UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	**Case No. 21-cr-47 (RDM)**
HECTOR VARGAS SANTOS	

GOVERNMENT OPPOSITION TO DEFENDANT'S
MOTIONS *IN LIMINE* REGARDING EVIDENCE

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits this response to Defendant Hector Vargas Santos Motions *in Limine* to preclude the government: 1) from using certain language about the January 6, 2021 rioter; 2) from using exhibits about the riot, including a compilation exhibit of U.S. Capitol Police closed circuit video (CCV) footage, and: 3) from introducing the content of certain Instagram messages and posts made by the defendant. ("Def. Motion") ECF No. 46.[1] The defendant asks this Court to preclude this evidence under Federal Rules of Evidence 401 and 403. The defendant's arguments lack merit, and his requests to exclude terminology and evidence should be denied.

FACTUAL BACKGROUND

The U.S. Capitol is secured 24 hours a day by U.S. Capitol Police. Restrictions around the U.S. Capitol include permanent and temporary security barriers and posts manned by U.S. Capitol Police. Only authorized people with appropriate identification were allowed access inside the U.S. Capitol. On January 6, 2021, the exterior plaza of the U.S. Capitol was also closed to members of the public.

[1] The defense also filed to preclude the testimony of the civilian witness. The government and the defense have reached stipulations with respect to the testimony of that witness, so we do not address that argument here.

On January 6, 2021, a joint session of the United States Congress convened at the United States Capitol, which is located at First Street, SE, in Washington, D.C. During the joint session, elected members of the United States House of Representatives and the United States Senate were meeting in separate chambers of the United States Capitol to certify the vote count of the Electoral College of the 2020 Presidential Election, which had taken place on November 3, 2020. The joint session began at approximately 1:00 p.m. Shortly thereafter, by approximately 1:30 p.m., the House and Senate adjourned to separate chambers to resolve a particular objection. Vice President Mike Pence was present and presiding, first in the joint session, and then in the Senate chamber.

As the proceedings continued in both the House and the Senate, and with Vice President Mike Pence present and presiding over the Senate, a large crowd gathered outside the U.S. Capitol. As noted above, temporary and permanent barricades were in place around the exterior of the U.S. Capitol building, and U.S. Capitol Police were present and attempting to keep the crowd away from the Capitol building and the proceedings underway inside.

At such time, the certification proceedings were still underway and the exterior doors and windows of the U.S. Capitol were locked or otherwise secured. Members of the U.S. Capitol Police attempted to maintain order and keep the crowd from entering the Capitol; however, shortly around 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of the U.S. Capitol Police, as others in the crowd encouraged and assisted those acts.

Shortly thereafter, at approximately 2:20 p.m. members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to—and did—evacuate the chambers. Accordingly, the joint session of the United States Congress was effectively suspended until shortly after 8:00 p.m. Vice

President Pence remained in the United States Capitol from the time he was evacuated from the Senate Chamber until the sessions resumed.

On January 4, 2021, the defendant made several messages and posts on Instagram, evincing his motive to travel to D.C. to "fight for our democracy" and stated he did not want to have another "peaceful protest." Then, on January 6, 2021, the defendant arrived at the U.S. Capitol grounds, wearing a tactical vest, with the first group of rioters who breached the West Front, moved barricades set up to keep people out, waved a flag while upon the steps of the Capitol, pushed into the building, past several officers, and ultimately ended up in the Rotunda, filming a video for Facebook, stating "we took over this mother f---er, bro! We took over this f---ing Capitol!"

ARGUMENT

I. The Descriptors the Defendant Seeks to Preclude Accurately Describe the Events of January 6 and the Federal Rules of Evidence Do Not Preclude Them.

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. "The general rule if that relevant evidence is admissible," *United States v. Foster*, 986 F.2d 541, 545 (D.C. Cir. 1993), a "liberal" standard, *United States v. Moore*, --- F.3d --- , 2022 WL 715238, at *2 (D.D.C. Mar. 10, 2022)

Evidence is subject to the balancing test of Federal Rule of Evidence 403, which renders it inadmissible only if the prejudicial effect of admitting the evidence "substantially outweighs" its probative value. *United States v. Miller*, 895 F.2d 1431, 1436 (D.C. Cir. 1990). Furthermore, it is not enough that the evidence is simply prejudicial; the prejudice must be "unfair." *United States v. Cassell,* 292 F.3d 788, 796 (D.C. Cir. 2002) (quoting *Dollar v. Long Mf'g, N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977) for the proposition that "[v]irtually all evidence is prejudicial or it isn't material. The prejudice must be "unfair."); *United States v. Pettiford*, 517 F.3d 584, 590 (D.C. Cir.

2008) ("[T]he Rule focuses on the danger of *unfair* prejudice, and gives the court discretion to exclude evidence only if that danger *substantially* outweigh[s] the evidence's probative value.") (citations and punctuation omitted) (emphasis in original). "Rule 403 establishes a high barrier to justify the exclusion of evidence.." *United States v. Lieu,* 963 F.3d 122, 128 (D.C. Cir. 2020). Additionally, Rule 403 does not require the government "to sanitize its case, to deflate its witnesses' testimony or to tell its story in a monotone." *United States v. Gartmon,* 146 F.3d 1015, 1021 (D.C. Cir. 1998).

Neither Rule 401 nor 403 supports the defendant's requested relief.

What took place at the Capitol on January 6, 2021 may be properly described as a riot, breach, assault or insurrection. Thousands of people forced their way into the Capitol building during the constitutionally mandated process of certifying the Electoral College votes, threatened the peaceful transfer of power after the 2020 presidential election, injured more than one hundred law enforcement officers, and caused more than two million dollars in damage and loss. As this Court has observed: This was not a protest. *See United States v. Paul Hodgkins*, 21-cr-188-RDM, Tr. at 46 ("I don't think that any plausible argument can be made defending what happened in the Capitol on January 6th as the exercise of First Amendment rights."). The defendant's argument that these terms have legal meanings (Def. Mot. at 3), does not prevent them from also being nouns descriptive of the actions of the day.

The defendant's conduct on January 6, like the conduct of scores of other defendants, took place in the context of a large and violent riot that relied on numbers to overwhelm police, breach the Capitol, and disrupt the proceedings. But for his actions alongside so many others, the riot likely would have failed to delay the certification vote. *See United States v. Matthew Mazzocco*, 1:21-cr-00054 (TSC), Tr. 10/4/2021 at 25 ("A mob isn't a mob without the numbers. The people

who were committing those violent acts did so because they had the safety of numbers.") (statement of Judge Chutkan). While a jury will judge the defendant based on his own actions, the context of the defendant's actions will necessarily be placed before them. And that context was a riot. The defendant provides no legal authority in support of his broad claim that witnesses and government prosecutors must only describe these events using certain words.

Additionally, the defendant can take comfort that this Court will, as it always does, instruct the jurors that the arguments of the lawyers are not evidence. Redbook Criminal Jury Instruction 2.105 ("The statements and arguments of the lawyers are not evidence. They are only intended to assist you in understanding the evidence. Similarly, the questions of the lawyers are not evidence."); *see also Darden v. Wainwright,* 477 U.S. 168, 182 (1986) ("The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence."). The Court will also instruct the jury as to precisely what the defendant is charged with, and can even go a step further, if needed, and instruct the jury as to what the defendant is not charged with. Such decisions can be made in response to the evidence elicited at trial, rather than pre-empted with the ruling requested by the defendant here.

Accordingly, the defendant's motion should be denied.

II. The Evidence of the Events of the Day Is Admissible

Although the defendant is only one participant in the events at the Capitol on January 6, evidence of the broader context of the events of the day is both relevant to, and probative of, the alleged offenses.

The government intends to introduce evidence through a U.S. Capitol Police Lieutenant familiar with the Capitol Police procedures leading up to January 6, 2021, including the security

cameras put in place. From the videos created by those cameras on January 6, 2021, the government has developed a comprehensive exhibit covering the events of the day.

As the Certification proceeding at the Capitol began, a large crowd gathered outside the U.S. Capitol. Officers with the United States Capitol Police and the Metropolitan Police Department attempted to keep the crowd away from the building, but the crowd broke through several barriers on the West front just before 1:00 pm. Another crowd gathered on the East Plaza of the building, encroaching on the area where the motorcade that brought Vice President Pence to the Capitol was located. Shortly before 2:00 p.m., the crowd on the West Front broke into the scaffolding, which was set up to construct the inauguration stage. At 2:13 p.m., individuals in the crowd forced entry into the U.S. Capitol building itself on the West side near the Senate. In response to this intrusion, representatives, senators, and Vice President Pence evacuated their respective chambers around 2:20 p.m. For the next two hours, rioters flooded the building and the grounds, while police attempted to clear them out. The police finally cleared the Lower West Terrace of the Capitol at approximately 5:10 p.m. Given that the defendant was on the Capitol grounds starting at approximately 12:52 p.m. and remained until well after 3:30 p.m., these videos depicting the chaos the police and the Congress from performing their duties are relevant.

Evidence about the official proceeding, and its disruption, as well of the actions of Capitol Police with respect to the rioters, is relevant to the charges in two respects. First, for Count Two, the government must prove that the defendant engaged in "disorderly or disruptive conduct" in a restricted area "when . . . such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions." 18 U.S.C. § 1752(a)(2). The compilation exhibits establish how and when the disruption occurred. Second, for Counts One and Two, the

government must prove the defendant knowingly engaged in certain conduct in a restricted area.[2] The compilation establishes that element by showing law enforcement efforts, both before and during the breach of the restricted area, to keep unauthorized persons out of the restricted area.

The probative value of the compilation is higher in a case such as this, when the defendant participated in disorderly and disruptive acts on both the East and West Fronts and remained on the restricted grounds for nearly four hours.

III. The Instagram Evidence is Admissible.

The defendant's several Instagram messages and posts should be admitted into evidence at trial as it is relevant to the defendant's *mens rea* and does not offend Federal Rule of Evidence 403.

As noted above, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. "[T]here is no such thing as 'highly relevant' evidence or ... 'marginally relevant' evidence. Evidence is either relevant or it is not." *Foster,* 986 F.2d at 545.

Each of the charges here have an intent requirement. Intent may be inferred from defendant's own statements. *Kawakita v. United States,* 343 U.S. 717, 742 (1952). The defendant's preparatory statements indicating that he was not coming to participate in a peaceful protest on January 6 is directly relevant to the issue of whether the defendant acted with a wrongful or unlawful purpose and that he did so with a consciousness of wrongdoing. The preparatory statements are relevant to his motive to disrupt the orderly operation of government—by violent

[2] A defendant may violate 18 U.S.C. § 1752(a)(2) by engaging in disruptive conduct (with the appropriate *mens rea*) while "within such proximity" to a restricted area. The proof in this case will establish that the defendant was "in" the restricted area, not merely in close proximity to it.

means, or otherwise. The factfinder at trial may properly make the inference that the defendant's preparatory statements in his Instagram messages evinced an intent to oppose the government, the same intent that was animating the defendant when he sought to impede or disrupt the orderly conduct of Government business or official functions on January 6. The defendant's statements make more probable his purposeful, deliberate effort to disrupt, impede, or interfere with an official Congressional proceeding. That the defendant made these statements after the events of January 6 does not detract from their relevance to the both the *actus reus* and *mens rea* elements of 18 U.S.C. § 1752(a)(2) and 40 U.S.C. §5104(e)(2)(D). At bottom, the Instagram messages and posts are evidence directly relevant to an element of the offenses.

As discussed above, the Instagram messages and posts are directly relevant to the *mens rea* element of 18 U.S.C. § 1752(a)(2) and 40 U.S.C. § 5104(e)(2)(D). The defendant's statements demonstrate that his conduct on January 6, 2021—entering Capitol grounds, moving aside barricades, waving a flag upon the Capitol steps, breaching the building, and filming video inside the Rotunda—was purposeful and motivated by his belief that the next American civil war was starting as a result of the certification of the Presidential election. They show the exact *mens rea* the government must show—that he intended, not to be peaceful, but to disrupt the government business of the day. The defendant cannot credibly argue that such evidence will be offered purely for the prohibited purpose of creating an inference that the defendant is of bad character.

The high probative value of the Instagram messages and posts is not substantially outweighed by potential prejudice to the defendant. Rule 403 "does not bar powerful, or even 'prejudicial' evidence." *United States v. Pettiford*, 517 F.3d 584, 590 (D.C. Cir. 2008) (internal quotation marks omitted). "The prejudice that the court must assess is the prejudice that "lies in the danger of jury misuse of the evidence." *See United States v. Mitchell*, 49 F.3d 769, 777 (D.C.

Cir. 1995). To warrant exclusion, prejudice to the defendant must be *unfair*, and the defense must show "compelling or unique" evidence of prejudice, *see id.*, distinct from the probative value of the evidence and distinct from the intrinsic prejudicial potential.

The D.C. Circuit has consistently upheld the use of limiting instructions as a way of minimizing the residual risk of prejudice. *See, e.g.*, *United States v. Douglas,* 482 F.3d 591, 601 (D.C. Cir. 2007) (emphasizing the significance of the district court's instructions to jury on the permissible and impermissible uses of the evidence); *Pettiford*, 517 F.3d at 590 (same); *Crowder II*, 141 F.3d at 1210 (stating that mitigating instructions to jury enter into the Rule 403 balancing analysis). Thus, because the Instagram messages and posts are not unduly prejudicial and any prejudice can be addressed through an appropriate limiting instruction, its admission is appropriate.

CONCLUSION

To accurately present the context of what took place at the Capitol on January 6, 2021, to wit: a riot, a breach, an assault and a riot that stopped the orderly government business, the government is required to so refer and the defendant's motion to preclude such language and evidence should be denied. Because the defendant's Instagram messages and posts are relevant to his *mens rea* and is not unfairly prejudicial, the government respectfully requests the Court deny the defendant's motion to exclude such evidence.

Respectfully submitted,

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