C. May 4, 2022) (JDB); *United States v. Hale-Cusanelli*, No. 21-cr-37, Minute Entry (D.D.C. April 29, 2022) (TNM); *United States v. Webster*, No. 21-cr-208, ECF No. 78 (D.D.C. Apr. 18, 2022) (APM); *United States v. Alford*, 21-cr-263, ECF No. 46 (D.D.C. Apr. 18, 2022) (TSC); *United States v. Brooks*, No. 21-cr-503, ECF No. 31 (D.D.C. Jan. 24, 2022) (RCL); *United States v. Bochene*, 579 F. Supp. 3d 177 (D.D.C. 2022) (RDM); *United States v. Fitzsimons*, No. 21-cr-158, Minute Order (D.D.C. Dec. 14, 2021) (RC); *United States v. Reffitt*, No. 21-cr-32, Minute Order (D.D.C. Oct. 15, 2021) (DLF); *United States v. Caldwell*, No. 21-cr-28, ECF No. 415 (D.D.C. Sept. 14, 2021) (APM).

Facebook messages discussing the incident in which he explained that "[t]here was one scuffle I got in between the one cop and the crowd, he was being dirty."

Based on his actions on January 6, 2021, a grand jury returned a six-count indictment against Defendant charging him with civil disorder in violation of 18 U.S.C. § 231(a)(3); assaulting, resisting, or impeding federal officers in violation 18 U.S.C. § 111(a)(1); entering and remaining in a restricted building or grounds in violation of 18 U.S.C. § 1752(a)(1); disorderly and disruptive conduct in a restrict building or grounds in violation of 18 U.S.C. § 1752(a)(2); disorderly conduct in the a Capitol building in violation of 40 U.S.C. § 5104(e)(2)(D); and parading, demonstrating, or picketing in a Capitol building in violation of 40 U.S.C. § 5104(e)(2)(G).

Defendant now moves for a change of venue. *See* ECF No. 56 at 1. He contends that prejudice should be presumed in this district for several reasons: (1) the size and characteristics of the District of Columbia jury pool (*id.* at 3-9), (2) the nature and volume of media coverage, including the results of a survey of potential jurors (*id.* at 9-20), and (3) the timing of the proceedings (*id.* at 21-22). Each of Defendant's arguments is without merit, and his motion should be denied.

LEGAL STANDARD

The Constitution provides that "[t]he trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment similarly guarantees the right to be tried "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. These provisions provide "a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." U*nited States v. Cores*, 356 U.S. 405, 407 (1958). Transfer to another venue is constitutionally required only where "extraordinary local prejudice will prevent a fair trial." *Skilling v. United States*, 561 U.S. 358, 378 (2010); *see* Fed. R. Crim. P. 21(a) (requiring transfer to another district if "so great a prejudice

against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there").

The primary safeguard of the right to an impartial jury is "an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Thus, the best course when faced with a pretrial publicity claim is ordinarily "to proceed to voir dire to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity." *United States v. Campa*, 459 F.3d 1121, 1146 (11th Cir. 2006) (en banc). "[I]f an impartial jury actually cannot be selected, that fact should become evident at the voir dire." *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976) (en banc) (per curiam). After voir dire, "it may be found that, despite earlier prognostications, removal of the trial is unnecessary." *Jones v. Gasch*, 404 F.2d 1231, 1238 (D.C. Cir. 1967).

ARGUMENT

Defendant has failed to establish a presumption of prejudice in this case to support a change of venue. In *Skilling*, the Supreme Court considered several factors in determining that prejudice should not be presumed where former Enron executive Jeffrey Skilling was tried in Houston, Enron's principal place of business. *Skilling*, 561 U.S. at 382-83. First, the Court considered the "size and characteristics of the community." *Id.* at 382. Unlike *Rideau*, where the murder "was committed in a parish of only 150,000 residents," Houston was home to more than 4.5 million people eligible for jury service. *Id.* at 382. Second, "although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.* Third, "over four years elapsed between Enron's bankruptcy and Skilling's trial," and "the decibel level of media attention diminished somewhat in the years following Enron's collapse." *Id.* at 383. "Finally, and of prime significance, Skilling's jury acquitted him of nine insider-trading counts," which undermined any "supposition of juror bias." *Id.*

Although these *Skilling* factors are not exhaustive, courts have found them useful when considering claims of presumptive prejudice based on pretrial publicity. *See, e.g.*, *In re Tsarnaev*, 780 F.3d 14, 20-21 (1st Cir. 2015) (per curiam); *United States v. Petters*, 663 F.3d 375, 385 (8th Cir. 2011). As discussed below, those factors do not support a presumption of prejudice in this case.

I. THE SIZE AND CHARACTERISTICS OF THE DISTRICT OF COLUMBIA JURY POOL DO NOT SUPPORT A PRESUMPTION OF PREJUDICE.

Defendant contends that a D.C. jury cannot be impartial because of various characteristics of the District of Columbia's jury pool, including (1) the size and population of the District; (2) the prevalence of federal employees in the District; (3) the impact of January 6 on D.C. residents; and (4) the political makeup of the District's electorate. ECF No. 56 at 3-8. None of these claims has merit.

A. The Size of the District of Columbia Jury Pool Does Not Support a Change of Venue.

Defendant asserts that an impartial jury cannot be found in Washington, D.C., despite the District's population of nearly 700,000 people. ECF No. 56 at 3. Although this District may be smaller than most other federal judicial districts, it has a larger population than two states (Wyoming and Vermont), and more than four times as many people as the parish in *Rideau*. The relevant question is not whether the District of Columbia is as populous as the Southern District of Texas in *Skilling*, but whether it is large enough that an impartial jury can be found. In *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991), the Court cited a county population of 182,537 as supporting the view that an impartial jury could be selected. And *Skilling* approvingly cited a state case in which there was "a reduced likelihood of prejudice" because the "venire was drawn from a pool of over 600,000 individuals." *Skilling*, 561 U.S. at 382 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991)). There is simply no reason to believe that, out of an eligible jury pool of nearly half a million, "12 impartial individuals could not be empaneled." *Id.* The same is true here.

B. The Number of Federal Employees Residing in the District of Columbia Does Not Support a Change of Venue.

Defendant next argues that the Court should presume prejudice in this District because the jury pool would contain a high percentage of federal government employees or their friends and family members. ECF No. 56 at 4-5. But Defendant fails to explain how merely being employed by the federal government would render a person incapable of serving as an impartial juror. Although some federal employees, such as the U.S. Capitol Police, were affected by the events of January 6, many others were neither directly nor indirectly affected. Indeed, many federal employees were nowhere near the Capitol on January 6 given the telework posture at the time. And the storming of the Capitol on January 6 was not aimed at the federal government in general, but specifically at Congress' certification of the electoral vote. There is therefore no reason to believe that federal employees with little or no connection to the events at the Capitol could not be impartial in this case. *See United States v. Bochene*, 579 F. Supp. 3d 177, 181 (D.D.C. 2022) (January 6 defendant's claim that federal employees would "have a vested interest in supporting their employer" was "exactly the kind of conjecture that is insufficient to warrant transfer prior to jury selection"); *see also Dennis v. United States*, 339 U.S. 162, 171 (1950) (rejecting claims that government employees should be disqualified on the theory that they are biased in favor of the federal government).

Even assuming (incorrectly) that every federal employee subject to voir dire will demonstrate improper bias, as Defendant suggests, there are ample numbers of potential jurors in this District who are not employed by the federal government. According to the Office of Personnel Management, approximately 141,000 federal employees (other than postal service employees) worked in Washington, D.C., in 2017.[2] The District has nearly 700,000 residents and many federal employees

[2] U.S. Office of Personnel Management, Federal Civilian Employment, available at https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federalemployment-reports/reports-publications/federal-civilian-employment (last visited Oct. 31, 2023).

who work in the District live elsewhere and would not be part of the jury pool. Thus, even if every federal employee were disqualified in voir dire, the Court would be able to pick a jury in this District.

C. The Impact of January 6 on the District of Columbia Does Not Support a Change of Venue.

Defendant further contends that a jury could not be impartial because D.C. residents have been acutely affected by events surrounding January 6, including the deployment of the National Guard, the mayor's declaration of a state of emergency, road closures, and a curfew. ECF No. 56 at 6-7. But January 6 occurred more than two-and-a-half years ago. Many D.C. residents do not live or work near the Capitol where roads were closed and the National Guard was deployed. There is no reason to believe that the District's entire population of nearly 700,000 people was so affected by these events that the Court cannot seat an impartial jury here.

Courts routinely conclude that defendants can receive a fair trial in the location where they committed their crimes even though some members of the community were victimized. *See In re Tsarnaev*, 780 F.3d at 15 (capital prosecution of Boston Marathon bomber); *Skilling*, 561 U.S. at 399 (fraud trial of CEO of Enron Corporation); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (trial of participant in 1993 World Trade Center bombing); *United States v. Moussaoui*, 43 F. App'x 612, 613 (4th Cir. 2002) (per curiam) (unpublished) (terrorism prosecution for conspirator in September 11, 2001 attacks); *Haldeman*, 559 F.2d at 70 (Watergate prosecution of former Attorney General John Mitchell and other Nixon aides). For example, in *Skilling*, the Supreme Court rejected the contention that Enron's "sheer number of victims" in the Houston area "trigger[ed] a presumption of prejudice." *Skilling*, 561 U.S. at 384 (quotation omitted). "Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to Enron," the voir dire was "well suited to that task." *Id.* In this case too, voir dire can adequately identify those D.C. residents who were so affected by January 6 that they cannot impartially serve as jurors. There is no reason to presume prejudice.

D. The District of Columbia's Political Composition Does Not Support a Change of Venue.

Finally, Defendant argues that he cannot obtain a fair trial in the District of Columbia because more than 90 percent of its voters voted for the Democratic Party candidate in the 2020 Presidential Election. ECF No. 7-9. The en banc D.C. Circuit rejected a nearly identical claim in *Haldeman*, where the dissent concluded that a venue change was required because "Washington, D.C. is unique in its overwhelming concentration of supporters of the Democratic Party" and the Democratic candidate received 81.8 percent and 78.1 percent of the vote when Nixon ran for President in 1968 and 1972, respectively. *Haldeman*, 559 F.2d at 160 (MacKinnon, J., concurring in part and dissenting in part). The majority rejected the relevance of this fact, observing that authority cited by the dissent gave no "intimation that a community's voting patterns are at all pertinent to venue." *Id.* at 64 n.43; *see also United States v. Chapin*, 515 F.2d 1274, 1286 (D.C. Cir. 1975) (rejecting the argument that "because of [the defendant's] connection with the Nixon administration and his participation in a 'dirty tricks' campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District's heavily black, and overwhelmingly Democratic, population").

If "the District of Columbia's voting record in the past two presidential elections" is not "at all pertinent to venue" in a case involving high-ranking members of a presidential administration, *Haldeman*, 559 F.2d at 64 n.43, it cannot justify a change of venue here. To be sure, *some* potential jurors might be unable to be impartial on January 6 cases based on disagreement with the defendants' political aims. But whether individual prospective jurors have such disqualifying biases can be assessed during voir dire. This Court should not presume that every member of a particular political party is biased simply because this case has a political connection. Indeed, the Supreme Court stated in the context of an election-fraud trial, that "[t]he law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity of national elections, and that his

political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute." *Connors v. United States*, 158 U.S. 408, 414 (1895). The same is true here. The District of Columbia's voting record does not establish that this Court will be unable to select "an unbiased jury capable of basing its verdict solely on the evidence introduced at trial." *Haldeman*, 559 F.2d at 70.

To the contrary, as the nation's capital and seat of the federal government, the District of Columbia has been home to its fair share of trials in politically charged cases. High-profile individuals strongly associated with a particular party, such as Marion Barry, John Poindexter, Oliver North, Scooter Libby, Roger Stone, and Steve Bannon have all been tried in the District. *See United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (per curiam); *United States v. Libby*, 498 F. Supp. 2d 1 (D.D.C. 2007); *United States v. Stone*, 613 F. Supp. 3d 1 (D.D.C. 2020); *United States v. Bannon*, No. 210-cr-670 (CJN). Indeed, the Court in *Stone* rejected the argument that jurors "could not possibly view [Roger Stone] independently from the President" because of his role in the presidential campaign or that "if you do not like Donald Trump, you must not like Roger Stone." 613 F. Supp. 3d at 38. Similarly, here, the fact that most District residents voted against Donald Trump does not mean those residents could not impartially consider the evidence against those charged in connection with the events on January 6.

II. THE PRETRIAL PUBLICITY RELATED TO JANUARY 6 DOES NOT SUPPORT A PRESUMPTION OF PREJUDICE.

Defendant next contends that a change of venue is warranted based on pretrial publicity. ECF No. 56 at 9-20 "The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity." *United States v. Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995); *see Murphy v. Florida*, 421 U.S. 794, 799 (1975) (juror exposure to "news accounts of the crime with which [a defendant] is charged" does not "alone presumptively

deprive[] the defendant of due process"). Indeed, "every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits." *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878). Thus, the "mere existence of any preconceived notion as to the guilt or innocence of an accused, without more," is insufficient to establish prejudice. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*

The Supreme Court has recognized only a narrow category of cases in which prejudice is presumed to exist without regard to prospective jurors' answers during voir dire. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). In *Rideau*, the defendant's confession—obtained while he was in jail and without an attorney present—was broadcast three times shortly before trial on a local television station to audiences ranging from 24,000 to 53,000 individuals in a parish of approximately 150,000 people. *Id.* at 724 (majority opinion), 728-29 (Clark, J., dissenting). The Court concluded that, "to the tens of thousands of people who saw and heard it," the televised confession "in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder." *Rideau*, 373 U.S. at 726. Thus, the Court "d[id] not hesitate to hold, without pausing to examine a particularized transcript of the voir dire," that these "kangaroo court proceedings" violated due process. *Id.* at 726-27.

Since *Rideau*, the Supreme Court has emphasized that a "presumption of prejudice . . . attends only the extreme case," *Skilling*, 561 U.S. at 381, and the Court has repeatedly "held in other cases that trials have been fair in spite of widespread publicity," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). In the sixty years since *Rideau*, the Supreme Court has never presumed prejudice based on pretrial publicity.[3] In fact, courts have declined to transfer venue in some of the most high-

[3] *But see Estes v. Texas*, 381 U.S. 532 (1965) (presuming prejudice based on media interference with

profile prosecutions in recent American history. *See In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015) (per curiam) (capital prosecution of Boston Marathon bomber); *Skilling*, 561 U.S. at 399 (fraud trial of CEO of Enron Corporation); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (trial of participant in 1993 World Trade Center bombing); *United States v. Moussaoui*, 43 F. App'x 612, 613 (4th Cir. 2002) (per curiam) (unpublished) (terrorism prosecution for conspirator in September 11, 2001 attacks); *Haldeman*, 559 F.2d at 70 (Watergate prosecution of former Attorney General John Mitchell and other Nixon aides).

Here, Defendant argues that prejudice should be presumed based on statements by President Biden, Representative Cori Bush, Representative Bennie Thompson (the Chairman of the Select Committee investigating the events of January 6th), Derrick Johnson (the President and CEO of the NAACP), Ron Rivera (Washington Commanders head coach), D.C. Mayor Muriel Bowser, D.C. Delegate Eleanor Holmes Norton, and several other local senators and representatives. ECF No. 56 at 12-17. But harsh condemnation of a defendant's actions is not uncommon in high-profile criminal cases, and it does not suffice to establish prejudice. In *Skilling*, the news stories about the defendant's involvement in Enron's collapse "were not kind," but they "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 561 U.S. at 382.

Similarly, in *Haldeman*, some of the coverage of the Watergate scandal was "hostile in tone and accusatory in content," but the bulk of the coverage "consist[ed] of straightforward, unemotional factual accounts of events and of the progress of official and unofficial investigations." *Haldeman*, 559 F.2d at 61. The D.C. Circuit concluded that the coverage "was neither as inherently prejudicial nor as unforgettable as the spectacle of *Rideau's* dramatically staged and broadcast confession." *Id.* The same is true where, as here, news coverage has not reported on any confession or other blatantly

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courtroom proceedings); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (same).

prejudicial information about the defendants. Moreover, statements by local and national politicians are ordinarily reported across the entire country, and exposure to these statements is hardly unique to Washington, D.C.

Defendant nonetheless asserts that a fair trial cannot be had in the District because of the sheer volume of news coverage of January 6. ECF No. 56 at 11. But even "massive" news coverage of a crime does not require prejudice to be presumed. *Haldeman*, 559 F.2d at 61. By contrast, a comparatively small percentage of the news coverage of January 6 has focused on Defendant himself.[4] Unlike most cases involving pretrial publicity, where the news coverage focuses on the responsibility of a single defendant (as in *Rideau* or *Tsarnaev*) or small number of co-defendants (as in *Skilling* and *Haldeman*), the events of January 6 involved thousands of participants and have so far resulted in charges against more than 1,000 people. The Court can guard against any spillover prejudice from the broader coverage of January 6 by conducting a careful voir dire and properly instructing the jury about the need to determine a defendant's individual guilt.

In any event, any threat of prejudice is not limited to Washington, D.C. because much of the news coverage of January 6 has been national in scope. *See Haldeman*, 559 F.2d at 64 n.43 (observing that "a change of venue would have been of only doubtful value" where much of the news coverage was "national in [its] reach" and the crime was of national interest); *Bochene*, 579 F. Supp. 3d at 182 ("The fact that there has been ongoing media coverage of the breach of the Capitol and subsequent prosecutions, both locally and nationally, means that the influence of that coverage would be present

[4] Indeed, some of the coverage about Defendant comes from Alabama where he seeks to transfer this case. *See, e.g.*, Melissa Brown, *'I got to manhandle 5 cops': Florida Man Arrested in Alabama on U.S. Capitol Riot charges*, Montgomery Advisor (June 24, 2021), https://www.montgomeryadvertiser.com/story/news/2021/06/24/brian-glenn-bingham-arrested-capitol-riot-charges-port-charlotte-florida-alabama/5334287001/; Leada Gore, '*I got to manhandle 5 cops': Florida Man Arrested in Alabama*, AL.com (June 21, 2021), https://www.al.com/news/2021/06/i-got-to-manhandle-5-cops-and-live-to-tell-capitol-riot-suspect-arrested-in-alabama.html.

wherever the trial is held" (internal quotation marks omitted)). Indeed, many of the news stories that Defendant relies upon were published by media organizations with wide national circulation, not purely local outlets. *See, e.g.*, ECF No. 56 at nn. 7, 11, 12, 16, 20, 23-24, 26-27, 37-38, 41-43. Thus, the nature and extent of the pretrial publicity do not support a presumption of prejudice.

II. THE PASSAGE OF TIME DOES NOT SUPPORT OF PRESUMPTION OF PREJUDICE.

In *Skilling*, the Court considered the fact that "over four years elapsed between Enron's bankruptcy and Skilling's trial." *Skilling*, 561 U.S. at 383. In this case, nearly three years have elapsed since the events of January 6, and more time will elapse before trial. This is far more than in *Rideau*, where the defendant's trial came two months after his televised confession. *Rideau*, 373 U.S. at 724. Although January 6 continues to be in the news, the "decibel level of media attention [has] diminished somewhat," *Skilling*, 561 U.S. at 383. Moreover, only a small percentage of the recent stories have mentioned Defendant himself, and much of the reporting has been national is scope, or limited to localities well outside this district, rather than limited to Washington, D.C.

III. NO JURY VERDICT SUPPORTS A PRESUMPTION OF PREJUDICE.

Because Defendant not yet gone to trial, the final *Skilling* factor—whether the jury's verdict undermines "in any way the supposition of juror bias," *Skilling*, 561 U.S. at 383—does not directly apply. But the fact that *Skilling* considered this factor to be "of prime significance" underscores how unusual it is to presume prejudice before trial. *Id.* Ordinarily, a case should proceed to trial in the district where the crime was committed, and courts can examine after trial whether the record supports a finding of actual or presumed prejudice. In short, none of the *Skilling* factors supports Defendant's contention that the Court should presume prejudice and order a transfer of venue without even conducting voir dire.

Defendant suggests that this factor *supports* his claim of prejudice because the other jury trials involving January 6 defendants have resulted in numerous guilty verdicts. ECF No. 56 at 22. Although

Skilling indicated that a split verdict could "undermine" a presumption of prejudice, it never suggested that a unanimous verdict—particularly a unanimous verdict in a separate case involving a different defendant—was enough to establish prejudice. The prompt and unanimous guilty verdicts in other January 6 jury trials resulted from the strength of the government's evidence. Moreover, juries in other January 6 trials have either been unable to reach a verdict on certain counts, *see United States v. Williams*, No. 21-cr-618 (D.D.C.), or have acquitted on some counts, *see United States v. Rhodes, et al.*, No. 22-cr-15, ECF No. 410 (D.D.C. Nov. 29, 2022); *United States v. Nordean, et al.*, No. 21-cr-175, ECF No. 804 (D.D.C. May 4, 2023).[5] This indicates that D.C. jurors are carefully weighing the evidence and not reflexively convicting January 6 defendants on all charges. As explained further below, jury selection in those cases confirms that impartial juries can be selected in the District of Columbia.

IV. THE POLL SUBMITTED BY DEFENDANT DOES NOT SUPPORT A CHANGE OF VENUE.

Defendant relies on an updated poll conducted by Select Litigation, a private litigation consulting firm, at the request of the Federal Public Defender for the Western District of Texas. ECF No. 56, Ex. 1 at 1. That poll does not support Defendant's request for a venue transfer.

A. Courts Have Repeatedly Declined to Find a Presumption of Prejudice Based on Pretrial Polling Without Conducting Voir Dire.

Defendant argues that this Court should find a presumption of prejudice based on a poll of prospective jurors. But "courts have commonly rejected such polls as unpersuasive in favor of effective voir dire as a preferable way to ferret out any bias." *United States v. Causey*, No. H-04-025, 2005 WL 8160703, at *7 (S.D. Tex. 2005). As one circuit has observed, the Supreme Court's emphasis on the important role of voir dire in addressing pretrial publicity "undercuts" the "argument

[5] *See* NPR Staff, *The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR (Oct. 27, 2023), https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories (observing that approximately 43 defendants have received mixed verdicts).

that poll percentages . . . decide the question of a presumption of prejudice." *In re Tsarnaev*, 780 F.3d at 23 (1st Cir. 2015); *see also Mu'Min*, 500 U.S. at 427 (observing that, "[p]articularly with respect to pretrial publicity, . . . primary reliance on the judgment of the trial court makes good sense").

Indeed, the D.C. Circuit has rejected a claim of presumed prejudice based on the results of a pre-voir dire survey. *Haldeman*, 559 F.2d at 64. In *Haldeman*, seven former Nixon administration officials (including the former Attorney General of the United States) were prosecuted for their role in the Watergate scandal. *Id.* at 51. According to a poll commissioned by the defense in that case, 93 percent of the D.C. population knew of the charges against the defendants and 61 percent had formed the opinion that they were guilty. *Id.* at 144, 178 n.2 (MacKinnon, J., concurring in part and dissenting in part). Recognizing that the case had produced a "massive" amount of pretrial publicity, *id.* at 61, the D.C. Circuit nevertheless held that the district court "was correct" to deny the defendants' "pre-voir dire requests for . . . a change of venue," *id.* at 63-64. The court observed that the district court "did not err in relying less heavily on a poll taken in private by private pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel." *Id.* at 64 n.43; *see Jones*, 404 F.2d at 1238 (observing that it is "upon the voir dire examination," and "usually only then, that a fully adequate appraisal of the claim [of local community prejudice] can be made" (quotation omitted)).

Other circuits have similarly rejected attempts to elevate polling results over voir dire. In *United States v. Campa*, a pre-trial survey found that 69 percent of respondents were prejudiced against anyone charged with spying on behalf of Cuba, as the defendants were. *Campa*, 459 F.3d at 1157 (Birch, J., dissenting). The en banc Eleventh Circuit affirmed the denial of a motion for change of venue, explaining that "[w]hen a defendant alleges that prejudicial pretrial publicity would prevent him from receiving a fair trial, it is within the district court's broad discretion to proceed to voir dire

to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity." *Id.* at 1146 (majority opinion).

Similarly, in *United States v. Rodriguez*, 581 F.3d 775 (8th Cir. 2009), a poll indicated that 99 percent of respondents had heard about the brutal rape and murder with which the defendant was charged, nearly 88 percent of those respondents believed he was guilty, and about 42 percent of respondents had a strongly held opinion of his guilt. *Id.* at 786; Brief for the Appellant, *United States v. Rodriguez*, No. 07-1316 (8th Cir.), 2008 WL 194877, at *19. The Eighth Circuit nonetheless found no presumption of prejudice, observing that a district court was not required "to consider public opinion polls when ruling on change-of-venue motions." *Rodriguez*, 581 F.3d at 786. And the court held that, in any event, the poll did not "demonstrate widespread community prejudice" because the "media coverage had not been inflammatory," two years had passed since the murder, and "the district court concluded that special voir dire protocols would screen out prejudiced jurors." *Id.*

There are good reasons to rely on voir dire, rather that public-opinion polls, when assessing whether prejudice should be presumed. First, polling lacks many of the safeguards of court-supervised voir dire, including the involvement of both parties in formulating the questions. Surveys that are not carefully worded and properly conducted can produce misleading results, such as by asking leading questions or providing the respondents with facts that will influence their responses. *See Campa*, 459 F.3d at 1146 (noting problems with "non-neutral" and "ambiguous" questions). Second, polling lacks the formality that attends in-court proceedings under oath, and it does not afford the court the "face-to-face opportunity to gauge demeanor and credibility." *Skilling*, 561 U.S. at 395. Third, polls ordinarily inform the court only the extent to which prospective jurors have heard about a case and formed an opinion about it. But that is not the ultimate question when picking a jury. A prospective juror is not disqualified simply because he has "formed some impression or opinion as to the merits of the case." *Irvin*, 366 U.S. at 722. Instead, "[i]t is sufficient if the juror can lay aside his impression

or opinion and render a verdict based on the evidence presented in court." *Id.* at 723. But pre-trial surveys are poorly suited to answering that ultimate question, which is best asked in the context of face-to-face voir dire under oath. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (observing that the trial judge's function in voir dire "is not unlike that of the jurors later in the trial" because "[b]oth must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions").

In sum, federal courts have shown an overwhelming preference for assessing prejudice through court-supervised voir dire rather than through public opinion polls. And Defendant has not offered any reason to depart from that usual practice here. This Court need not give substantial weight to the polling when considering whether to presume prejudice. In any event, as explained below, the poll submitted by Defendant does not support a presumption of prejudice.

B. The Select Litigation Poll Does Not Support a Presumption of Prejudice in the District of Columbia.

Contrary to Defendant's assertion, the Select Litigation poll does not support a presumption of prejudice in this District. As an initial matter, Defendant only attaches a Select Litigation poll dated May 9, 2023, which reflects updates from the January 2022 poll conducted of D.C. residents. It contains no comparator jurisdiction. Thus, the Select Litigation survey tells the Court nothing about the views or media exposure of prospective jurors in the Middle District of Alabama, where Defendant seeks to transfer this case. The poll therefore cannot show that selecting an impartial jury would be any more difficult in the District of Columbia than in Defendant's preferred district. *See Haldeman*, 559 F.2d at 64 n.43 (observing that a change of venue "would have been only of doubtful value" where the pretrial publicity was national in scope).

Moreover, the Select Litigation poll shows that 61 percent of respondents in D.C. said they had formed the opinion January 6 arrestees were "guilty" of the charges brought against them. *See* ECF No. 56, Ex. 1 at 8. The percentage of respondents to the survey who answered "guilty" dropped

a full 10 percent from when the survey was originally conducted in January 2022. *Id.* As with the prior survey, the updated survey failed to identify (much less define) any of the charges brought against Defendant. It also failed to provide respondents with the option of saying they were "unsure" about guilt, even though such an option is required by professional standards that apply in this area.[6] The survey instead gave respondents a binary choice between "guilty or not guilty." *Id.* Even without being provided the appropriate options, 33 percent of D.C. respondents voluntarily gave an answer of "Depends" or "Don't know/Refused." *Id.* Respondents who answered "Depends" or "Don't know/Refused" increased 7 percent from the previous survey conducted in January 2022. *Id.* This shows that, even in response to a poorly worded question, more than a quarter of D.C. residents realized the need to keep an open mind about guilt.

Understood in context, the Select Litigation poll does not indicate any higher degree of juror bias than in *Haldeman*, where the en banc D.C. Circuit found no presumption of prejudice. In *Haldeman*, 61 percent of respondents expressed a view that the defendants were guilty—the exact same as the 61 percent cited here. *See* ECF No. 56, Ex. 1 at 8; *Haldeman*, 559 F.2d at 144, 178 n.2 (MacKinnon, J., concurring in part and dissenting in part). But the survey in *Haldeman* first asked respondents whether they had formed an opinion about whether the indicted Nixon aides were guilty or innocent, giving options for both "No" (*i.e.* had not formed an opinion) and "Don't Know/No Opinion." *Id.* at 178 n.2. The survey then asked whether respondents thought the defendants were "guilty or innocent in the Watergate affair," giving options for "Not Guilty Until Proven" and "No Opinion/Don't Know." *Id.* Only after (1) being prompted to consider whether they could form an opinion, and (2) being reminded of the presumption of innocence, did 61 percent of respondents say "guilty." *Id.* Here, by contrast, respondents were not provided a "don't know" option, were not

[6] *See* American Society of Trial Consultants, Professional Standards for Venue Surveys at 9, available at https://www.astcweb.org/Resources/Pictures/Venue%2010-08.pdf ("Respondents must be made aware that they can say they do not know or have no opinion.").

reminded of the presumption of innocence, and were asked only whether they thought the "several hundred people" arrested in connection with January 6 were "guilty." ECF No. 56, Ex. 1 at 8.

When asked about guilt in the context of a criminal trial, however, respondents in the Select Litigation survey were far less likely to give an answer of "guilty." Question 5 asked them to assume they "were on a jury for a defendant charged with crimes for his or her activities on January 6" and then asked whether they were "more likely to vote that the person is guilty or not guilty." ECF No. 56. Ex. 1 at 8. In response to this question, only 46 percent of D.C. respondents said "Guilty," and 49 percent volunteered a response of "Depends" or "Don't know/Refused." *Id.* Respondents who answered "Guilty" dropped 6 percent from when polling was originally conducted in January 2022. *Id.* Thus, when asked to consider guilt or innocence in the context of a "defendant charged with crimes," as opposed to the "several hundred people . . . arrested," nearly half of D.C. residents were committed to keeping an open mind—even without being instructed on the presumption of innocence. This indicates, if anything, a lower degree of prejudice than was present in *Haldeman*.

Prejudice should also not be presumed based on the substantial numbers of respondents describing "the people who forced their way into the U.S. Capitol" as "[t]rying to overturn the election and keep Donald Trump in power" (85%), engaging in "[i]nsurrection" (76%), or "[t]rying to overthrow the U.S. government" (72%). ECF No. 56 at 17-18. For starters, this question asked specifically about those who "forced their way into the U.S. Capitol," which suggests a higher degree of culpability than simply entering the Capitol. The poll also did not provide an "undecided" option but asked only whether respondents "would" or "would not" use those descriptions. *Id.* Nor did the question define the offenses of "insurrection" or advocating the overthrow of government, *see* 18 U.S.C. §§ 2383, 2385, offenses with which no defendant has been charged in connection with January 6. And, most importantly, the poll did not answer the key question: whether a sufficient number of prospective jurors can "lay aside [their] impression[s] or opinion[s] and render a verdict based on the

evidence presented in court." *Irvin*, 366 U.S. at 723; *see also Patton v. Yount*, 467 U.S. 1025, 1029 (1984) (no presumption of prejudice where nearly 99 percent of prospective jurors had heard of the case and 77 percent indicated on voir dire that "they would carry an opinion into the jury box"). In short, the Select Litigation poll does not come close to demonstrating that "12 impartial individuals could not be empaneled" in Washington, D.C. *Skilling*, 561 U.S. at 382.

In any U.S. jurisdiction, most prospective jurors will have heard about the events of January 6, and many will have various disqualifying biases. But the appropriate way to identify and address those biases is through a careful voir dire, rather than a change of venue based solely on pretrial polling. As in *Haldeman*, there is "no reason for concluding that the population of Washington, D.C. [i]s so aroused against [Defendant] and so unlikely to be able objectively to judge [his] guilt or innocence on the basis of the evidence presented at trial" that a change of venue is required. *Haldeman*, 559 F.2d at 62.

V. THE PUBLICITY AND REDUCTION OF THE JURY POOL CAUSED BY OTHER JANUARY 6 TRIALS DOES NOT SUPPORT A CHANGE OF VENUE.

Defendant argues that he is likely to be prejudiced by the publicity generated by other recent trials involving charges based on the events of January 6. ECF No. 56 at 21-22. Although the trials in those cases have generated media coverage, that coverage was not confined to the District of Columbia and was focused on the defendants in those cases without mentioning Bingham. Defendant cannot show that jurors in this District, carefully selected after a thorough voir dire and properly instructed in the law, would be more likely to convict him simply because they were exposed to media coverage of other January 6 trials. Nor can Defendant show that any such asserted prejudice would be meaningfully different in another jurisdiction given the national media coverage of these trials. Additionally, by the time Defendant has gone to trial, even more time will have passed since the riot at the Capitol on January 6, 2021. As more January 6 defendants go to trial, the level of media attention given to each particular trial is likely to diminish.

Defendant also argues that, as additional January 6 trials take place, the pool of potential jurors will shrink, making it more difficult to obtain an impartial jury, citing the Court's concerns expressed on May 4, 2022, when denying a motion to transfer venue in *United States v. McHugh*, No. 21-cr-453 (JDB), ECF No. 56 at 22. Although the Government is sensitive to the Court's concern, each trial will barely touch the potential jury pool. Assuming (1) a jury pool of 500,000 out of nearly 700,000 residents, and (2) approximately 80 people being summoned per trial, over 60 trials will have to occur before *one percent* of the jury pool has been called. Accordingly, by the time Defendant's case proceeds to trial, there will still be hundreds of thousands of potential jurors, who have never been summoned to a January 6 trial, available for voir dire. And, as previously discussed, the Court can ensure the prospective jurors on the panel at Defendant's trial have not been tainted through the process of voir dire.

VI. THE JANUARY 6 JURY TRIALS THAT HAVE ALREADY OCCURRED HAVE DEMONSTRATED THE AVAILABILITY OF FAIR, IMPARTIAL JURORS.

At this point, numerous January 6 cases have proceeded to jury trials. Contrary to Defendant's assertions, the Court in each of those cases has been able to select a jury without undue expenditure of time or effort. *See Murphy*, 421 U.S. at 802-03 ("The length to which the trial court must go to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality."); *Haldeman*, 559 F.2d at 63 (observing that "if an impartial jury actually cannot be selected, that fact should become evident at the voir dire").

Instead, the judges presiding over nearly all of those trials were able to select a jury in one or two days. *See, e.g.*, *United States v. Sabol et al.*, 21-cr-35, Minute Entries (Oct. 2, 2023); *United States v. Vo*, 21-cr-509, Minute Entries (Sept. 18, 2023); *United States v. Horn*, 21-cr-301, Minute Entry (Sept. 13, 2023); *United States v. Christensen*, 21-cr-455, Minute Entries (Sept. 11, 2023); *United States v. Ryan Zink,* 21-cr-191, Minute Entries (Sept. 5, 2023); *United States v. Stephen Horn*, 21-cr-301 Minute Entries (Sept. 13, 2023); *United States v. Reed Christensen*, 21-cr-455, Minute

Entries (Sept. 12 & 13, 2023); *United States v. Reffitt*, No. 21-cr-32, Minute Entries (Feb. 28 & Mar. 1, 2022); *United States v. Robertson*, No. 21-cr-34, Minute Entry (Apr. 5, 2022); *United States v. Thompson*, No. 21-cr-161, Minute Entry (Apr. 11, 2022); *United States v. Webster*, No. 21-cr-208, Minute Entry (Apr. 25, 2022); *United States v. Hale-Cusanelli*, No. 21-cr-37, Minute Entry (May 23, 2022); *United States v. Anthony Williams*, No. 21-cr-377, Minute Entry (June 27, 2022); *United States v. Bledsoe*, No. 21-cr-204, Minute Entry (July 18, 2022); *United States v. Herrera*, No. 21-cr-619, Minute Entry (D.D.C. August 15, 2022); *United States v. Jensen*, No. 21-cr-6, Minute Entries (Sep. 19 & 20, 2022); *United States v. Strand*, No. 21-85, Minute Entry (D.D.C. Sep. 20, 2022); *United States v. Alford*, No. 21-cr-263, Minute Entry (Sep. 29, 2022); *United States v. Riley Williams*, No. 21-cr-618, Minute Entries (D.D.C. Nov. 7 & 8, 2022); *United States v. Schwartz*, No. 21-cr-178, Minute Entries (D.D.C. Nov. 22 & 29, 2022); *United States v. Gillespie* No. 22-cr-60, Minute Entry (D.D.C. Dec. 19, 2022); *United States v. Barnett*, 21-cr-38, Minute Entries (D.D.C. Jan. 9 & 10, 2023); *United States v. Sheppard*, No. 21-cr-203, Minute Entries (D.D.C. Jan. 20 & 23, 2023); *United States v. Eckerman*, No. 21-CR-623, Minute Entry (D.D.C. Jan. 23, 2023); *United States v. Zink*, 21-cr-191, Minute Entry, (D.D.C. Sept. 5, 2023). The only exceptions have been trials involving seditious conspiracy charges which are not at issue here. *See United States v. Rhodes, et al.*, No. 22-cr-15 (APM), Minute Entries (Sept. 27, 28, 29; Dec. 6, 7, 8, 9, 2022); *United States v. Nordean, et al.,* No. 21-cr-175 (TJK), Minute Entries (Dec. 19, 20, 21, 22, 23; Jan. 3, 4, 5, 6, 9, 10, 11, 12, 2023).

Using the first five jury trials as exemplars, the voir dire that took place undermines Defendant's claim that prejudice should be presumed. For example, in *Reffitt*, this Court individually examined 56 prospective jurors and qualified 38 of them (about 68 percent of those examined). *See Reffitt*, No. 21-cr-32, ECF No. 136 at 121. The Court asked all the prospective jurors whether they had "an opinion about Mr. Reffitt's guilt or innocence in this case" and whether they had any "strong feelings or opinions" about the events of January 6 or any political beliefs that it would make it

difficult to be a "fair and impartial" juror. *Reffitt*, No. 21-cr-32, ECF No. 133 at 23, 30. The Court then followed up during individual voir dire. Of the 18 jurors that were struck for cause, only nine (or 16 percent of the 56 people examined) indicated that they had such strong feelings about the events of January 6 that they could not serve as fair or impartial jurors.[7]

In *Thompson*, the Court individually examined 34 prospective jurors, and qualified 25 of them (or 73 percent). *See Thompson*, No. 21-cr-161, ECF No. 106 at 170, 172, 181, 190, 193. The court asked the entire venire 47 standard questions, and then followed up on their affirmative answers during individual voir dire. *Id.* at 4-5, 35. Of the nine prospective jurors struck for cause, only three (or about 9 percent of those examined) were stricken based on an inability to be impartial, as opposed to some other cause.[8]

Similarly, in *Robertson*, the Court individually examined 49 prospective jurors and qualified 34 of them (or about 69 percent of those examined). *See Robertson*, No. 21-cr-34, ECF No. 106 at 73. The Court asked all prospective jurors whether they had "such strong feelings" about the events of January 6 that it would be "difficult" to follow the court's instructions "and render a fair and impartial verdict." *Robertson*, No. 21-cr-34, ECF No. 104 at 14. It asked whether anything about the allegations in that case would prevent prospective jurors from "being neutral and fair" and whether

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[7] For those struck based on a professed inability to be impartial, *see Reffitt*, No. 21-cr-32, ECF No. 133 at 49-54 (Juror 328), 61-68 (Juror 1541), 112-29 (Juror 1046); ECF No. 134 at 41-42 (Juror 443), 43-47 (Juror 45), 71-78 (Juror 1747), 93-104 (Juror 432), 132-43 (Juror 514); ECF No. 135 at 80-91 (Juror 1484). For those struck for other reasons, *see Reffitt*, No. 21-cr-32, ECF No. 134 at 35-41 (Juror 313, worked at Library of Congress); ECF No. 134 at 78-93 and ECF No. 135 at 3 (Juror 728, moved out of D.C.); ECF No. 135 at 6-8 (Juror 1650, over 70 and declined to serve), 62-73 (Juror 548, unavailability), 100-104 (Juror 715, anxiety and views on guns), 120 (Juror 548, medical appointments); ECF No. 136 at 41-43 (Juror 1240, health hardship), 53-65 (Juror 464, worked at Library of Congress), 65-86 (Juror 1054, prior knowledge of facts).

[8] For the three stricken for bias, *see Thompson*, No. 21-cr-161, ECF No. 106 at 51-53 (Juror 1242), 85-86 (Juror 328), 158-59 (Juror 999). For the six stricken for hardship or inability to focus, *see Thompson*, No. 21-cr-161, ECF No. 106 at 44 (Juror 1513), 45 (Juror 1267), 49-50 (Juror 503), 50-51 (Juror 1290), 86-93 (Juror 229), 109-10 (Juror 1266).

their political views would affect their ability to be "fair and impartial." *Id.* at 13, 15. The Court followed up on affirmative answers to those questions during individual voir dire. Of the 15 prospective jurors struck for cause, only nine (or 18 percent of the 49 people examined) indicated that they had such strong feelings about the January 6 events that they could not be fair or impartial.[9]

In *Webster*, the Court individually examined 53 jurors and qualified 35 of them (or 66 percent), *Webster*, No. 21-cr-208, ECF No. 115 at 6. It later excused one of those 35 based on hardship, *Webster*, No. 21-cr-208, ECF No. 114 at 217-18. The Court asked all prospective jurors whether they had "strong feelings" about the events of January 6 or about the former President that would "make it difficult for [the prospective juror] to serve as a fair and impartial juror in this case." *Webster*, No. 21-cr-208, ECF No. 113 at 19. During individual voir dire, the Court followed up on affirmative answers to clarify whether prospective jurors could set aside their feelings and decide the case fairly. *See, e.g., id.* at 32-33, 41-42, 54-56, 63, 65-66. Only 10 out of 53 prospective jurors (or about 19 percent) were stricken based on a professed or imputed inability to be impartial, as opposed to some other reason.[10] The *Webster* Court observed that this number "was actually relatively low"

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[9] For those struck based on a professed inability to be impartial, *see Robertson*, No. 21-cr-34, ECF No. 104 at 26-34 (Juror 1431), 97-100 (Juror 1567); ECF No. 105 at 20-29 (Juror 936), 35-41 (Juror 799), 59-70 (Juror 696), 88-92 (Juror 429); ECF No. 106 at 27-36 (Juror 1010), 36-39 (Juror 585), 58-63 (Juror 1160). For those struck for other reasons, *see Robertson*, No. 21-cr-34, ECF No. 104 at 23-26 (Juror 1566, hardship related to care for elderly sisters), 83-84 (Juror 1027, moved out of D.C.); ECF No. 105 at 55-59 (Juror 1122, language concerns), 92-94 (Juror 505, work hardship); ECF No. 106 at 16-21 (Juror 474, work trip); 50-53 (Juror 846, preplanned trip).

[10] Nine of the 19 stricken jurors were excused based on hardship or a religious belief. *See Webster*, No. 21-cr-208, ECF No. 113 at 46 (Juror 1464), 49-50 (Juror 1132), 61 (Juror 1153), 68 (Juror 951), 78 (Juror 419); *Webster*, No. 21-cr-208, ECF No. 114 at 102-04, 207, 217 (Juror 571), 188 (Juror 1114), 191 (Juror 176), 203-04 (Juror 1262). Of the ten other stricken jurors, three professed an ability to be impartial but were nevertheless stricken based on a connection to the events or to the U.S. Attorney's Office. *See Webster*, No. 21-cr-208, ECF No. 113 at 58-60 (Juror 689 was a deputy chief of staff for a member of congress); *Webster*, No. 21-cr-208, ECF No. 114 at 139-41 (Juror 625's former mother-in-law was a member of congress); 196-98 (Juror 780 was a former Assistant U.S. Attorney in D.C.).

and therefore "doesn't bear out the concerns that were at root in the venue transfer motion" in that case. *Webster*, No. 21-cr-208, ECF No. 115 at 7.

In *Hale-Cusanelli*, the Court individually examined 47 prospective jurors and qualified 32 of them (or 68 percent). *Hale-Cusanelli*, No. 21-cr-37, ECF No. 91 at 106, 111. The Court asked prospective jurors questions similar to those asked in the other trials. *See Hale-Cusanelli*, No. 21-cr-37, ECF No. 90 at 72-74 (Questions 16, 20). Of the 15 prospective jurors struck for cause, 11 (or 23 percent of those examined) were stricken based on a connection to the events of January 6 or a professed inability to be impartial.[11]

In these first five jury trials, the percentage of prospective jurors stricken for cause based on partiality is far lower than in *Irvin*, where the Supreme Court said that "statement[s] of impartiality" by some prospective jurors could be given "little weight" based on the number of other prospective jurors who "admitted prejudice." *Irvin*, 366 U.S. at 728. In *Irvin*, 268 of 430 prospective jurors (or 62 percent) were stricken for cause based on "fixed opinions as to the guilt of petitioner." *Id.* at 727. The percentage of partiality-based strikes in these first five January 6-related jury trials—between 9 and 23 percent of those examined—is far lower than the 62 percent in *Irvin*. The percentage in these cases is lower even than in *Murphy*, where 20 of 78 prospective jurors (25 percent) were "excused because they indicated an opinion as to petitioner's guilt." *Murphy*, 421 U.S. at 803. *Murphy* said that this percentage "by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." *Id.* As in *Murphy*, the number of prospective jurors indicating bias does not call into question the qualifications of others whose statements of impartiality the Court has credited.

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[11] *See Hale-Cusanelli*, No. 21-cr-37, ECF No. 90 at 61-62 (Juror 499), 67-68 (Juror 872), 84-85 (Juror 206), 91-94 (Juror 653); ECF No. 91 at 2-5 (Juror 1129), 32 (Juror 182), 36 (Juror 176), 61-62 (Juror 890), 75-78 (Juror 870), 94-97 (Juror 1111), 97-104 (Juror 1412). For the four jurors excused for hardship, see *Hale-Cusanelli*, No. 21-cr-37, ECF No. 90 at 77-79 (Juror 1524), 99 (Juror 1094); ECF No. 91 at 12 (Juror 1014), 31 (Juror 899).

Far from showing that "an impartial jury actually cannot be selected," *Haldeman*, 559 F.2d at 63, the first five January 6-related jury trials have confirmed that voir dire can adequately screen out prospective jurors who cannot be fair and impartial, while leaving more than sufficient qualified jurors to hear the case. The Court should deny Defendant's request for a venue transfer and should instead rely on a thorough voir dire to protect Defendant's right to an impartial jury.

CONCLUSION

For these reasons, the United States respectfully requests that the Court deny Defendant's motion to transfer venue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on November 6, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification to all counsel of record.

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