IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CASE NO. 1:23CR114
	:	:
Plaintiff,	:	JUDGE ANA C. REYES
	:	:
vs.	:	:
	:	:
KYLE MLYNAREK, et al.,	:	**DEFENDANT'S REPLY TO**
	:	**GOVERNMENT'S MEMORANDUM**
Defendant.	:	**IN OPPOSITION TO DEFENDANT'S**
	:	**MOTIONS IN LIMINE**

Defendant, Kyle Mlynarek, through counsel, submits this reply to the Government's Memorandum in Opposition to Mr. Mlynarek's motions in limine. The Government has objected to all three of Mr. Mlynarek's motions in limine. For the following reasons, Mr. Mlynarek maintains that the Court should grant his second and third motion in limine, and asks to withdraw the first motion pending future developments.

I. Mr. Mlynarek asks to reserve the right to raise the substance of his first motion in limine at a later juncture

After further consideration, Mr. Mlynarek agrees with the Government that imposing a categorical ban on the use of evidence of the "bad acts" of other people would not be appropriate at this time. ECF no. 37 at 2. At this point, the Defense has not received all the exhibits the government intends to offer at trial. The Government has indicated that they will provide such evidence as soon as possible, and the Defense will work with the Government to accomplish that task. The Government has also indicated to the parties and the Court that it "continues to investigate this matter and anticipates supplementing this [exhibit] list in the coming weeks, as

well as deleting where possible unnecessary exhibits." ECF no. 34 at 80. In short, there are additional exhibits that could be submitted in the future, which the parties have not seen. The Government may seek to introduce video clips that display, for example, the extremely violent acts of individuals on January 6 that did not involve Mr. Mlynarek. This is not mere speculation, as video of many such instances of violence exists and the Government has stated its intention to present an overview of the day's events to the jury. ECF no. 37 at 2. It is at that point that Mr. Mlynarek would raise an objection that such a video is substantially more prejudicial than probative. *See* Fed. R. Evid. 403. For those reasons, Mr. Mlynarek requests leave of the Court to withdraw his first motion in limine but to reserve the right to raise the issue again should future disclosures necessitate it.

II. The Government will not be able to authenticate its central piece of evidence

The Government has objected to Mr. Mlynarek's request to exclude a specific video from evidence absent a showing of its authenticity. ECF no. 37 at 2. It also stated its intention to "…present the testimony from one or more witnesses who will establish that the video fairly and accurately captures the scene on January 6, 2021." Presumably the Government does not intend to call the person who actually recorded the video, as the remainder of the objection argues that the videographer's testimony is not required for authentication. ECF no. 37 at 2-4. The Government must show, however, "'as a matter of reasonable probability', [that] possibilities of misidentification and adulteration have been eliminated." *United States* v. *White*, 116 F.3d 903, 920 (D.C. Cir. 1997) (quoting *United States v. Stewart*, 104 F.3d 1377, 1383 (D.C. Cir. 1997). The Government cannot meet even that modest standard based on the representations it has made about its intended proof. Without a witness who can testify that either: they witnessed the events depicted on the recording and they are accurate, or that they recorded the video and it has not been tampered

with, the Government is not able to make any showing that the video was not altered at some point after its recording. For that reason, the video clip in question should be excluded from this trial.

III. The Government should be precluded from arguments that appeal to jurors' shared interests as Americans

In its opposition, the Government states that it will not use the terms: sedition, treason or insurrection, because "these are separate crimes for which the defendants have not been charged." ECF no. 37 at 6. The government reserves the right, however, to describe the defendants' actions "for what they were, namely an attack on our democracy." *Id.* The Government should be precluded from making that argument, as well as analogous arguments, because it would inflame the passions of the jurors and focus the jurors' attention away from the facts admitted into evidence. *See* Fed. R. Evid. 403.

A recent case from the DC Circuit Court of Appeals, *United States v. Khatallah*, is illustrative of Mr. Mlynarek's contentions on this issue. 41 F.4th 608 (D.C. Cir 2022). Khatallah was tried on 18 counts alleging his involvement in the murders of Americans in the infamous attack on the U.S. Embassy in Benghazi, Libya. *Id.* at 619. Prior to her closing statement, the prosecutor was instructed to "avoid gratuitous or unnecessary uses of the term [] [terrorist]" and to not refer to the U.S. Mission in Bengahzi as "our" mission. *Id.* at 636. The prosecutor nonetheless repeatedly referred to the mission as our "mission" and the deceased Americans as "our American sons." *Id.* In addressing the defense's strategy in the case, the Government stated the following:

> The defendant is guilty as sin. And he is a stone cold terrorist. Innocent presence? Innocent presence? ... His hit squad was searing through the United States Mission, searing violently with rage—his rage against America, brandishing AK-47s, [rocket-propelled grenades] and all sorts of weapons to destroy us, those innocent men who are on the compound.

Id. at 637.

The court found that the Government's argument "crossed the line." *Id.* at 635 -636. The court noted the clear rule that the government may not "…weaponize a jury's allegiance to their Nation or incite jurors to protect their community or act as its conscience." *Id.* at 636. The prosecutor had "encouraged the jury to 'substitute emotion for evidence[,]'and "made an appeal to nationalism that was 'wholly irrelevant to any facts or issues in the case, the purpose and effect of which [was] only…to arouse passion and prejudice'". *Id.* at 637 (quoting *United States v. Vega*, 826 F.3d 514, 525 (D.C. Cir. 2016).

The Government wishes to describe January 6 as "an attack on our democracy." This is the same type of appeal to emotion, love of country and natural desire to protect one's community that *Khatallah* clearly forbids. It essentially positions the jurors as having been amongst the victims of these charges because their way of life and shared values is at risk. Our country's democratic values are of great pride to Americans and surely cause a swell of emotion in many who contemplate them. The Government's argument, and the analogous forms it can assume, should not be utilized during a criminal trial in which Mr. Mlynarek is not charged with any type of treason. The Government points to recent cases in which the courts in question had described January 6 as an attack on democratic institutions. ECF No. 37 at 6. Those comments occurred in the context of sentencing hearings, however, which is when the court expresses its views about the nature of the crimes of the convicted defendant. This case has not yet proceeded to trial, so the Government should be barred from using language that posits the jurors as having "our" democracy attacked. Regardless of whether that kind of argument is true, it must give way to the dictates of a fair trial.

Respectfully submitted,

STEPHEN C. NEWMAN
Federal Public Defender
Ohio Bar: 0051928

/s/ Andrew Byrd
ANDREW BYRD
California Bar: 337584
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856 Fax: (216) 522-4321
e-mail address: andrew_byrd@fd.org