

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 21-cr-495 (ABJ)
	:	
DANIEL GRAY,	:	
	:	
Defendant.	:	

**UNITED STATES’ MOTION IN LIMINE TO
PRECLUDE ANY IMPROPER FIRST AMENDMENT DEFENSE**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, moves this Court to preclude the defense from eliciting evidence or arguing to the jury that Gray’s statements and actions are a legal defense to his criminal activity on January 6, 2021. The government also moves *in limine* for a preliminary ruling of admissibility regarding statements that evince Defendant Daniel Gray’s motive or intent, or which go to prove an element of any offense with which he is charged.

BACKGROUND

The facts of this matter are summarized in the Court’s Order denying Defendant’s Motion for Return of Property and Exculpatory Evidence Held by the United States (ECF No. 60), which the government incorporates by reference herein.

On July 28, 2021, a federal grand jury in the District of Columbia returned the initial indictment against Daniel Gray, which was superseded on December 1, 2021. ECF Nos. 12, 25. The Superseding Indictment charges the Defendant with nine counts, including Civil Disorder (18 U.S.C. §§ 231(a)(3)), Obstruction of an Official Proceeding (18 U.S.C. §§ 1512(c)(2)), and Assaulting, Resisting, or Impeding Certain Officers (18 U.S.C. §§ 111(a)(1)). ECF No. 25. On October 21, 2022, defendant moved to dismiss the 40 U.S.C. § 5104 charges on First

Amendment grounds (among other reasons). ECF No. 56. The Court denied his motion on January 26, 2023, finding “section 5104(e)(2)(G) is not overbroad because it is limited to the interior of the Capitol buildings, is viewpoint-neutral, and is reasonable in light of the statute’s purposes” and finding the defendant wholly “failed to advance any argument in support of an as-applied challenge at all.” *United States v. Gray*, No. 21-cr-495 (ABJ), 2023 WL 2998862, at *9 (D.D.C. Jan. 26, 2023) (ECF No. 71 at 23-28) (citations and quotations omitted).

ARGUMENT

I. This Court has repeatedly rejected the First Amendment as a defense to much of the criminal conduct that occurred on January 6, 2021.

The defendant has previewed that he intends to raise First Amendment defenses to the crimes he committed on January 6, 2021, an argument this Court has rejected with respect to the charges brought under 40 U.S.C. § 5104. *See* ECF Nos. 56 (Motion to Dismiss), 71 at 23-30 (Memorandum Opinion and Order). The government files this motion *in limine* to preclude the defendant from levying additional meritless First Amendment arguments at trial with respect to the Superseding Indictment’s remaining charges.

As the Court noted previously, “there is no constitutional problem to avoid. To the extent defendant seeks to argue that he was merely exercising his First Amendment rights in his alleged conduct, that is a factual argument for the jury.” *United States v. Gray*, No. 21-cr-495 (ABJ), 2023 WL 2998862, at *9 (D.D.C. Jan. 26, 2023). The government agrees: while Gray cannot assert that the alleged criminal activity was legally protected by the First Amendment, if he intends to deny he assaulted officers, entered a restricted area, or obstructed Congress (among other illegal conduct), and that he, for example, remained outside the area peacefully protesting, he may do so.

However, additional argument that the First Amendment is a legal defense to the charged crimes should be precluded at trial because here, the Defendant is being prosecuted for his violent

and obstructive conduct, not his speech. As noted above, the charged conduct includes assaulting law enforcement, obstructing the certification of the election, interfering with officers, and entering restricted grounds. Open-source, Capitol Police security footage, and MPD body-worn camera footage show Gray breaching both the Capitol's restricted perimeter and the building itself, physically resisting efforts by law enforcement officers to keep the angry mob at bay, and repeatedly grabbing officers and encouraging others to do the same, among other conduct.

“No matter Defendants’ political motivations or any political message they wished to express, this alleged conduct is simply not protected by the First Amendment.” *United States v. Nordean*, 579 F. Supp. 3d 28, 53 (D.D.C. 2021); *see also, e.g., United States v. Bozell*, No. 21-CR-216 (JDB), 2022 WL 474144, at *7 (D.D.C. Feb. 16, 2022) (defendant “is not being prosecuted for exercising his First Amendment rights to peacefully protest outside the Capitol, but rather on the belief that he corruptly used force to disrupt the January 6 Certification.). Furthermore, none of the offenses with which the defendant is charged punishes speech, unlike crimes such as threats or solicitation do. Even if some aspect of Gray’s conduct were protected by the First Amendment, it would still not negate criminal action for his unprotected conduct because “when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). That is to say that even if a defendant is engaged in speech that is protected, when his actions turn physically obstructive or outright violent, the First Amendment ceases to protect the speech itself because the government has a legitimate interest in preventing or stopping violent conduct. *Id.*

These principles have been upheld in the context of January 6 cases, including in recent cases involving charges beyond any § 5104 charges. *See, e.g., United States v. Bozell*, No. 21-CR-216 (JDB), 2022 WL 474144, at *7 (D.D.C. Feb. 16, 2022) (“And to the extent that any of Bozell’s

alleged crimes did constitute constitutionally protected expressive conduct, a proposition this Court strongly doubts, the Court concludes that Bozell’s prosecution is still constitutional under *United States v. O’Brien*, 391 U.S. 367 (1968).”); May 20, 2023 Minute Order, *United States v. Thomas*, 21-cr-552-DLF (In case involving charges under 18 U.S.C. §§ 1512, 231, 111, 1752, and § 5104: “For all the reasons stated from the bench on May 19, 2023, the defendant’s 136 Motion for Mistrial on First Amendment Grounds is DENIED. As the Court stated repeatedly, the government is permitted to introduce protected speech ‘to establish the elements of a crime or to prove motive or intent.’ *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).”) (rejecting First Amendment-based challenge to identical charges as Gray’s); *United States v. Alberts*, 21-cr-26 (CRC), Trial Tr., April 11, 2023 at 261-63 (“With respect to the First Amendment defense, the Court previously ruled that there is no First Amendment right to engage in assaultive or other unlawful conduct.”) (citing ECF No. 77 at 9-12) (“Alberts contends that prosecuting him under the statutes underlying counts one, two, five, seven, and eight violates the First Amendment because he ‘had a constitutional right to protest regarding his perceptions of unfair election tabulation.’ Because the ‘U.S. Capitol must be [] accessible to the citizenry,’ his argument goes, it is ‘perhaps the place in America where government has the least authority to restrict citizen presence, petitioning, demonstrating, and activism.’ This argument fails.”) (citations omitted); ECF No. 57 at 16-20, *United States v. Lesperance*, 21-cr-575-JDB (denying motion to dismiss 1752 and 5104 charges on First Amendment grounds and rejecting argument that “there is no law of Congress which makes the Capitol a restricted building”) (citing, e.g., *United States v. McHugh*, 583 F. Supp. 3d 1, 29-35 (D.D.C. 2022); ECF No. 79, *United States v. Rhine*, Crim. A. No. 21-687 (RC) (D.D.C. Jan. 24, 2023)).¹

¹ See also July 28, 2023 Order (ECF No. 151), *United States v. Kastner*, 21-cr-725-MAU (denying First Amendment motion to dismiss §§ 1752 and 5104 charges); June 6, 2023 Order (ECF No. 43),

None of his illegal conduct is sanctioned by the First Amendment. Therefore, to avoid confusing the issues or misleading the jury, the Court should preclude the Defendant from arguing that this conduct was protected by the First Amendment.²

II. Nonetheless, the government should be permitted to introduce the Defendant's statements as evidence of his motive and intent.

However, the statements that the Defendant made about the 2020 Presidential Election and the certification are admissible motive and intent evidence relevant to the charges in this case. For example, this evidence helps to establish that defendant intended to obstruct the certification that day and disrupt the government, elements of the charges under 18 U.S.C. §§ 1512(c)(2) and 1752(a)(2). It is uncontroversial that a defendant's statements, which would otherwise be protected under the First Amendment, may be introduced in a criminal case when those statements are evidence of the intent behind a defendant's acts. See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). "Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trial subject to evidentiary rules dealing with relevancy, reliability, and the like." *Id.* at 489. Courts across the country have followed the mandate in *Mitchell* and admitted evidence for this purpose. *United States v. Smith*, 967 F.3d 1196, 1205 (11th Cir. 2020) (admitting musical lyrics composed by a defendant in a Hobbs Act prosecution); *United States v. Pierce*, 785 F.3d 832 (2d Cir. 2015) ("The speech was not the basis for the prosecution, but instead it was used to establish the existence of, and [defendant's] participation in, the alleged RICO enterprise[.]" (internal citations omitted); *United States v. Salameh*, 152 F.3d 188, 111-112 (2d Cir. 1998) (the defendants were not "prosecuted for possessing or reading terrorist materials. The materials seized

United States v. Baez, 21-cr-507-PLF (same); also, e.g., January 24, 2023 Order (ECF No. 78), *United States v. Rhine*, 21-cr-687-RC (same).

² To the extent Gray intends to raise First Amendment arguments regarding non-§ 5104 charges, this Court should reject them for the same reasons provided in the above-referenced decisions and orders by judges in this District.

[...] were used appropriately to prove the existence of the bombing conspiracy and its motive.”). This same principle has been upheld and applied in the context of cases arising from the Capitol Riot. *See, e.g., United States v. Chansley*, 525 F. Supp 3d 151, 164 (D.D.C. 2021) (Lamberth, J.) (“[E]ven if defendant’s statements were themselves protected, the First Amendment does not prohibit their consideration as evidence of motive or intent.”); *United States v. Robertson*, No. 21-cr-34 (CRC), ECF No. 63, 2022 WL 969546 at *6 (D.D.C. Feb. 25, 2022) (Cooper, J.) (“If Robertson had expressed his views only through social media, he almost certainly would not be here. But he also allegedly took action—entering the Capitol without lawful authority in an alleged attempt to impede the Electoral College vote certification. His words remain relevant to his intent and motive for taking those alleged actions.”).

The Defendant is not being prosecuted *for* his speech. Instead, his speech is relevant and highly probative evidence of the intent behind his actions. *Id.* Among the Defendant’s charges are multiple counts which require the government to prove his intent beyond a reasonable doubt. The First Amendment thus does not bar the admission of any evidence which the government offers to establish the Defendant’s motive, intent, or an element of the crime, including that his actions that day were intended to stop the certification of the Electoral College vote. *Mitchell*, 508 U.S. at 489. The Court should therefore find that the government may introduce these statements as probative of the Defendant’s intent. *Id.*

CONCLUSION

For the foregoing reasons, the Court should (1) preclude Gray from arguing that the First Amendment is a legal defense to the charges in this case, and (2) permit the government to admit Gray's statements that are evidence of his motive and intent to commit the charged offenses.

Respectfully submitted,

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