UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL NO. 1:21-cr-00263-TSC**
v.	:	
	:	
RUSSELL DEAN ALFORD,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO THE DEFENDANT'S MOTION IN LIMINE TO PRECLUDE REFERENCES TO OFFENSES AS MISDEMEANORS

The United States of America, by and through its undersigned counsel, hereby files this response to the defendant's motion *in limine* to preclude the parties and their witnesses from referring to the charged offenses as "misdemeanors." (ECF No. 55.) This motion should be denied.

As an initial matter, the government does not plan to use the word "misdemeanors" during trial, and will instruct its witnesses not to use that word. The government agrees that this matter is serious, and as it has argued throughout its effort to prosecute offenses committed at the United States Capitol on January 6, 2021, misdemeanor offenses committed that day were not minor crimes. Courts in this District have agreed. *See*, *e.g.*, *United States v. Blake Austin Reed*, 1:21-cr-00204-03 (BAH), Tr. 4/14/2022 at 75-76 ("This is a trespass offense. But even for defendants like this one, who didn't engage in overt direct violence . . . this was not a garden variety episode of unlawful entry . . . . This defendant . . .was successful, actually, in overwhelming law enforcement to such an extent that Congress had to stop its proceedings and ensure[e] the peaceful transition of power in this democracy . . . ."") (statement of Chief Judge Howell); *United States v. Thomas Fee*, 1:21-cr-00131 (JDB), Tr. 04/01/2022 at 17 ("The defendant was an active participant in a mob assault on our core democratic values and our cherished institution. And that assault was intended by many and by the mob at large in general to interfere with an important democratic process[] of

this country. I cannot ignore that, cannot pull this misdemeanor out of that context.") (statement of Judge Bates); *United States v. Zachary and Kelsey Wilson*, Tr. 1/27/2022 at 60-61 ("[Y]ou all made the decision to do something that contributed to a transition of power that ultimately was marred by violence, destruction, and death . . . And some [people] were certainly far more culpable than both of you are, but . . . anybody that was in the Capitol building that day contributed to a very sad and terrible day.") (statement of Judge Mehta).

But the fact remains: these offenses *are* misdemeanors. If an attorney or witness inadvertently uses that word, the defendant should not benefit from a truthful utterance, and there should be no sanction. Both parties understand that they may not argue to the jury about the potential punishment that the defendant will face upon conviction. *See* Redbook 2.505 (instruction on punishment). The defense fears that even without such argument from the government, "[t]he jury's factfinding should not be clouded by a belief that its verdict will not carry serious consequences." (ECF No. 55 at 1.) It is speculation that the jury would hear the word "misdemeanor" and think "this isn't serious."[1] At most, the inadvertent use of the word "misdemeanor" would support a curative instruction that the jury is not to consider punishment. But the need for a curative instruction will depend heavily on context, and the Court can decide whether to give one if this issue arises at trial.

[1] In any event, such an assumption would be wrong. Alford faces a maximum of three years of incarceration if convicted of all counts, and the government has consistently argued that for *any* case arising out of the January 6 riot, several of the factors delineated in 18 U.S.C. § 3553(a) support a sentence of incarceration.

Respectfully submitted,

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