

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO. 21-cr-00374-APM-1
	:	
LOGAN GROVER,	:	
	:	
Defendant.	:	

**GOVERNMENT’S OPPOSITION TO DEFENDANT’S
MOTION TO TRANSFER VENUE**

Defendant Logan Grover (“Grover”), who is charged in connection with events at the U.S. Capitol on January 6, 2021, has moved to transfer venue in this case to “his home district of Colorado.” ECF No. 40 at 9-10. Grover fails to establish that he “cannot obtain a fair and impartial trial” in this district, Fed. R. Crim. P. 21(a) or that transfer is appropriate “[f]or convenience,” Fed. R. Crim. P. 21(b), and this Court should deny his motion.

BACKGROUND

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress was halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

Based on closed-circuit video footage and other information gathered during the investigation, at approximately 2:46 p.m. Grover first entered restricted grounds surrounding the Capitol. At 3:15 p.m., Grover was on the East side of the Capitol near the outer Eastern Doors of

the Rotunda. Grover then entered the Capitol. Approximately three minutes later, Grover was in the Rotunda where he remained until approximately 3:20 p.m. and during which time a physical altercation between rioters and officers occurred. Grover left the Rotunda but remained inside the Capitol Building. Video footage from an officer's body-worn-camera time stamped at 3:27 p.m. depicted Grover looking at his cellular phone as law enforcement officers removed Grover and other protesters from the Capitol building. ECF No. 1-1 at 5. At 3:32 p.m., Grover exited the Capitol through the East Rotunda doors.

On January 21, 2021, the Federal Bureau of investigation ("FBI") received an anonymous tip that Grover had posted on Facebook that he planned to attend the January 6, 2021 rally at the U.S. Capitol. The tipster also included a screen capture of a Facebook message attributed to Glover that included the Washington Monument in Washington, D.C. and below the image a lengthy paragraph that referenced the upcoming rally and concluded with Grover expressing uncertainty about what would happen at the rally the next day (January 6), and that he "recogniz[ed] violence is highly likely" but that he was "certain" that he needed to be at the rally. ECF No. 1-1 at 2. The FBI also received a tip from another tipster who also stated that Glover had posted the same Facebook message. *Id.* The investigation also uncovered numerous videos of Glover on Capitol grounds and inside the Capitol on January 6, 2021. *Id.* For example, in a screen capture taken from a video recovered from another protester Glover is depicted on Capitol grounds standing outside a Capitol door. *Id.* at 3. A screen capture from a second video obtained by the FBI from another tipster depicted Glover and other protesters outside a Capitol door. *Id.* at 4. The windowpanes in the screen capture are clearly broken and another protester can be seen pointing at law enforcement officers behind the Capitol door. *Id.* The FBI also received a third video which depicted Grover inside the Capitol building near the Rotunda. *Id.*

On April 26, 2021, the Government filed a criminal complaint that charged Grover with Knowingly Entering or Remaining in a Restricted Building or Grounds without Lawful Authority, in violation of 18 U.S.C. § 1752 (a)(1); Disorderly and Disruptive Conduct in a Restricted Building, in violation of 18 U.S.C. § 1752 (a)(2); Violent Entry and Disorderly Conduct on Capitol Grounds, in violation of 40 U.S.C. § 5104 (e)(2)(D); and Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104 (e)(2)(G). The Government attached to the Criminal Complaint a Statement of Facts that included screen captures of Grover's Facebook post and images of Grover on restricted grounds both outside and inside the Capitol. ECF No. 1-1.

On April 28, 2021, law enforcement agents arrested Grover and executed a search warrant at his residence in Colorado. Agents seized Grover's cellular phone, computer, thumb drive, and clothing matching the clothing Grover wore on January 6, 2021. Grover now moves for a change of venue. ECF No. 40. He contends, "The size and characteristics of the District of Columbia support a change of venue because Mr. Grover will face a jury prejudiced against him." *Id.* at 1-9. Grover claims in support of his motion that the Court should presume prejudice against him in this District because: (1) a survey conducted by Select Litigation demonstrates prospective jurors in this District hold "hostile attitudes" and are more prejudiced against January 6 defendants; (2) factors such as the size and characteristics of the community where the crime occurred, the information reported by the media related to the defendant's guilt, and the interval between a widely reported crime and the actual trial warrant a transfer of venue. Grover also separately contends that a change of venue is warranted in the interest of justice for convenience of the parties and witnesses. Each of the defendant's arguments is without merit, and the motion should be denied.

ARGUMENT

The Constitution provides that “[t]he trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.” U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment similarly guarantees the right to be tried “by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI. These provisions provide “a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.” *United States v. Cores*, 356 U.S. 405, 407 (1958). Transfer to another venue is constitutionally required only where “extraordinary local prejudice will prevent a fair trial.” *Skilling v. United States*, 561 U.S. 358, 378 (2010); *see* Fed. R. Crim. P. 21(a) (requiring transfer to another district if “so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there”).

The primary safeguard of the right to an impartial jury is “an adequate voir dire to identify unqualified jurors.” *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (italics omitted). Thus, the best course when faced with a pretrial publicity claim is ordinarily “to proceed to voir dire to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity.” *United States v. Campa*, 459 F.3d 1121, 1146 (11th Cir. 2006) (en banc). “[I]f an impartial jury actually cannot be selected, that fact should become evident at the voir dire.” *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976) (en banc) (per curiam). And, after voir dire, “it may be found that, despite earlier prognostications, removal of the trial is unnecessary.” *Jones v. Gasch*, 404 F.2d 1231, 1238 (D.C. Cir. 1967).

I. The Select Litigation Poll Does Not Support a Presumption of Prejudice.

Grover relies on a poll conducted by Select Litigation, a private litigation consulting firm, at the request of the Federal Public Defender for the District of Columbia. ECF No. 40 at 4. Select

Litigation conducted a telephone poll of potential jurors in the District of Columbia and in the Atlanta Division of the Northern District of Georgia and contracted with a media research firm to analyze news media coverage of January 6 in both of those jurisdictions. ECF No. 40-1 at 1.

A. Courts have repeatedly declined to find a presumption of prejudice based on pretrial polling without conducting voir dire.

Grover argues that this Court should find a presumption of prejudice based on the results of the Select Litigation poll of prospective jurors. ECF No. 40 at 4-9. But “courts have commonly rejected such polls as unpersuasive in favor of effective voir dire as a preferable way to ferret out any bias.” *United States v. Causey*, 2005 WL 8160703, at *7 (S.D. Tex. 2005). As one circuit has observed, the Supreme Court’s emphasis on the important role of voir dire in addressing pretrial publicity “undercuts” the “argument that poll percentages . . . decide the question of a presumption of prejudice.” *In re Tsarnaev*, 780 F.3d 14, 23 (1st Cir. 2015) (per curiam); see *Mu’Min v. Virginia*, 500 U.S. 415, 427 (1991) (observing that, “[p]articularly with respect to pretrial publicity, . . . primary reliance on the judgment of the trial court makes good sense”).

Indeed, the D.C. Circuit has rejected a claim of presumed prejudice based on the results of a pre-voir dire survey. *Haldeman*, 559 F.2d at 64. In *Haldeman*, seven former Nixon administration officials (including the former Attorney General of the United States) were prosecuted for their role in the Watergate scandal. *Id.* at 51. According to a poll commissioned by the defense in that case, 93% of the Washington, D.C. population knew of the charges against the defendants and 61% had formed the opinion that they were guilty. *Id.* at 144, 178 n.2 (MacKinnon, J., concurring in part and dissenting in part). Recognizing that the case had produced a “massive” amount of pretrial publicity, *id.* at 61, the D.C. Circuit nevertheless held that the district court “was correct” to deny the defendants’ “pre-voir dire requests for . . . a change of venue,” *id.* at 63-64. The court observed that the district court “did not err in relying less heavily

on a poll taken in private by private pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel.” *Id.* at 64 n.43.

Other circuits have similarly rejected attempts to elevate polling results over voir dire. In *United States v. Campa*, a pre-trial survey found that 69% of respondents were prejudiced against anyone charged with spying on behalf of Cuba, as the defendants were. *Campa*, 459 F.3d at 1157 (Birch, J., dissenting). The en banc Eleventh Circuit affirmed the denial of a motion for change of venue, explaining that “[w]hen a defendant alleges that prejudicial pretrial publicity would prevent him from receiving a fair trial, it is within the district court’s broad discretion to proceed to voir dire to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity.” *Id.* at 1146 (majority opinion).

Similarly, in *United States v. Rodriguez*, 581 F.3d 775 (8th Cir. 2009), a poll indicated that 99 percent of respondents had heard about the brutal rape and murder with which the defendant was charged, nearly 88 percent of those respondents believed he was guilty, and about 42 percent of respondents had a strongly held opinion of his guilt. *Id.* at 786; Brief for the Appellant, *United States v. Rodriguez*, No. 07-1316 (8th Cir.), 2008 WL 194877, at *19. Nonetheless, the Eighth Circuit found no presumption of prejudice, observing that a district court was not required “to consider public opinion polls when ruling on change-of-venue motions.” *Rodriguez*, 581 F.3d at 786. And the court held that, in any event, the poll did not “demonstrate widespread community prejudice” because the “media coverage had not been inflammatory,” two years had passed since the murder, and “the district court concluded that special voir dire protocols would screen out prejudiced jurors.” *Id.*

There are good reasons to rely on voir dire, rather than public-opinion polls, when assessing whether prejudice should be presumed. First, polling lacks many of the safeguards of court-supervised voir dire, including the involvement of both parties in formulating the questions. Surveys that are not carefully worded and properly conducted can produce misleading results, such as by asking leading questions or providing the respondents with facts that will influence their responses. *See Campa*, 459 F.3d at 1146 (noting problems with “non-neutral” and “ambiguous” questions). Second, polling lacks the formality that attends in-court proceedings under oath, and it does not afford the court the “face-to-face opportunity to gauge demeanor and credibility.” *Skilling*, 561 U.S. at 395. Third, polls ordinarily inform the court only the extent to which prospective jurors have heard about a case and formed an opinion about it. But that is not the ultimate question when picking a jury. A prospective juror is not disqualified simply because he has “formed some impression or opinion as to the merits of the case.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Instead, “[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Id.* at 723. But pre-trial surveys are poorly suited to answering that ultimate question, which is best asked in the context of face-to-face voir dire under oath. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (observing that the trial judge’s function in voir dire “is not unlike that of the jurors later in the trial” because “[b]oth must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions”).

In sum, federal courts have shown an overwhelming preference for assessing prejudice through court-supervised voir dire rather than through public opinion polls. And the defendant has not offered any reason to depart from that usual practice here. Thus, this Court need not give substantial weight to the polling when considering whether to presume prejudice. But, as

explained below, the Select Litigation poll does not support a presumption of prejudice in any event.

B. The Select Litigation poll does not demonstrate pervasive prejudice in the District of Columbia.

Contrary to Grover’s contention, the Select Litigation poll does not support a presumption of prejudice in this District. As an initial matter, the Select Litigation poll selected only one comparator jurisdiction—the Atlanta Division of the Northern District of Georgia. Grover has not requested a transfer to that district or division, but instead asks this Court for “a transfer to his home District of Colorado.” ECF No. 40 at 1. The Select Litigation survey tells the Court nothing about the views or media exposure of prospective jurors in that district. The poll therefore cannot show that selecting an impartial jury would be any more difficult in the District of Columbia than in the District of Colorado. *See United States v. Haldeman*, 559 F.2d 31, 64 n.43 (D.C. Cir. 1976) (en banc) (per curiam) (observing that a change of venue “would have been only of doubtful value” where the pretrial publicity was national in scope).

Furthermore, to the extent the poll is useful at a more general level in comparing the District of Columbia to other districts, the poll indicates that levels of media exposure to the events of January 6 are not significantly different in Atlanta than in Washington, D.C. The number of respondents who had seen “[a] lot” of coverage in each jurisdiction differed only by three percentage points (33% in D.C. versus 30% in Atlanta), which is within the margin of error. ECF No. 40-1 at 1-2, 14. The number of respondents who had seen “[s]ome” coverage was exactly the same (25% in both jurisdictions), and the number who had seen “[q]uite a bit” of coverage was not significantly different (28% in D.C. versus 20% in Atlanta). *Id.* at 14. The total percentage of respondents who were exposed to “[a] lot,” “[q]uite a bit,” or “[s]ome” news coverage was 86%

in Washington, D.C. and 75% in Atlanta. *Id.* at 14. This relatively small difference does not suggest that news coverage has made it impossible to pick an impartial jury in Washington, D.C.

Grover points out that 71% of respondents in D.C. said they had formed the opinion January 6 arrestees were “guilty” of the charges brought against them. *See* ECF No. 40 at 4; ECF No. 40-1 at 14. The survey failed, however, to provide respondents with the option of saying they were “unsure” about guilt, even though such an option is required by professional standards that apply in this area. *See* American Society of Trial Consultants, Professional Standards for Venue Surveys at 9, available at <https://www.astcweb.org/Resources/Pictures/Venue%2010-08.pdf> (“Respondents must be made aware that they can say they do not know or have no opinion.”). The survey instead gave respondents a binary choice between “guilty or not guilty.” ECF No. 40-1 at 14. Yet even without being provided the appropriate options, 26% of D.C. respondents voluntarily gave an answer of “Depends” or “Don’t know/Refused.” *Id.* This shows that, even in response to a poorly worded question, more than a quarter of the District’s residents realized the need to keep an open mind about guilt.

Understood in context, the Select Litigation poll does not indicate any higher degree of juror bias than in *Haldeman*, where the en banc D.C. Circuit found no presumption of prejudice. In *Haldeman*, 61% of respondents expressed a view that the defendants were guilty, as opposed to the 71% here. *See Haldeman*, 559 F.2d at 144, 178 n.2 (MacKinnon, J., concurring in part and dissenting in part). But the survey in *Haldeman* first asked respondents whether they had formed an opinion about whether the indicted Nixon aides were guilty or innocent, giving options for both “No” (i.e. had not formed an opinion) and “Don’t Know/No Opinion.” *Id.* at 178 n.2. The survey then asked whether respondents thought the defendants were “guilty or innocent in the Watergate affair,” giving options for “Not Guilty Until Proven” and “No Opinion/Don’t Know.” *Id.* Only

after (a) being prompted to consider whether they could actually form an opinion, and (b) being reminded of the presumption of innocence, did 61% of respondents say “guilty.” *Id.*

Here, by contrast, respondents were not provided a “don’t know” option, were not reminded of the presumption of innocence, and were asked only whether they thought the “several hundred people” arrested in connection with January 6 were “guilty.” ECF No. 40-1 at 14 (Questions 3, 4). When asked about guilt in the context of a criminal trial, however, respondents in the Select Litigation survey were far less likely to give an answer of “guilty.” Question 5 asked them to “[a]ssume [they] were on a jury for a defendant charged with crimes for his or her activities on January 6” and then asked whether they were “more likely to vote that the person is guilty or not guilty.” ECF No. 40-1 at 14. In response to this question, only 52% of D.C. respondents said “Guilty,” and fully 46% volunteered a response of “Depends” or “Don’t know/Refused.” *Id.* Thus, when asked to consider guilt or innocence in the context of a “defendant charged with crimes,” as opposed to the “several hundred people . . . arrested,” nearly half of D.C. residents were committed to keeping an open mind—even without being instructed on the presumption of innocence or being provided an option for “Do not know.” This indicates, if anything, a lower degree of prejudice than was present in *Haldeman*.

Grover asserts “there is a significant and unique disparity in negative views of the accused held by prospective D.C. jurors that does not exist in a comparable city (i.e., Atlanta).” ECF No. 40 at 6. According to the Select Litigation poll Grover relies upon, 84% of D.C. respondents had an “unfavorable” view of “people arrested for participating in the events at the U.S. Capitol on January 6.” ECF No. 40-1 at 14. Although that is higher than the 54% of Atlantans with unfavorable views, it is quite similar to the results of a nationwide CBS poll, which found that 83% of respondents “[s]omewhat disapprove” or “[s]trongly disapprove” of the “actions taken by

the people who forced their way into the U.S. Capitol on January 6.” *See* CBS News Poll, December 27-30, 2021, Question 2, <https://drive.google.com/file/d/1QNzK7xBJeWzKlTrHVobLgyFtId9Cgsq/view>. Notably, despite extensive citation to the Select Litigation poll, Grover has not asked to be tried in Atlanta and has not provided any information about the views in the District of Colorado, the requested venue. And, in any event, the fact that many D.C. residents have a generally “unfavorable” view of people “arrested” on January 6 does not mean that an impartial jury cannot be selected in this jurisdiction.

Grover also points out that 62% of D.C. respondents (compared to 48% of Atlanta respondents) would describe “most of the people who were arrested for their involvement in the events on January 6th” as “criminals.” *See* ECF No. 40 at 5; *see also* ECF No. 40-1 at 14 (Question 10). The answers to this question likely reflect the commonly held view that most people arrested for crimes are in fact guilty of those crimes. But the fact that 62% of D.C. respondents expressed this off-the-cuff view about “most” of the 700-plus January 6 arrestees does not demonstrate that all of those respondents would be unable to impartially find the facts in a specific case after being properly instructed by the Court. Moreover, the question demonstrates that fully 28% of D.C. respondents would not describe those arrestees as criminals, and 9% were unsure or refused to answer. ECF No. 40-1 at 14. And the 14% difference between D.C. and Atlanta—which could easily be explained by demographic differences such as age and education levels (*see* ECF No. 40-1 at 15)—would not justify the conclusion that this is an “extreme case” in which a change of venue is required. *Skilling*, 561 U.S. at 381.

Nor should prejudice be presumed as Grover suggests because a substantial numbers of respondents “would” describe “the people who forced their way into the U.S. Capitol” as “[t]rying

to overturn the election and keep Donald Trump in power” (85%), engaging in “[i]nsurrection” (76%), or “[t]rying to overthrow the U.S. government” (72%). ECF No. 40-1 at 15. For one thing, this question asked specifically about those who “forced their way into the U.S. Capitol,” which suggests a higher degree of culpability than simply entering the Capitol. For another, the poll did not provide an “undecided” option but asked only whether respondents “would” or “would not” use those descriptions. *Id.* Nor did the question define the offenses of “insurrection” or advocating the overthrow of government, *see* 18 U.S.C. §§ 2383, 2385, offenses with which few defendants have been charged in connection with January 6. And, most importantly, the poll did not answer the key question: whether a sufficient number of prospective jurors can “lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court.” *Irvin*, 366 U.S. at 723; *see Patton v. Yount*, 467 U.S. 1025, 1029 (1984) (no presumption of prejudice where nearly 99% of prospective jurors had heard of the case and 77% indicated on voir dire that “they would carry an opinion into the jury box”). In short, the Select Litigation poll does not come close to demonstrating that “12 impartial individuals could not be empaneled” in Washington, D.C. *Skilling*, 561 U.S. at 382.

In any U.S. jurisdiction, most prospective jurors will have heard about the events of January 6, and many will have various disqualifying biases. But the appropriate way to identify and address those biases is through a careful voir dire, rather than a change of venue based solely on pretrial polling and media analyses. As in *Haldeman*, there is “no reason for concluding that the population of Washington, D. C. [i]s so aroused against [the defendant] and so unlikely to be able objectively to judge [his] guilt or innocence on the basis of the evidence presented at trial” that a change of venue is required. *Haldeman*, 559 F.2d at 62.

II. The District of Columbia’s Political Makeup Does Not Support a Presumption of Prejudice.

Moreover, contrary to Grover’s assertion, ECF No. 40 at 6, the political makeup of the District of Columbia (with more than 90% of voters voting for the Democratic Party in the 2020 Presidential Election) does not mean he cannot obtain a fair trial here. The en banc D.C. Circuit rejected a nearly identical claim in *Haldeman*, where the dissent concluded that a venue change was required because “Washington, D.C. is unique in its overwhelming concentration of supporters of the Democratic Party” and the Democratic candidate received 81.8% and 78.1% of the vote when Nixon ran for President in 1968 and 1972, respectively. *Haldeman*, 559 F.2d at 160 (MacKinnon, J., concurring in part and dissenting in part). The majority rejected the relevance of this fact, observing that authority cited by the dissent gave no “intimation that a community’s voting patterns are at all pertinent to venue.” *Id.* at 64 n.43; *see also United States v. Chapin*, 515 F.2d 1274, 1286 (D.C. Cir. 1975) (rejecting the argument that “because of [the defendant’s] connection with the Nixon administration and his participation in a ‘dirty tricks’ campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District’s heavily black, and overwhelmingly Democratic, population”). If “the District of Columbia’s voting record in the past two presidential elections” is not “at all pertinent to venue” in a case involving high-ranking members of a presidential administration, *Haldeman*, 559 F.2d at 64 n.43, it cannot justify a change of venue here. To be sure, some potential jurors might be unable to be impartial in January 6 cases based on disagreement with the defendants’ political aims. But whether individual prospective jurors have such disqualifying biases can be assessed during voir dire. This Court should not presume that every member of a particular political party is biased simply because this case has a political connection. Indeed, the Supreme Court has stated in the context of an election-fraud trial, that “[t]he law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity

of national elections, and that his political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute.” *Connors v. United States*, 158 U.S. 408, 414 (1895). The same is true here. The District’s voting record does not establish that this Court will be unable to select “an unbiased jury capable of basing its verdict solely on the evidence introduced at trial.” *Haldeman*, 559 F.2d at 70.

To the contrary, as the nation’s capital and seat of the federal government, the District has been home to its fair share of trials in politically charged cases. High-profile individuals strongly associated with a particular party, such as Marion Barry, John Poindexter, Oliver North, Scooter Libby, and Roger Stone, have all been tried in the District. See *United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (per curiam); *United States v. Libby*, 498 F. Supp. 2d 1 (D.D.C. 2007); *United States v. Stone*, No. 19-CR-0018 (ABJ), 2020 WL 1892360 (D.D.C. Apr. 16, 2020). Indeed, the Court in *Stone* rejected the argument that jurors “could not possibly view [Roger Stone] independently from the President” because of his role in the presidential campaign or that “if you do not like Donald Trump, you must not like Roger Stone.” 2020 WL 1892360, at *30-31. Similarly, here, the fact that most District residents voted against Donald Trump does not mean those residents could not impartially consider the evidence against those charged in connection with the events on January 6.

III. The Factors Cited in *Skilling and Rideau* Do Not Support a Presumption of Prejudice in This District.

Grover also contends that prejudice should be presumed based on various factors cited in *Skilling and Rideau v. Louisiana*, 373 U.S. 723 (1963), including (1) the size and characteristics of the community where the crime occurred, (2) the information reported by the media related to the defendant’s guilt, and (3) the interval between a widely reported crime and the actual trial.

ECF No. 40 at 3.

“The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity.” *United States v. Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995); *see Murphy v. Florida*, 421 U.S. 794, 799 (1975) (juror exposure to “news accounts of the crime with which [a defendant] is charged” does not “alone presumptively deprive[] the defendant of due process”). Indeed, “every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.” *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878). Thus, the “mere existence of any preconceived notion as to the guilt or innocence of an accused, without more,” is insufficient to establish prejudice. *Irvin*, 366 U.S. at 723. “It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Id.*

The Supreme Court has recognized only a narrow category of cases in which prejudice is presumed to exist without regard to prospective jurors’ answers during voir dire. In *Rideau*, the defendant’s confession—obtained while he was in jail and without an attorney present—was broadcast three times shortly before trial on a local television station to audiences ranging from 24,000 to 53,000 individuals in a parish of approximately 150,000 people. *Id.* at 724 (majority opinion), 728-29 (Clark, J., dissenting). The Court concluded that, “to the tens of thousands of people who saw and heard it,” the televised confession “in a very real sense was Rideau’s trial—at which he pleaded guilty to murder.” *Rideau*, 373 U.S. at 726. Thus, the Court “d[id] not hesitate to hold, without pausing to examine a particularized transcript of the voir dire,” that these “kangaroo court proceedings” violated due process. *Id.* at 726-27.

Since *Rideau*, the Supreme Court has emphasized that a “presumption of prejudice . . . attends only the extreme case,” *Skilling*, 561 U.S. at 381, and the Court has repeatedly “held in other cases that trials have been fair in spite of widespread publicity,” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976). In the half century since *Rideau*, the Supreme Court has never presumed prejudice based on pretrial publicity. *But see Estes v. Texas*, 381 U.S. 532 (1965) (presuming prejudice based on media interference with courtroom proceedings); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (same). In fact, courts have declined to transfer venue in some of the most high-profile prosecutions in recent American history. *See In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015) (per curiam) (capital prosecution of Boston Marathon bomber); *Skilling*, 561 U.S. at 399 (fraud trial of CEO of Enron Corporation); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (trial of participant in 1993 World Trade Center bombing); *United States v. Moussaoui*, 43 F. App’x 612, 613 (4th Cir. 2002) (per curiam) (unpublished) (terrorism prosecution for conspirator in September 11, 2001 attacks); *Haldeman*, 559 F.2d at 70 (Watergate prosecution of former Attorney General John Mitchell and other Nixon aides).

In *Skilling*, the Supreme Court considered several factors in determining that prejudice should not be presumed where former Enron executive Jeffrey Skilling was tried in Houston, where Enron was based. *Skilling*, 561 U.S. at 382-83. First, the Court considered the “size and characteristics of the community.” *Id.* at 382. Unlike *Rideau*, where the murder “was committed in a parish of only 150,000 residents,” Houston was home to more than 4.5 million people eligible for jury service. *Id.* at 382. Second, “although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.” *Id.* Third, “over four years elapsed between Enron’s bankruptcy and Skilling’s trial,” and “the decibel level of media attention diminished

somewhat in the years following Enron’s collapse.” *Id.* at 383. “Finally, and of prime significance, Skilling’s jury acquitted him of nine insider-trading counts,” which undermined any “supposition of juror bias.” *Id.*

Although these *Skilling* factors are not exhaustive, courts have found them useful when considering claims of presumptive prejudice based on pretrial publicity. *See, e.g., In re Tsarnaev*, 780 F.3d at 21-22; *United States v. Petters*, 663 F.3d 375, 385 (8th Cir. 2011). And contrary to Grover’s contention, those factors do not support a presumption of prejudice in this case.

A. Size and characteristics of the community.

Grover suggests that an impartial jury cannot be found in Washington, D.C., despite the District’s population of nearly 700,000. ECF No. 40 at 3-4. Although this District may be smaller than most other federal judicial districts, it has a larger population than two states (Wyoming and Vermont), and more than four times as many people as the parish in *Rideau*. The relevant question is not whether the District of Columbia is as populous as the Southern District of Texas in *Skilling*, but whether it is large enough that an impartial jury can be found. In *Mu’Min v. Virginia*, 500 U.S. 415, 429 (1991), the Court cited a county population of 182,537 as supporting the view that an impartial jury could be selected. And *Skilling* approvingly cited a state case in which there was “a reduced likelihood of prejudice” because the “venire was drawn from a pool of over 600,000 individuals.” *Skilling*, 561 U.S. at 382 (*quoting Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991)). There is simply no reason to believe that, out of an eligible jury pool of nearly half a million, “12 impartial individuals could not be empaneled.” *Id.*

B. Information reported by the media related to the defendant’s guilt.

Grover also cites Select Litigation’s finding that over 90% of the District’s residents have been exposed to media coverage of January 6 and a perception that January 6 defendants are non-

resident, white supremacists, insurrectionists who supported of the former President. ECF No. 40 at 6-7. Glover cites those factors and a comparison of media coverage from the Washington, D.C. media outlets and outlets in Atlanta as further evidence of prejudice. *Id.* Such arguments fail because even “massive” news coverage of a crime does not require prejudice to be presumed. *Haldeman*, 559 F.2d at 61.

The fact that organizations such as National Public Radio (“NPR”) keep and update information on January 6 defendants, *see* ECF No. 40 at 7-8, does not compel a conclusion that District residents routinely visit such websites. Further, the specific statement attributed to Grover is not a “confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.” *Skilling*, 561 U.S. at 382. Even news stories that are “not kind,” *Skilling*, 561 U.S. at 382, or are “hostile in tone and accusatory in content,” *Haldeman*, 559 F.2d at 61, do not alone raise a presumption of prejudice. As in *Skilling* and *Haldeman*, the news coverage of Grover is “neither as inherently prejudicial nor as unforgettable as the spectacle of Rideau’s dramatically staged and broadcast confession.” *Id.* Indeed, although any media characterizations of Grover would be inadmissible, the photos and videos of Grover that have been disseminated would be both admissible and highly relevant at trial. *Compare Sheppard*, 384 U.S. at 360 (noting that information reported by the media was “clearly inadmissible” and that “[t]he exclusion of such evidence in court is rendered meaningless when news media make it available to the public”), with *Murray v. Schriro*, 882 F.3d 778, 805 (9th Cir. 2018) (“There was no inflammatory barrage of information that would be inadmissible at trial. Rather, the news reports focused on relaying mainly evidence presented at trial.”); *Henderson v. Dugger*, 925 F.2d 1309, 1314 (11th Cir. 1991) (“[B]ecause we have found [the defendant’s] confessions were admissible, the damage if any from the [pretrial] publicity is negligible.”).

Moreover, other than the short period after Grover's arrest almost one year ago, there has been a comparatively small percentage of the news coverage of January 6 has focused on Grover himself. Unlike most cases involving pretrial publicity, where the news coverage focuses on the responsibility of a single defendant (as in *Rideau* or *Tsarnaev*) or small number of co-defendants (as in *Skilling* and *Haldeman*), the events of January 6 involved thousands of participants and have so far resulted in charges against more than 775 people. The Court can guard against any spillover prejudice from the broader coverage of January 6 by conducting a careful voir dire and properly instructing the jury about the need to determine a defendant's individual guilt.

In any event, any threat of such spillover prejudice is not limited to Washington, D.C. because much of the news coverage of January 6 has been national in scope. *See Haldeman*, 559 F.2d at 64 n.43 (observing that "a change of venue would have been of only doubtful value" where much of the news coverage was "national in [its] reach" and the crime was of national interest). As the Select Litigation poll demonstrates, the number of potential jurors exposed to "[a] lot" of news coverage of January 6 differs only slightly between Washington, D.C. (33%) and Atlanta (30%). ECF No. 40-1, at 14 (Question 8). Thus, the nature and extent of the pretrial publicity do not support a presumption of prejudice.

C. The interval between the events of January 6, 2021 and trial.

Grover suggests that because media reporting on the events of January 6, 2021 and trials stemming from those events (including his own trial) will be "ongoing," the duration of time between the events of January 6 and his trial would not allow prejudice to dissipate. ECF No. 40 at 8. In *Skilling*, however, the Court considered the fact that "over four years elapsed between Enron's bankruptcy and Skilling's trial." *Skilling*, 561 U.S. at 383. In this case, 15 months have already elapsed since the events of January 6, and more time will elapse before trial. This is far

more than in *Rideau*, where the defendant’s trial came two months after his televised confession. *Rideau*, 373 U.S. at 724. Although January 6 continues to be in the news, the “decibel level of media attention [has] diminished somewhat,” *Skilling*, 561 U.S. at 383. Moreover, only a relatively small percentage of the recent stories have mentioned Grover himself, and much of the reporting has been national in scope, rather than limited to Washington, D.C.

D. The Impact of January 6 on Washington D.C. Does Not Support a Presumption of Prejudice.

Grover also contends that a D.C. jury could not be impartial because D.C. residents have been particularly affected by events surrounding January 6 in that they feel a “deep connection to the attack.” EFC No. 40 at 9. Although that is true of some D.C. residents, including some who “know people who were at the Capitol when the breach occurred,” *id.*, it is not true of everyone who resides in the District. *Voir dire* is designed to identify and eliminate potential jurors whose connections to the attack prevent them from being impartial. And there is no reason to believe that the District’s entire population of 700,000 people was so affected by these events that the Court cannot seat an impartial jury here.

Indeed, courts routinely conclude that defendants can receive a fair trial in the location where they committed their crimes, despite the fact that some members of the community were victimized. See *In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015) (Boston Marathon bombing); *Skilling*, 561 U.S. at 399 (Enron collapse); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (1993 World Trade Center bombing); *United States v. Moussaoui*, 43 F. App’x 612, 613 (4th Cir. 2002) (per curiam) (unpublished) (September 11, 2001 attacks, including on the Pentagon). In *Skilling*, the Supreme Court rejected the contention that Enron’s “sheer number of victims” in the Houston area “trigger[ed] a presumption of prejudice.” *Skilling*, 561 U.S. at 384 (quotation omitted). “Although the widespread community impact necessitated careful identification and

inspection of prospective jurors' connections to Enron," the voir dire was "well suited to that task."

Id. In this case too, voir dire can adequately identify those D.C. residents who were so affected by January 6 that they cannot impartially serve as jurors. There is no reason to presume prejudice.

IV. A Change of Venue Is Not Warranted Under Federal Rule of Criminal Procedure 21(b) Based on Convenience or the Interest of Justice.

Lastly, Grover argues (ECF No. 40 at 9-10) that this Court should transfer venue to the District of Colorado under Rule 21(b), which allows transfer to another district "for the convenience of the parties, any victim, and the witnesses, and in the interest of justice." Fed. R. Crim. P. 21(b). Grover asserts that a change in venue "will afford Mr. Grover a more diverse jury pool of his peers in a similarly urban environment," allow him to avoid "travel expenses," and provide him with "proximity to his family and support system" during trial. *Id.* These arguments do not support a transfer of venue under Rule 21(b).

"There is a general presumption that a criminal prosecution should be retained in the original district." *United States v. Bowdoin*, 770 F. Supp. 2d 133, 138 (D.D.C. 2011) (quoting *United States v. Baltimore & Ohio R.R.*, 538 F. Supp. 200, 205 (D.D.C. 1982)). That presumption is rooted in the Constitution, which states that "[t]he trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, cl. 3. And it is reflected in the Federal Rules of Criminal Procedure, which state that, "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18. To obtain a change of venue under Rule 21(b), a defendant must demonstrate that trial in the district where the crime occurred "would be so unduly burdensome that fairness requires the transfer to another district of proper venue where a trial would be less burdensome." *Id.* at 138 (quotations marks omitted). Factors a court considering a motion to transfer venue are:

(1) location of the defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of the defendant's business; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district of division involved; and (10) any other special elements which might affect the transfer.

Id. at 137-38. Those factors strongly support keeping the prosecution in this District. The events at issue took place in the District of Columbia, and the witnesses and evidence are in this District. Holding a trial in the District of Colorado would require a significant expenditure of government funds for the prosecution team and witnesses to travel to that district.

Moreover, none of Grove's reasons for transfer under Rule 21(b) support an interest of justice transfer. A trial in Colorado would undoubtedly be more convenient for Grover. But that fact alone is not sufficient to justify transfer, particularly considering that Grover chose to travel to Washington, D.C. to commit his crimes at the U.S. Capitol. As he recognizes, he "does not have the right to be tried in his home jurisdiction." ECF No. 40 at 10. And he does not explain how proximity to his family and support system would justify a transfer under the rule.

Grover's claim that the District of Colorado would afford him "a more diverse jury pool," ECF No. 40 at 10, is similarly unavailing. As an initial matter, he does not explain what kind of diversity he is talking about. And, as explained above, the D.C. Circuit in *Haldeman* rejected the notion that a politically diverse jury pool was necessary to obtain an impartial trial in a case with political connection. *Haldeman*, 559 F.2d at 64 n.43. Moreover, Grover cannot use Rule 21(b)'s "interest of justice" standard as an alternative way to raise a claim of "local community prejudice." *Jones v. Gasch*, 404 F.2d 1231, 1238 (D.C. Cir. 1967). In *Jones*, the D.C. Circuit denied a petition for mandamus which challenged the presiding judge's denial of his motion to transfer under Rule 21(b) based on a claim of prejudicial publicity. *Id.* at 1234, 1238-39. The court of appeals held "that the standard of Rule 21(a) is the exclusive gauge by which circumstances of that character

(prejudice) are to be measured.” *Id.* at 1239.

Grover is properly charged with committing offenses on January 6, 2021, in Washington, D.C. He has failed to establish that he cannot receive a fair trial in this District, and he has failed to articulate a basis for transfer under Rule 21(b). The Court should deny the motion.

CONCLUSION

For the foregoing reasons, Grover’s motion to transfer venue should be denied.

Respectfully submitted,

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CERTIFICATION

This is to certify that on this 20th day of April 2022, undersigned counsel served a copy of foregoing Response in Opposition to Defendant's Motion to Transfer Venue for Trial on Defendant via the Court's CM/ECF addressed to Defendant's counsels of record.

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