UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	**CASE NO. 1:21-cr-708-RCL**
LEO CHRISTOPHER KELLY,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO THE DEFENDANT'S MAY 2, 2023 TRIAL BRIEF

The government hereby responds to the defendant's May 2, 2023 trial brief (ECF No. 96), detailing his belief that defense exhibit 103 – an 18-page internal action report ("Report") planned by the Civil Disturbance Unit of the U.S. Capitol Police – is relevant, authentic, and admissible, for this trial. The government intends to focus on the most salient details to help streamline this proceeding.

The Report is Irrelevant for 18 U.S.C. § 1752 Purposes

It is not entirely clear whether the defendant seeks admission of the entire 18-page document, or just portions of the document. As a matter of authenticity, the government does not challenge that the report is the report it purports to be. Beyond that, there is much to question.

First, the report is riddled with hearsay issues. As this Court knows, hearsay is a test of reliability, and much of this report contains information obtained from other third-party sources, not necessarily connected to the U.S. Capitol Police.

Second, the report is irrelevant to this case. As the defendant acknowledges, the purpose of seeking admission of this report (or specific subsections) is to prove that "the restricted perimeter on January 6 was not exactly as the government has portrayed it and that USCP were briefed on a completely different restricted perimeter prior to the January 6 event." ECF No. 96, at 2. The defendant's obsession with the contours of the restricted perimeter seem to misunderstand

the legal requirements of the restricted perimeter, and its enforceability. As this Court knows, the defendant is charged with several offenses dealing with trespassing or committing crimes while "in any restricted building or grounds." *See* 18 U.S.C. § 1752(a)(1) and (2). Section 1752(c)(1) defines restricted grounds as "any posted, cordoned off, or otherwise restricted area (B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting."

Thus, as a matter of law, the preparation of the creation of the restricted perimeter is of no legal significance. Nor are updates to reports about the contours of the perimeter. Rather, the restricted grounds are created by postings, barriers, or things that denote a restricted area. § 1752(c)(1). In other words, the restricted perimeter is that which physically manifests in order to let unauthorized personnel know of the consequences for entering in the first place.

In this case, whether the U.S. Capitol Police had a thousand different iterations of restricted perimeter maps is entirely irrelevant as to what was actually enforced on the day in question. The fact that there are multiple maps has *nothing* to do with the perimeter as it was enforced on that day. Nor does it undermine the existence of a restricted perimeter or make the restricted perimeter into some sort of legal nullity.

The defendant respectfully misunderstands the purpose of the government's map, as utilized in January 6 matters. ECF No. 96, at 3. The aerial map below does not represent some sort of permanent fixture that exists for all restricted perimeters in perpetuity. Rather, it illustrates the general contours of where the physical barriers – snowfencing, bike racks, signs, etc. – were placed on the Capitol grounds on January 6, 2021, to delineate the start and stop of the restricted area.

The defendant seems to think that if those barriers were moved, or if the map is not foolproof and flawless, that the restricted perimeter simply ceases to exist. This is simply wrong. If anything, moved barriers or gaps in fencing may undercut whether *this* defendant knowingly trespassed in a restricted area. But that does not swallow the restricted area into oblivion. The restricted area still exists, whether a rioter tosses a bike rack aside or not.

The defendant's trial brief highlights some of his confusion. For example, the defendant cites to Judge Kollar-Kotelly's finding that it may be germane to § 1752 charges whether "the federal government took some measures to restrict an area." ECF No. 96, at 6. We agree. But the evidence in this case (and candidly, all cases) will show that the U.S. Capitol Police did take measures to restrict the area. It is those measures – the physical implementation of such measures – that matter. Such physical barriers put the public on notice of the restricted area.

An internal document showing a different map, however, does not. Most saliently, the defendant, prior to January 6, 2021, never observed *any* of these maps. So how these maps would be relevant to show what the defendant did or did not know about the perimeter would be irrelevant, if not incredibly misleading to the jury. Once the jury becomes aware of multiple maps, absent a curative instruction, it is entirely possible a juror becomes confused as to whether a restricted perimeter existed. The focus for the restricted area should be on the postings, signage,

and barriers as legally contemplated by the law – §1752(c)(1) – not internal speculation of internal police memoranda.

Absent a Proffer, the "Donald, You're Fired March on DC" is Equally Irrelevant, as well as Misleading

As documented in the government's earlier motion *in limine* (ECF No. 92), the defendant's attempt to introduce the "Donald, You're Fired March on DC" as a lawful permitted demonstration is equally unavailing, for many of the same reasons. To start, there is no evidence the defendant was aware of this specific protest. Second, this protest was not lawfully permitted. There is no meaningful way to slice and dice this fact: there is no evidence, at all, that any groups were lawfully permitted to protest within the restricted area. The fact the defendant continues to beat this drum suggests, in the face of actual evidence, he will utilize rumors as a basis to sow confusion amongst jurors.

This line of argument is concerning, not only because of the factual misalignment repeatedly explained in this and prior briefing, but because of its legal significance before a jury. According to the defendant, "[i]f, as the Ops Plan tends to prove, law enforcement agencies at the Capitol were prepared to allow unidentified members of the public . . . to access such an area in the immediately vicinity of the Capitol, the premise that such territory satisfies the statutory definition of "restricted" cannot hold." ECF No. 96, at 5. But this statement entirely lacks legal support. Assume the hypothetical: if there was a lawful protest held within the restricted perimeter – there was not – why would the restricted perimeter collapse? Assuming that police correctly – as the evidence will show – erected barriers for unauthorized persons to remain out – how would this nullify the perimeter? Certainly a trial may revolve around whether a person is authorized or not. But the area itself remains intact.

The Report Does Not Satisfy a Hearsay Exception

Finally, the government must address the defendant's hearsay arguments. *See* ECF No. 96, at 8-10. The report is not one that is kept in the "course of a regularly conducted activity." FRE 803(6). Indeed, the defendant has made no effort – other than conclusory assertions – to actually develop a record that this report was something that was used by U.S. Capitol Police in any regular manner or regular practice. Indeed, part of the uniqueness of what happened on January 6 is that the event was so irregular. It hardly stands to reason that this is somehow a record that is routinely made as part of the organization's efforts to protect the U.S. Capitol. *See* ECF No. 96, at 9 (attempting to add in the word "protective" as a way to normalize the report).

This is especially so when the government has repeatedly, as officers of the court, proffered that the content the defendant continues to belabor is *inaccurate*. It seems strange to suggest to this Court that the record falls under the residual exception, *see* ECF No. 96, at 9, as a sufficient "guarantee" of "trustworthiness" when the government has literally explained that the source of the march was a website screengrab, not an official vetting by law enforcement. ECF No. 92, at 4. The defendant is certainly free to disagree, but the absence of evidence is not evidence in this instance. The report is inadmissible hearsay offered to prove that a march that did not happen, happened. It is thus offered for its truth, in a way that completely mangles the factual narrative.

Finally, it is worth noting that the government has also repeatedly identified one of the main generators of the report as an individual who no longer works for the U.S. Capitol Police, but helped collate the report in the days prior to January 6. The defendant is free to investigate as he sees fit, as well as subpoena testimony for relevant evidence. But absent more, this fishing expedition leads to nowhere.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
DC Bar No. 481052

By: */s/ Gregory Rosen*
GREGORY ROSEN
Assistant United States Attorney
VA Bar No. 82584
U.S. Attorney's Office
District of Columbia
601 D Street N.W.
Washington, D.C. 20530
Gregory.rosen@usdoj.gov
(202) 252-6932

/s/ Ashley Akers
ASHLEY AKERS
Trial Attorney