UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Case No. 21-cr-180-RJL**
v.	:	
	:	
ELIAS COSTIANES,	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL DISCOVERY

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits this opposition to the Defendant's motion to compel discovery. (Dkt. 49). The Defendant has moved to compel the United States to produce to the Defendant the names of any news correspondents, reporters, videographers or similar persons who entered the United States Capitol on January 6, 2021, and have not been charged with illegally entering the Capitol because of their status as members of the media. *Id.* For reasons that will be explained below, the Defendant's motion is meritless and should be denied.

BACKGROUND

On January 6, 2021, Congress assembled in a Joint Session at the United States Capitol to declare the winner of the 2020 presidential election by reviewing and certifying the Electoral College ballots. The Defendant was aware of this proceeding, and he wanted to stop it. He traveled to Washington, D.C., from his home in Maryland and stayed overnight at a hotel downtown near the National Mall.

On the afternoon of January 6, the Defendant went to the Capitol to participate in the riot and to obstruct Congress from meeting to certify the vote. While at the Capitol, the Defendant climbed scaffolding outside of the building and shouted in support of the rioting crowd. He then

ascended the stairs of the Capitol while shouting "Mitch McConnell's a traitor" and "Let's go." The Defendant entered the Capitol through a broken window in the presence of law enforcement officers. Once inside the Capitol, the Defendant filmed himself taking the "Senators Only" elevator to the second level of the chamber overlooking the Senate floor. The Defendant entered the Senate chamber where numerous other rioters were rifling through the desks of Senators on the chamber floor. The Defendant left the Senate chamber and, again, used the "Senators Only" elevator. He then chanted in support of a mob who overran police who were attempting to keep a door sealed. The Defendant left the Capitol sometime thereafter.

The Defendant was arrested on February 12, 2021, at his home in Maryland after agents searched his residence. In a post-arrest statement to law enforcement, the Defendant admitted that he was part of the Capitol breach on January 6, 2021. On March 3, 2021, a grand jury returned an Indictment charging the Defendant with six counts. (Dkt. 7.) Count 1 charges a violation of 18 U.S.C. §§ 1512(c)(2), 2 (Obstruction of Congress; Aiding and Abetting); Count 2 charges a violation of 18 U.S.C. § 1752(a)(1) (Entering and Remaining in a Restricted Building or Grounds); Count 3 charges a violation of 18 U.S.C. § 1752(a)(2) (Disorderly and Disruptive Conduct in a Restricted Building or Grounds); Count 4 charges a violation of 40 U.S.C. § 5104(e)(2)(B) (Entering and Remaining in the Gallery of Congress); Count 5 charges a violation of 40 U.S.C. § 5104(e)(2)(D) (Disorderly Conduct in a Capitol Building); Count 6 charges a violation of 40 U.S.C. § 5104(e)(2)(G) (Parading, Demonstrating, or Picketing a Capitol Building).

In his brief motion, the Defendant advances two arguments in support of his motion for discovery in aid of a future selective prosecution claim. First, he asserts that he is a "media person" with his own YouTube channel and an "influencer" on social media. Second, he contends that no similarly situated members of the media have been prosecuted. Those bare assertions and

speculative contentions fall far short of the demanding standard required to compel discovery in support of a selective prosecution claim. The Defendant is not a member of the news media, but even if he were, he proffers no evidence or information to suggest that he has been singled out for prosecution given the nature of the conduct in which he engaged. The Defendant's motion therefore fails the threshold evidentiary showing for a selective-prosecution discovery claim and should be denied.

ARGUMENT

I. A defendant must make a "rigorous" showing on each element of selective prosecution before he can obtain discovery on the issue.

Because "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws," a "presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotation marks and citations omitted). This presumption "rests in part on an assessment of the relative competence of prosecutors and courts." *Id.* at 465. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Ibid.* (citation omitted). "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016). So "the presumption of regularity" applies to "prosecutorial decisions and,

in the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties." *Id.*

As a result, "[i]n the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Armstrong*, 517 U.S. at 464.

This presumption of regularity "also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465. To overcome the presumption of regularity and obtain dismissal of the criminal charges, a defendant must present "clear evidence" that the government's decision to prosecute was "based on an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 464-65 (citations omitted).

Concerned that selective-prosecution inquiries "will divert prosecutors' resources and may disclose the Government's prosecutorial strategy," the Supreme Court has also imposed a "correspondingly rigorous standard for discovery in aid of such a claim." *Armstrong*, 517 U.S. at 468. The defendant must initially produce "some evidence tending to show the existence of the essential elements of" selective prosecution, which are: "discriminatory effect and discriminatory intent." *Ibid.* (citation omitted). The defendant's evidence must also be "credible"—something more than "personal conclusions based on anecdotal evidence." *Id.* at 470. "If either part of the test is failed," the defendant cannot "subject[] the Government to discovery." *Att'y Gen. of United States v. Irish People, Inc.*, 684 F.2d 928, 947 (D.C. Cir. 1982); *see also United States v. Lewis*, 517 F.3d 20, 25 (1st Cir. 2008) ("[D]iscovery will not be allowed unless the defendant's evidence

supports each of the two furcula of his selective prosecution theory: failure on one branch dooms the discovery motion as a whole").

II. The Defendant has failed to proffer any evidence supporting an inference of selective prosecution.

The Defendant has failed to make the threshold showing on either selective-prosecution element. He has not presented any evidence suggesting "that (1) [he] was singled out for prosecution from among others similarly situated and (2) that [his] prosecution was improperly motivated." *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000) (quoting *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983)). "[T]he standard is a demanding one." *Armstrong*, 517 U.S. at 463.

A) The Defendant has not made a colorable showing that the government singled him out for prosecution.

The Defendant must first adduce evidence that "others similarly situated generally have not been prosecuted for conduct similar to that for which he was prosecuted." *Irish People, Inc.*, 684 F.2d at 946 (citation omitted). As a judge of this Court explained, an individual may be similarly situated if he "committed the same basic crime in substantially the same manner as the defendant— so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant." *United States v. Stone*, 394 F. Supp. 3d 1, 31 (D.D.C. 2019) (quoting *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000)); *see also United States v. Lewis*, 517 F.3d 20, 27-28 (1st Cir. 2008) ("A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced. … A multiplicity of factors legitimately may influence the government's decision to prosecute one individual but not another. These may include, inter alia, the comparability of the crimes, the

similarities in the manner in which the crimes were committed, the relative efficacy of each prosecution as a deterrent, and the equivalency of the evidence against each prospective defendant.") (internal citations omitted).

The Defendant fails to identify "similarly situated" individuals who "have not been prosecuted," *Irish People, Inc.*, 684 F.2d at 946 (citation omitted), in two respects. First, the Defendant's conduct on January 6 places him in a category of similarly situated individuals who *are being prosecuted*, namely those whose words and conduct evinced an intent to stop Members of Congress from certifying the Electoral College vote. As noted above, the Defendant climbed scaffolding outside of the Capitol building while shouting in support of the rioting crowd. Once inside, he calumniated one lawmaker by name—yelling "Mitch McConnell's a traitor"—while wearing a t-shirt indicating his belief that the 2020 presidential election was fraudulent. Far from reporting events as an objective journalist might, the Defendant bragged that that he had "commandeered" the "Senators Only" elevator and urged on other rioters—encouraging those around him to "open the fucking doors"—as he moved throughout the Capitol building. The Defendant admitted to law enforcement that he once had on his YouTube channel multiple "Stop the Steal"[1] videos (which he subsequently removed) and that he told others to delete text conversations he had with them following the riot. Those actions alone demonstrate that the Defendant is not "similarly situated" to individuals who have not been prosecuted. *See United States v. Rivera*, No. 21-cr-060 2022 WL 2187851, (D.D.C. Jun. 17, 2022) (defendant who claimed to be a videographer convicted at trial for conduct on January 6).

[1] "Stop the Steal" was the name of an organization that called itself "the home of the rebellion against an illegitimate government." See Oct. 7, 2021, Ltr. from Rep. Bennie G. Thompson, to Custodian of Records for Stop the Steal, LLC, at 3, available at https://january6th.house.gov/sites/democrats.january6th.house.gov/files/20211007%20STS.pdf.

Second, the Defendant's "similarly-situated" claim fails because he cannot plausibly argue that he qualifies as member of the news media. Filming himself on a rampage and posting that footage to YouTube does not erect a journalist's privilege behind which the Defendant may try to shield himself.[2] Unlike the individuals identified in his motion who are associated with newsgathering entities, the Defendant proffers no information to suggest that he has ever held a press credential, been otherwise affiliated with a news organization, or even identified himself as a member of the news media. In brief, the individuals mentioned in the Defendant's motion are improper "comparator[s]" because they are not similarly situated. *Stone*, 394 F. Supp. 3d at 31. It follows that the situational and evidentiary differences between the Defendant and the other individuals in his motion represent "distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions." *Branch Ministries*, 211 F.3d at 145 (quoting *United States v. Hastings*, 126 F.3d 310, 315 (4th Cir. 1997);.

B) The Defendant has not made a colorable showing that the government harbored an improper motive in prosecuting him.

With respect to the second prong, the Defendant has failed to adduce any evidence that improper motives undergird this prosecution. "[A] defendant must provide something more than mere speculation or 'personal conclusions' of selective prosecution." *Stone*, 394 F. Supp. 3d at 31 (quoting *Armstrong*, 517 U.S. at 470).

To the extent the Defendant is arguing that he has been singled out for his political views, the Defendant presents no evidence linking any of the individuals he mentions in his Motion to a particular viewpoint. The Defendant simply does not explain why, in his view, the other

[2] Even if the Defendant could plausibly claim he was engaged in news-gathering,being a member of the news media does not immunize one from criminal prosecution. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) (explaining that the First Amendment does not, "in the interest of securing news or otherwise, confer[] a license on either the reporter or his news sources to violate criminal laws).

individuals were not prosecuted, and he was, and therefore cannot claim an improper motive for his own prosecution. That is insufficient to meet the "rigorous" standard to compel discovery.

CONCLUSION

Thus, for the reasons set forth above, the Court should deny the Defendant's Motion.

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