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

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| **UNITED STATES OF AMERICA** | : | |
| | : | **CASE NO. 21-CR-619-BAH** |
| **v.** | : | |
| | : | |
| **ERIK HERRERA,** | : | |
| | : | |
| **Defendant.** | : | |

**ERIK HERRERA'S REPLY IN SUPPORT OF HIS**

**MOTION FOR TRANSFER OF VENUE**

Erik Herrera files this reply in support of his motion to transfer venue to the Central District of California, or to any district other than the District of Columbia and its immediately neighboring districts. In response to his motion, the government argues that the facts of this case do not support a presumption of prejudice and that any potential partiality and fairness issues can be resolved through, or deferred until after, voir dire. Mr. Herrera disagrees. The combination of factors present here supports a presumption of prejudice and venue should be transferred prior to the commencement of trial.

## I. The Characteristics of the District of Columbia's Jury Pool Collectively Support a Presumption of Prejudice

The government disputes that the characteristics of the District of Columbia -- in particular, the prevalence of federal employees in the District, the impact of January 6 events on the lives of District residents, and the political makeup of the District -- support a presumption of prejudice. The government is incorrect. These factors in combination strongly support a presumption of prejudice.

The events of January 6 are unique to American history. As the government describes the day, it involved a "rioting mob" that "overwhelmed police resources," and overtook the U.S.

Capitol building. *See* Govt's Opp. to Deft's Motions in Limine, Dkt. 41, at 13. The resulting chaos from the day impacted the lives of the District of Columbia's residents, as described in Mr. Herrera's motion, and set into motion a series of investigative processes that continue to intensify with the House Select Committee's hearings this summer as Mr. Herrera's trial date approaches. The residents of the District of Columbia were, and continue to be, privy to the January 6 events in ways no other citizen can relate to; this is particularly true for the significant portion of them who are employed by the federal government.

The government states that Mr. Herrera "does not explain how merely being employed by the federal government" "render[s] a person incapable of serving as an impartial juror." Govt. Opp, Dkt. 42, at 4. It is not their mere federal employment Mr. Herrera relies on, but also the other factors set forth in his motion. In any case, a person's federal employment has obvious connections to their ability to be fair and impartial in a case that deals with an assault at the heart of federal government. The government's tries to minimize the events of January 6 in the context of this motion by saying they were "not aimed at the federal government in general, but specifically at Congress' certification of the electoral vote." Govt. Opp., Dkt. 42, at 5. But this characterization unfairly narrows the consequential scope and public understanding of the event. The District of Columbia is "the Seat of Government of the United States," U.S. Const., art. I, § 8, and the Capitol building a symbolic pillar of government. It is commonly understood that the electoral process affects federal employees at all levels because their duties and priorities flow from law and policy implemented and administered by those who prevail in elections. The certification of the electoral vote is of particular importance given its cross-branch nature: it is a Legislative Branch process that marks the beginning of a new Executive Branch administration. An effort to disrupt that process, thus, is significant to anyone with a connection to government.

The government's attempt to frame the U.S. Capitol Police as the only pool of employees directly affected by the January 6 events is unpersuasive. Govt. Opp., Dkt. 42, at 4. Of course, U.S. Capitol Police officers would have had a more harrowing experience than other federal employees not on the Capitol grounds while the event was taking place, but it is not necessary for a federal employee to have been a physically present, percipient eyewitness to the event to feel harmed by the activities.

The government suggests that, even if prejudice is presumed as to federal employees, the jury pool in the District is large enough that "the Court could draw a jury from those District residents who are not employed by the federal government." Govt. Opp., Dkt. 42, at 5. But this argument does not resolve the prejudice issue, because its likely that the remaining citizens have close relationships with federal employees. The government agrees that there are at least 141,000 non-Postal Service employees in the District, which has a population of less than 700,000 people. *Id.* Even if only *half* of the 141,000 employees lived in the District, that would still mean that about 1 in 10 people in the District work for the federal government. It can fairly be inferred from this number that a significant portion of the District population that is not employed by the federal government nonetheless is likely to have a close relationships with federal employees, which causes significant prejudice concerns.

The government claims that "January 6 is now a year and a half in the past," and that "[m]any D.C. residents do not live or work near the Capitol where the roads were closed and the National Guard was deployed," Govt. Opp., Dkt. 42, at 5. Again, direct physical proximity to the Capitol is not a prerequisite to District residents feeling that their community was harmed by the events of January 6. And the government cannot seriously argue that the events of January 6 are stale even as it prepares to try Mr. Herrera (and others) related to those events, and especially

as the January 6 House Select Committee investigation rises toward a crescendo that is running parallel to Mr. Herrera's pre-trial litigation and trial.

The government further argues that it is irrelevant that an overwhelming majority of the District of Columbia's population belongs to the Democratic Party and voted for the Democratic candidate in the 2020 election. Govt. Opp., Dkt. 42, at 6. Mr. Herrera does not base his motion on this fact alone; rather, the uncontested data regarding the District's political makeup is a factor that should be considered in tandem with the other bases for the motion. A significant percentage of the jury pool will have a combination of the factors Mr. Herrera identifies as part of their profile -- employment with the federal government or a relationship with someone employed by the federal government, residency in the District, and/or affiliation with the political party whose election victory was targeted by the "rioting mob" -- such that prejudice should be presumed. The government places too much emphasis on dicta in *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), on the issue of political affiliation. The dissent in *Haldeman* noted that political bias "can itself be a basis for changed venue." *Haldeman*, 559 F.2d at 160. The majority did not dedicate any meaningful analysis to this point -- in fact, it relegated the issue to a footnote -- because the parties had not raised the claim in the underlying record and because it believed the cited authority did not support the dissent's position. *Id.* at 64 n.43. This case is different because Mr. Herrera is affirmatively raising the issue in district court and because he is raising it in combination with the other factors set forth in his motion.

## II. The *Skilling* Factors Support a Presumption of Prejudice

The government argues that the intense pretrial publicity surrounding the January 6 events and its aftermath does not support a presumption of prejudice. As set forth in Mr. Herrera's motion, the Supreme Court identified three factors to guide lower courts in determining whether a presumption of prejudice should attach where pretrial publicity is of

concern: (1) the size and characteristics of the jury pool; (2) the type of information included in the media coverage; and (3) the time period between the defendant's arrest and trial, as it relates to the attenuation of the media coverage. *See Skilling v. United States*, 561 U.S. 358, 378 (2010). With respect to the size and characteristics of the jury pool, the government points to the District's population of nearly 700,000 to argue that there are likely to be sufficient impartial jurors. But the size of the District's population is offset by the extremely high number of federal employees (and their friends and family) living in the district, which for the reasons discussed above and in his initial motion, supports a presumption of prejudice.

With respect to the type of information in the media, the government states that there is an absence of a "'confession or other blatantly prejudicial information,'" and that the majority of media coverage has not focused on Mr. Herrera specifically. Govt. Opp., Dkt. 42, at 11, 13. Though Mr. Herrera is solely charged in the indictment in this case, the government describes him as "part of the larger mob that descended on the Capitol" on January 6, 2021, *see* Govt. Opp. to Deft's Motions in Limine, Dkt. 41, at 2, and as "refreshing" the "rioting mob" that "overwhelmed police resources." *See id.* at 13. The government's characterization of Mr. Herrera as being part of the "rioting mob" is precisely how members of the public called to jury service will perceive him, given the emotionally charged media coverage of the January 6 events and its aftermath to date. It does not matter that Mr. Herrera is not individually named or specifically targeted by the media coverage, or by comments by public officials and judicial officers. He will readily accrue prejudice from the intense media coverage by association. While there is not a widely publicized confession by Mr. Herrera akin to the one in *Rideau v. Louisiana*, 373 U.S. 723 (1963), the intensity and pervasiveness of the media coverage regarding

the activities of those who participated in the January 6 event nonetheless have a substantial prejudicial effect on Mr. Herrera's ability to obtain a fair trial in the District.

With respect to the attenuation of media coverage factor, the government's claim that the "'decibel of media attention [has] diminished somewhat" since January 6, 2021, is simply not credible. Govt. Opp., Dkt. 42, at 14. Even as briefing on this motion is pending, reporting on the January 6 events remains in the news daily, including for example, a story about the potential presence of firearms.[1] Intense press coverage will almost certainly continue in the coming weeks before trial because of the House Select Committee's work. Again, though Mr. Herrera individually is not the subject of these hearings, it is unpersuasive to argue that the jury will not connect him with the hearings when it is the precise subject matter for which he is on trial.

The *Skilling* factors, taken together, support a presumption of prejudice. The government, in its opposition, claims that the voir dire process conducted in other jury trials to date demonstrates that courts have been able to seat impartial and fair juries in these cases, thereby undermining Mr. Herrera's claim that prejudice should be presumed before jury selection. But as set forth in Mr. Herrera's motion, the Supreme Court has acknowledge that the presumption of prejudice can override juror declarations of impartiality during voir dire. *Murphy v. Fla.*, 421 U.S. 794, 802 (1975) ("Even these indicia of impartiality might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory."); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father."). Jurors may not understand their own

[1] Tom Jackman, Rachel Weiner & Spencer S. Hsu, Evidence of Firearms in Jan. 6 Crowd Grows as Arrests and Trials Mount, Washington Post (July 8, 2022), https://www.washingtonpost.com/dc-md-va/2022/07/08/jan6-defendants-guns/.

biases or they may be unable to set them aside, despite good faith efforts to do so, which is why in certain cases the presumption of prejudice is necessary to protect a defendant's rights to a fair trial. Thus, the fact that courts in other January 6 cases have used the voir dire process to address juror fairness and impartiality issues does not control the outcome of this motion. January 6 was a historically unique event and the media coverage has contributed to the "extraordinary local prejudice" envisioned by *Skilling*. 561 U.S. at 378. The are ample grounds here to presume prejudice prior to trial.

## CONCLUSION

For all the reasons discussed above, and those in his moving papers, the Court should grant Mr. Herrera's motion for transfer venue.

Respectfully submitted,

DATED: July 8, 2022

*/s/ Jonathan K. Ogata & Cuauhtemoc Ortega*

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