

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 1:21-cr-00708-RCL-1
	:	
LEO CHRISTOPHER KELLY,	:	
	:	
Defendant.	:	

**GOVERNMENT’S RESPONSE TO DEFENDANT’S
MOTION IN LIMINE TO EXCLUDE EVIDENCE CONCERNING CONDUCT BY
OTHERS THAN DEFENDANT**

The Court should deny Defendant Leo Christopher Kelly’s (“Kelly”) Motion in Limine to Exclude Evidence Concerning Conduct by Others than Defendant, ECF No. 51, because the conduct of others is relevant, and Kelly also fails to meet the high burden under Fed. R. Evid. 403 to exclude evidence.

BACKGROUND

A. Relevant Procedural History

On January 16, 2021, the Court issued a criminal complaint that charged Kelly with violating 18 U.S.C. §§ 1752(a)(1) and (2) (knowingly entering or remaining in any restricted building or grounds without lawful authority) and 40 U.S.C. §§ 5104(e)(2)(A),(C), and (G) (violent entry with intent to disrupt the orderly conduct of official business and disorderly conduct on capitol grounds). ECF No. 1.

After a series of unopposed motions to continue, on December 3, 2021, the Grand Jury issued a seven-count indictment that charged Kelly with violating 18 U.S.C. § 1512(c)(2) (Obstruction of an Official Proceeding) (Count One), 18 U.S.C. § 1752(a)(1) (Entering and Remaining in a Restricted Building or Grounds) (Count Two), 18 U.S.C. § 1752(a)(2) (Disorderly and Disruptive Conduct in a Restricted Building or Grounds) (Count Three), 40 U.S.C. §

5104(e)(2)(A) (Entering and Remaining on the Floor of Congress) (Count Four), 40 U.S.C. § 5104(e)(2)(C) (Entering and Remaining in Certain Rooms in the Capitol Building) (Count Five), 40 U.S.C. § 5104(e)(2)(D) (Disorderly Conduct in a Capitol Building) (Count Six), and 40 U.S.C. § 5104(e)(2)(G) (Parading, Demonstrating, or Picketing in a Capitol Building) (Count Seven). ECF No. 27.

B. Factual Background

At 1:00 p.m., EST, on January 6, 2021, a Joint Session of the United States Congress convened in the United States Capitol building. The Joint Session assembled to debate and certify the vote of the Electoral College of the 2020 Presidential Election. With the Joint Session underway and with Vice President Mike Pence presiding, a large crowd gathered outside the U.S. Capitol. As early as 12:50 p.m., certain individuals in the crowd forced their way through, up, and over erected barricades. The crowd, having breached police officer lines, advanced to the exterior façade of the building. Members of the U.S. Capitol Police attempted to maintain order and keep the crowd from entering the Capitol; however, shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol. 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.

Kelly's Participation in the January 6, 2021 Riot.

Kelly is a resident of Cedar Rapids, Iowa. ECF No. 1-1 at 2. Kelly was present in Washington, DC for the “Stop the Steal” rally on January 6, 2021. At the conclusion of the rally, Kelly marched to the U.S. Capitol. Kelly saw individuals climbing the scaffolding in place for the construction of the inauguration and up the stairs. United States Capitol Police (“USCP”) closed-circuit video footage establishes that at 2:40 p.m., rioters shattered a glass Senate Fire Door

windowpane and opened the Senate Fire Door. The rioters overwhelmed the responding USCP officers. Some rioters forced their way into nearby Senate offices, including the Senate Parliamentarian's Office.

At approximately 2:43 p.m., Kelly and other rioters streamed into the breached Capitol. Kelly recorded their confrontation with USCP officers. Kelly also entered the breached Senate Parliamentarian's Office and recorded an encounter with an individual in which Kelly stated, "Hey knock that shit off. Don't destroy this place. This is ours. Dude, knock it off." Ex. 1 – Kelly Video Clip January 6, 2021 inside Parliamentarian's Office. At approximately 2:58 p.m., Kelly and others confronted USCP officers near the North Door Appointment Desk. *See* Figure 1.



Figure 1 – screen capture from a Twitter account depicting Kelly and rioters near the North Door Appointment Desk.

Kelly and the others chanted, "Whose house? Our house." Ex. 2 – Twitter | gracyn_forever 5ff93adc86c51.video.mp4 ("Kelly Twitter video"),

<https://archive.org/download/nmu9xcmP9bo57SEGH/nmu9xcmP9bo57SEGH.mpeg4d>; *see also* Figure 1 above. The officers tried to prevent them from advancing further into the Capitol. *See* Figure 2.



Figure 2 – Kelly and other rioters confront Capitol police officers.

The USCP were overwhelmed. Kelly and the others made their way to the Senate chamber. *See* Figures 3 and 4.



Figure 3 - Kelly and other rioters about to enter the Senate chamber.



Figure 4 – Screen capture from *A Reporter's Footage Inside the Capitol Siege*. Kelly is pictured on the Senate dais with other rioters, including Jacob Chansley. Kelly is wearing a black jacket and grey sweater.

Kelly stood on the Senate dais and used his cellular phone to record himself examining papers on the desk. He also took photographs of Senate material. Kelly and the others on the dais

said a prayer lead by Jacob Chansley.¹ At approximately 3:05 p.m., law enforcement officers expelled Kelly and the other rioters from the Senate chamber. At approximately 3:08 p.m., Kelly exited the Capitol and returned to his hotel.

At approximately 6:00 p.m., while wearing the same sweater he wore during the Capitol breach, Kelly was interviewed by a LifeSiteNews.com reporter.² Ex. 3 – LifeSitenews.com interview of Leo Kelly (January 6, 2021). The reporter asked Kelly why Kelly entered the Capitol and Kelly responded, “We listened to the President’s speech over at the Ellipse over at the White House and made our way down Constitution and Pennsylvania Avenue.”³ *Id.* He told the reporter that by the time he arrived at the Capitol he saw people climbing the scaffolding and climbing up the stairs. *Id.* He further stated, “there wasn’t even any barricades to keep us out, like maybe there were before I got there but they were gone by the time I got there.” *Id.* Kelly continued:

(Um) and I wanted to see what was going on so I just kept climbing as far as I could, and you just have to understand that there was so many people out there you couldn’t ... you could only move so fast. Like people ... everybody was trying to get up close to the building and you just couldn’t ... you couldn’t even move for a lot of the time. You had to wait for people to kind of filter up as they ... as different people were ... I don’t know if they were opening up new parts of the stairs or something, but, um, eventually I made it up around the building, the Capitol building.

¹ On November 17, 2021, the Court sentenced Chansley on his guilty plea to Obstruction of an Official Proceeding, in violation of 18 U.S.C. § 1512(c)(2) to 41 months’ imprisonment. *See* Judgment, *United States v. Jacob Anthony Chansley*, Case 1:21-cr-00003-RCL, Docket Entry 92 (Nov. 17, 2021).

² The About section of LifeSiteNews.com states LifeSitenews.com “is a non-profit Internet news service dedicated to issues of life, family, and many related issues.” LifeSitenews.com, <https://www.lifesitenews.com/about>. Last accessed November 15, 2022.

³ The video recording of Kelly’s interview, LifeSitenews.com, Exclusive: Man who entered Capitol tells his story to LifeSiteNews (Jan. 6, 2021), <https://www.lifesitenews.com/episodes/exclusive-man-who-stormed-capitol-tells-his-story-to-lifesitenews/>, is no longer available on the website. The government has endeavored to accurately transcribe the broadcast interview for the government’s response and pursuant to Local Rule 49(e)(1), has provided the Court with a copy of the recorded interview for the Court’s review.

Id. The reporter asked Kelly what motivated Kelly to enter the Capitol. Kelly responded:

That ... that's an interesting moment. I just ... I think I just saw it happen and I was like there's something going on here. This is a ... this is a moment in U.S. history. It's ... it's not unlike the days of the beginning of the country. Like, it's just like at ... at some point there's enough illegal behavior and there's enough crimes against the Constitution being committed by the elected officials that what are you supposed to do? You know. Nobody in the courts will listen to ... they won't even take a look at the evidence. They just dismiss court cases ... all the election fraud cases on grounds ... on ... ah ... that there's no standing or whatever ... like ... so at some point you reach a point ... how none of my institutions are working. What are you supposed to do?

Id. The reporter then stated, "When you woke up this morning, you obviously had no idea you'd be storming the Capitol and breaching the Capitol building and going inside," to which Kelly interjected, "no." and the reporter continued, "You shot some video in there" to which Kelly interjected, "yeah," and the reporter continued, "We're going to show some of that." *Id.* The reporter then showed a video clip from Kelly's cellular phone from inside the Senate chamber that showed rioters celebrating and then panned down to the papers on the dais desk and the contents inside open drawers. *Id.*

Kelly told the reporter that he was inside the Capitol between 30 and 60 minutes and that he saw hundreds of people inside the Capitol. *Id.* Kelly further referred to the scene inside the Capitol as "chaos" and that:

Because there would be a group with me and a group of people that were blocked by a line of law enforcement officers, which by the way, in most of my interactions with them were ... they were professional trying to fulfill their duty and the people ... us ... were just ... mostly respectful, as respectful as you can be when you're kind of really pushing in on somebody's space like that. Um but then there would be a line ... us ... there'd be a line of police officers ... or whatever law enforcement and then behind you'll see other people just running around ... it's just absolute chaos.

Id. After remarking on the size of the Capitol building, Kelly stated "and it's kind of weird, like you get in there and oh now we're going to go ... you know make our voices heard on ... the

floor of the Senate ... or the floor of the House, whatever.” *Id.* The reporter then stated, “And you made it all the way to the Senate floor.” *Id.* Kelly shook his head in approval and stated, “I did. I did. We said a prayer up there.” *Id.* Kelly continued, “we’ve been betrayed by Congress, been betrayed by the judicial branch. We’ve been betrayed by our local governments, our mayors and everything. What are we supposed to do?”

The reporter asked Kelly how Kelly felt about events at the Capitol. Kelly stated he was “conflicted” and that “you violate someone else’s space ... “force your way into a building ... in some ways that really feels wrong ... but, that [space] really does belong to us.” *Id.* Kelly continued:

[T]hat should only be an absolute last resort ... maybe we shouldn’t have done that ... it’s just, you come to the end of your rope ... and you get swept up in a movement ... and there’s a bunch of people running and doing this ... it’s not the logical mind that’s working anymore ... you’re just reacting to things and, finally, there’s a chance that you can be heard ... and, we took that chance ... God will judge us ... perhaps I did something wrong ... I tried to be as respectful as I could while I was in there, while still saying what I felt needed to be said.

Id.

On January 8, 2021, LifeSiteNews.com posted a 1 minute, 16 second exclusive clip of Kelly’s interview to its Facebook page. Ex. 4 – LifeSitenews.com interview of Leo Kelly, extended clip (January 6, 2021). Kelly was asked if he thought Antifa was present at the Capitol. *Id.* He said “there was a mixture. *Id.* “Most of the people up there were true patriots but I just had the sense that this is an information war, and a lot of people are trying to put their spin on things.” *Id.* Kelly also referenced entering a Senate office located to his right after he entered the Capitol and discovering individuals “tearing up” the office and “stealing stuff.” *Id.* He explained “patriots” told the individuals to stop and that he believed Antifa was present at the Capitol, although he had no proof, and that there were people inside the Capitol, “who did just not fit what I expect from

the patriotic Trump movement, if that makes sense.” *Id.* Local Iowa media also featured Kelly’s account of his time inside the Capitol.

The FBI received numerous anonymous tips identifying Kelly as an individual inside the Capitol unlawfully on January 6, 2021.

On January 18, 2021, law enforcement officers arrested Kelly. At 8:56 a.m., Kelly signed FD-395, an FBI Advice of Rights form and waived his right to remain silent. Ex. 5 – FBI Advice of Rights, FD-395 form. Kelly then made incriminating statements. Among those statements were that after attending the “Stop the Steal” rally at the Ellipse he and others marched to the Capitol. Ex. 6 – Redacted Transcription of Audio Recording: Custodial FBI interview of Leo Kelly (January 18, 2021) at 24-25; *see also* Ex. 6A – Audio Recording: Custodial FBI interview of Leo Kelly (January 18, 2021). Kelly described the scene when he and others reached the Capitol as follows:

So then you walk up there and you, we got to the Capitol and by the time I got there, there were already people like way up like, you know, I don’t know if you guys have ever been there but you look up the hill and there’s this scaffolding which I think is what the bleachers are now. And people had climbed up on that and people had, they were just all over the grounds. And I was just, I wanted to see it.

You know? And I wanted to get, you know, and so I just followed ‘em up and kept walking. And I don’t know, when you’re in a group like that and you’re kind of moving around in a mass, I guess what I would expect is at some point you run up against whatever the building’s normal fence would be or something. And I don’t remember ever seeing that. Like I assume someone took it out of the way or whatever. I don’t know. But you just keep walking and walking and walking, getting closer and closer and closer and there’s always thousands more people ahead of you so I just kept going.

And eventually, yeah, we got up there and there was just thousands of people everywhere and I can’t remember. There were some people I actually saw coming out of the building, like regular, just folks. And I guess what’s weird s-I [sic] read

this. I don't know if it's true but apparently according to the police report in D.C. the, there was people in the building or the building was breached or something like that before (Pause) the President even got done speaking or something like that. Like it's just something like, there's just all this weird stuff that happened around the whole event.

But by the time I show up there, they're like swarming up the scaffolding and like I mean, you know, I mean maybe we should have known better. I mean possibly. Like, but you're in a group and you just walk and it's just like well what's going on here? I don't know. It's like (Laughing).

Ex. 6 – Redacted Transcription of Audio Recording: Custodial FBI interview of Leo Kelly (January 18, 2021) at 25-26. When asked if he knew of advanced planning to enter the Capitol, Kelly denied having such prior knowledge but stated, “We certainly knew what the schedule was for that day. They were going to certify the, or I can't remember if it's called certify or whatever, the election results, which was why the whole event (VO).” *Id.* at 27. Kelly also explained how he entered the Capitol:

There was a door. I was up in like I don't know, off to the side. Whatever. There's like the middle of the building and then somehow wherever I had flown with the crowd up there. And there was a group of people actually coming out of some doors or windows or something that they had broken. But they were, there was already people coming out by the time I got up there. And then something happened off to my left where there was another door and somebody started, I don't know, hitting it with something or something. I don't know if they were trying to break the window or what. And I do not remember how that door got opened, if the person forced it open or if the police from the inside opened it. Or, I don't know if they were police or what they were but (VO).

Id. Kelly made other admissions, including that he did not have a badge or credentials that would allow him into the Capitol, *id.* at 28; agreed with Agent Bronner's characterization that a police line was “breached,” *id.* at 30; that the group inside the Capitol significantly outnumbered the police, *id.* at 31; and informed the agents that he and 20-30 people made their way into the Senate chamber, *id.* at 36. Additionally, Kelly identified himself in a YouTube video. *Id.* at 38. When

asked if there was anything he wanted the agents to know, Kelly explained, “[the] crowd was not a violent bunch of psychopaths.” *Id.* at 44. He blamed the event on the failure of police to stop the group when he said:

Like it wouldn’t have taken much to like stopped the group. Now clearly we went up there and we did what we did. But it would not have been, like all you needed was like a few police officers and some actual barricades and it would have just taken the wind out of everybody’s sails and, and like we would have just stood around and didn’t, like (VO).

Id. at 45. When asked if in hindsight he thought his actions were the right thing to do, Kelly said, “No. I don’t, actually.” And further that, “I don’t think I had the, an authorized right to be in that building, you know?” *Id.* at 46.

ARGUMENT

Kelly seeks an order “excluding evidence concerning conduct by others than defendant.” ECF No. 51 at 1. Specifically, he seeks to exclude, “all evidence concerning conduct and statements of others who may have been in Mr. Kelly’s general vicinity on January 6.” *Id.* Kelly argues that, in particular to the obstruction of a proceeding count, Count One, which charges a violation of 18 U.S.C. § 1512(c)(2), for the jury to convict him under an aiding and abetting theory the government must prove Kelly had advance knowledge that other rioters intended to obstruct the Electoral College certification.⁴ *See* ECF No. 51 at 3-4. He also argues that “[b]ecause the spontaneous words and conduct of others around Mr. Kelly are insufficient to establish aider and abettor liability, such evidence should be excluded as substantially more prejudicial than probative under Fed. R. Evid. 403.” *Id.* at 5-7.

⁴ Although Count One does not charge Kelly with aiding and abetting the obstruction of the official proceeding, in violation of 18 U.S.C. § 2, the government need not allege aiding and abetting in an indictment for the Court to submit the theory of liability in a jury instruction. *United States v. Tajideen*, 319 F. Supp. 3d 445, 458–59 (D.D.C. 2018).

I. The conduct of others is relevant to Kelly’s disruptive and disorderly conduct and mens rea and motive.

As a general matter, the government agrees that Kelly is not liable for the conduct of people around him in the Capitol building on January 6, 2021. However, the conduct of people who were near Kelly in the Capitol is relevant to explain how his conduct was disorderly and disruptive, and to prove his motive and mens rea.

The nature of Kelly’s crimes arises from collective action. It was the mob’s collective action that disrupted Congress, and the government further needs to prove Kelly’s intent, which puts the behavior of other, nearby rioters at issue. This is important because Counts Three, Five, and Six charge Kelly with committing disorderly and disruptive conduct. 18 U.S.C. § 1752(a)(2); 40 U.S.C. § 5104(e)(2)(C); 40 U.S.C. § 5104(e)(2)(C). These crimes require proof of disorderly and disruptive conduct: with the intent to impede or disrupt government business (Count Three), disrupt the orderly conduct of official business, (Count Five), or an orderly session of Congress (Count Six). *Id.* Count Three carries the additional requirement that the conduct “*in fact*, impedes or disrupts the orderly conduct of Government business or official functions.” 18 U.S.C. § 1752(a)(2) (emphasis added).

To prove that Kelly’s conduct was disorderly and disruptive, and that his conduct in fact impeded or disrupted Congress, the government will present video and audio evidence of Kelly’s admission that he was not authorized to be inside the Capitol and testimony from USCP officers. USCP officers will explain that the Capitol building was closed to the public on January 6, 2021. No member of the mob was authorized to be in the Capitol, no member of the mob submitted to security checks, and the USCP assessed every member of the mob to be an active threat. Given a variety of factors, including the size of the crowd and the existence of multiple breach points, Congress was forced to recess. Congress could not resume its business until the entire mob was

cleared. Kelly was not only in the building but in the Senate chamber when USCP officers expelled him (and others) before Congress could return from recess. In that way, his conduct was in fact disruptive. And proof of this requires evidence of the conduct of other rioters. Without acting as one with the mob Kelly would not have made it into the Capitol and later to the Senate chamber. USCP closed-circuit video will show Kelly was able to access the Capitol only after rioters shattered a Senate Fire Door windowpane and opened the door, which Kelly observed before entering. Ex. 6 – Redacted Transcription of Audio Recording: Custodial FBI interview of Leo Kelly (January 18, 2021) at 27 (discussing how Kelly entered the Capitol building).

As Judge Kollar-Kotelly explained in another January 6 case:

The following metaphor is helpful in expressing what the statute [18 U.S.C. §1752(a)(2)] does require. Just as heavy rains cause a flood in a field, each individual raindrop itself contributes to that flood. Only when all of the floodwaters subside is order restored to the field. The same idea applies in these circumstances. Many rioters collectively disrupted Congressional proceedings, and each individual rioter contributed to that disruption. Because Rivera's presence and conduct in part caused the continued interruption to Congressional proceedings, the Court concludes that Rivera in fact impeded or disrupted the orderly conduct of Government business and official functions.

United States v. Jesus D. Rivera, Case No. 1:21-cr-00060 (CKK), ECF No. 62 at 13. In other words, “the nature of these crimes is collective action. It was the mob’s collective action that disrupted Congress” (ECF No. 59 at 3.).

Where other rioters near Kelly did something that he could have observed, or where Kelly talked about the conduct of other rioters, their conduct is probative of his mens rea and motive. It is neither novel nor controversial to see other people’s behavior as probative of Kelly’s state of mind. Indeed, in other trials arising out of the January 6, 2021 riot at the Capitol, the government has made similar arguments about the relationship between the conduct of nearby rioters and other defendants’ states of mind. *E.g.*, *Rivera*, Tr. 6/15/2022 at 198 (Closing Argument) (“Mr. Rivera

was part of a huge collective of people who disrupted Congress and the staff as they worked. . . . He heard people chanting outside the building. “Whose house? Our house.” He heard those same chants when he entered the building as well. He watched rioters confront law enforcement on the west front plaza and fight to fend off the mobs on the northwest stairs.”)

To be sure, Kelly may argue—if the evidence supports it—that he failed to see, hear, or understand what was happening around him. But that defense should not be able to convert this argument into a legal principle which treats the events happening around Kelly as irrelevant. Context matters. The behavior of other rioters, together with other evidence, will establish Kelly’s intent and motive when he joined them in breaching the Capitol and remaining inside.

Against this backdrop, Kelly primarily cites in support of his motion the Supreme Court’s decision in *Rosemond v. United States*, 572 U.S. 65 (2014). In *Rosemond*, the Supreme Court found that a district court provided the jury an erroneous aiding and abetting instruction in a trial in which the defendant was charged with a drug offense and a Section 924(c) offense “because [the jury instruction] did not explain that [defendant] needed advance knowledge of a firearm’s presence.” *Rosemond*, 572 U.S. at 81.

Rosemond considered aiding and abetting liability for purposes of Section 924(c), where a defendant must have advanced knowledge that someone else will bring gun to be on the hook for the use of the firearm in furtherance of a drug trafficking crime. But *Rosemond* does not unsettle the standard aiding and abetting principle that “at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense’s commission.” *Id.* at 71. The advanced knowledge requirement makes sense in the context of Section 924(c), where a defendant must have an opportunity to “walk away” when he learns that someone has brought a gun to what was

otherwise going to be a drug transaction. *See id.* at 78. No such consideration is at play in the ordinary aiding and abetting scenario, which is what this case presents.

II. Kelly also fails to meet the high burden under Fed. R. Evid. 403 to exclude evidence.

Kelly also seeks to limit relevant evidence and fails to meet the high burden of Fed. R. Evid. 403. 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).

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 Kelly’s requested relief. 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 Mfg, 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).

Kelly argues that the actions of other rioters in his vicinity should be excluded under Fed. R. Evid. 401 and 403. As noted previously, Kelly's conduct that makes up these charges 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. To show the overall riot, its effects, and why the certification of the Electoral College vote was suspended, the government will show the actions of other rioters in other areas of the Capitol building and grounds and rioters in Kelly's vicinity. Kelly will be held responsible for his actions, but the actions of the mob that day is needed for the jury to receive a complete picture of what took place at the Capitol that day.

Kelly's own words support presenting evidence of the actions of others in Kelly's vicinity because Kelly, in his own words, frames his actions on January 6 as jointly undertaken activities. For example, when inside the Capitol, Kelly and other rioters shouted, "Whose house? Our house." Ex. 2 – Kelly Twitter Video. Additionally, when discussing the breach of the Capitol with the reporter from LifeSitenews.com on the evening of January 6 fresh after storming the Capitol, Kelly referenced his disruptive and disorderly conduct when he said, "[b]ecause there would be a group with me and a group of people that were blocked by a line of law enforcement officers" and that he and the others in his group were "mostly respectful, as respectful as you can be when you're kind of really pushing in on somebody's space like that." Ex. 3 – LifeSitenews.com interview of Leo Kelly (January 6, 2021). Further, during his custodial interview, Kelly, in blaming the Capitol police for failing to secure the Capitol, stated, "it wouldn't have taken much to like stopped the group. Now clearly we went up there and we did what we did." Ex. 6 – Redacted Transcription of Audio Recording: Custodial FBI interview of Leo Kelly (January 18, 2021) at 45. Kelly also said that if more police officers and barricades were present on January 6, "it would have just taken the

wind out of everybody's sails and, and like we would have just stood around and didn't, like (VO).”
Id.

Even if this Court found the actions of other rioters were prejudicial, a limiting instruction would be the appropriate remedy. 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); *United States v. Crowder*, 141 F.3d 1202, 1210 (D.C. Cir. 1998)(stating that mitigating instructions to jury enter into the Rule 403 balancing analysis). Thus, because the actions of other rioters are relevant and not unduly prejudicial and any prejudice can be addressed through an appropriate limiting instruction, its admission is appropriate.

CONCLUSION

For the reasons stated herein, the government respectfully requests that this Court deny Kelly's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 29, 2022, I, the undersigned Assistant United States Attorney, served on copy of the foregoing response to the defendant's motion via CM/ECF on the counsels of record in this action.

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