UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

V. CAUSE NO. 1:21-cr-00599-RBW

THOMAS HARLEN SMITH

MOTION IN LIMINE TO EXCLUDE THE USE OF PERJORATIVE TERMS AND TO PRECLUDE ANY AND ALL PHOTOGRAPHS AND VIDEO FOOTAGE FROM THE CAPITOL PRIOR TO THE DEFENDANT'S ARRIVAL

Defendant, Thomas Smith, hereby *moves in limine* for an order excluding the following: (1) any general evidence, including testimony, videos, photos, or other exhibits, of the events of January 6, 2021, from locales at the Capitol prior to the arrival of Mr. Smith and areas where he never was and did not know about; and (2) any terminology by witnesses to describe either events at or near the Capitol Building on January 6, 2021 or persons who participated in or were present for those events. It is not possible to anticipate or compile here a complete list of such words, but for illustrative purposes, they would include—but by no means be limited to—words such as "riot" and "rioter," "insurrection" and "insurrectionist," "mob," "trespass," "disorderly conduct," "picketing," "breach," "extremist," "anti-government," and "demonstrating." Many individual Americans no doubt have formed personal opinions about the aptness of describing January 6 in such terms, but their use in the context of a criminal trial would frustrate the ends of justice. The exclusion of such words will not prejudice either party's ability to fully and fairly present the case at trial, whereas allowing the use of such words could unduly inflame juror passions and imperil Mr. Smith's right to a fair trial.

ARGUMENT

The evidence at trial should be limited in scope to the circumstances surrounding Mr. Smith and not to the broader actions of individuals or groups of individuals on January 6, 2021. Further, any evidence introduced should

be carefully limited to ensure compliance with the federal rules of evidence to avoid an unfair prejudice through gratuitous and prejudicial characterizations. To ensure such compliance, the defense raises the following evidentiary objections in limine.

I. THE COURT SHOULD EXCLUDE ANY GENERAL EVIDENCE, INCLUDING TESTIMONY, VIDEOS, PHOTOS, OR OTHER EXHIBITS, OF THE EVENTS OF JANUARY 6, 2021 PRIOR TO THE ARRIVAL OF MR. SMITH AT THE CAPITOL OR FROM ANY PORTION OF THE CAPITOL WHERE HE WAS NOT PREENT.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would without the evidence; and (b) the fact is of consequence in determining the action. Fed. R. Evid. 401. Under Rule 402, only relevant evidence is admissible. Fed. R. Evid. 402." *United States v. Fitzsimons*, No. 21-CR-158, 2022 WL 1658846, at *2 (D.D.C. May 24, 2022) (internal quotations omitted). "[T]he burden is on the introducing party to establish relevancy," *Dowling v. United States*,

493 U.S. 342, 351 n.3(1990), as well as admissibility under other evidentiary rules. *United States v. Oseguera Gonzalez*, 507 F. Supp. 3d 137, 147 (D.D.C. 2020).

Smith is charged with violations related to *his* alleged conduct. Evidence in the aggregate, related to the conduct of others on January 6, 2021—including protesters, demonstrators, and people generally—is not relevant. Further, any and all actions taken by others **prior to Mr. Smith arriving at the Capitol** should be excluded as he was neither involved nor had personal knowledge. The conduct of others is not at issue in this case, and the admission of such evidence lacks any tendency to make a fact at issue more or less probable. The government has no relevant purpose for introducing such evidence as it does not link any alleged conduct of Smith to the elements of any of the charges. For this reason, any general evidence of the events of January 6, 2021, unrelated to the direct and specific alleged conduct of Smith is irrelevant and should be excluded.

Regardless of whether such evidence has some modicum of relevance – it does not – any value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Rule 403 renders relevant

evidence inadmissible upon a showing that it presents a risk of "unfair prejudice,"—prejudice that is "compelling or unique,"

United States v. Mitchell, 49 F.3d 769, 777 (D.C. Cir. 1995) (quoting *United States v. Washington*, 969 F.2d 1073, 1081 (D.C. Cir. 1992)), or has "an undue tendency to suggest decision on an improper basis," *United States v. Ring*, 706 F.3d 460, 472 (D.C. Cir. 2013) (quoting Fed. R. Evid. 403 advisory committee's note to 1972 proposed rules); *see also United States v. Oseguera Gonzalez*, 507 F. Supp. 3d 137, 146–47 (D.D.C. 2020).

Evidence of others' conduct at other locations in and around the Capitol is wholly untethered from Smith's conduct which forms the sole basis for the indictment. The only purpose of introducing this evidence is to impermissibly inflame the passions of the jury and provide a skewed perspective of Smith's actual alleged conduct. In other words, admission of such evidence would allow the jury to superimpose the general conduct of others onto Smith, viewing his alleged actions through the aggregate lens of the January 6, 2021, event as a whole. This is improper. Permitting introduction will create a vast undue tendency for the jury to tie Smith's culpability to the culpability of others present—others necessarily unknown to Smith – and placing the blame for the general conduct that occurred at the Capitol on January 6, 2021, on Smith, rather than considering simply his own alleged conduct as alleged in the indictment. Because the introduction of general evidence of the events of January 6, 2021, is substantially more prejudicial than probative the Court must bar its introduction. Fed. R. Evid. 403.

II. THE COURT SHOULD EXCLUDE PEJORATIVE CHARACTERIZATIONS OF THE EVENT.

For similar reasons, defendant moves that the government and its witnesses be precluded from characterizing the event in pejorative terms such as "insurrection", "attack", and "riot," and not be permitted to elicit testimony characterizing the participants in terms such as "rioters" or "mobs." Such references to the participants carry a high risk of unfair prejudice and confusion as the jurors may - indeed, are likely to - equate Smith's participation in the events as indicative of general criminality.

A criminal defendant has the right to have the jury make an "individualized determination[] of guilt based on the evidence presented at trial." *United States v. McGill*, 815 F.3d 846, 895 (D.C. Cir. 2016); *see also id*. at 898 (verdict should be based on "an individual assessment of the . . . defendant's personal culpability" (quoting *United States v.*

Blevins, 960 F.2d 1252, 1260 (4th Cir. 1992))). Words like "rioter" and "insurrection" emphasize group culpability and distract from the proper question of individual culpability. Words that inflame juror passions will tempt the jury to base a verdict on emotion instead of the evidence.

Words that suggest legal conclusions, such as "trespass," "disorderly conduct," and "demonstrating," are indisputably proper in the context of a closing argument. But allowing such words during the presentation of evidence would "intrude upon the duties of, and effectively substitute for the judgment of, the trier of fact and the responsibility of the Court to instruct the trier of fact on the law." *United States ex rel. Mossey v. Pal-Tech, Inc.*, 231 F. Supp. 2d 94, 98 (D.D.C. 2002); *see also Cameron v. City of New York*, 598 F.3d 50, 62 (2d Cir. 2010) ("The cases [prohibiting legal conclusions in testimony] have focused on expert witnesses. But the impropriety of allowing a lay witness to testify in the form of a legal conclusion is all the clearer.").

Besides being misleading and prejudicial, such characterizations do nothing to prove any fact at issue "more probable or less probable than it would be without" the resort to such characterizations and therefore must be excluded. *See* Fed. R. Evid. 401, 402. But such judgments carry with them a such a high likelihood of unfair prejudice and confusion that it they must be excluded pursuant to Fed. R. Evid. 403. Such characterizations – which have nothing to do with whether Smith committed the crimes set for the in the indictment - will only result in an appeal to emotion, rather than an objective consideration of the charge in the indictment. *See United States v. Fulmer*, 108 F.3d 1486, 1497-98 (1st Cir. 1997) (reversing conviction where references to the Oklahoma City bombing, while of some probative value, tremendously outweighed by prejudicial impact); *United States v. Rodriguez-Cortes*, 949 F.2d 532, 541 (1st Cir. 1991)(reversing conviction where introduction of defendant's Colombian identification card, although relevant, presented impermissible danger of conviction on improper basis). The government and its witnesses should therefore be instructed to use neutral terms such as "event" for the assembled crowd and "participants" for those involved.

For the foregoing reasons, Mr. Smith asks the Court to order that the government and witnesses not use inflammatory, value-laden, or legally conclusory words to describe events or persons. Mr. Smith further requests that no evidence of events or actions by others at the Capitol prior to his arrival be admitted, as he was neither

involved nor had personal knowledge.

Respectfully Submitted,

THOMAS HARLEN SMITH

By: */s/ Gregory S. Park*

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CERTIFICATE OF SERVICE

I, Gregory S. Park, attorney for the Defendant, Thomas Harlen Smith, do hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which provided notification to all parties of record.

Dated this the 23rd day of February, 2023.

/s/ Gregory S. Park
GREGORY S. PARK
Assistant Federal Public Defender