UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S OPPOSITION TO THE DEFENDANT'S MOTION FOR A NEW TRIAL AND JUDGMENT OF ACQUITTAL

The United States of America, through its attorneys, respectfully files this opposition to the defendant's Motion for a New Trial and Judgment of Acquittal (ECF No. 118). The defendant's motion raises two arguments: (1) a juror was inherently biased and failed to disclose that bias during the Court's *voir dire* examination, thus tainting the jury's verdicts; and (2) no reasonable juror could find all of the essential elements of the statutes at issue beyond a reasonable doubt. *See* ECF No. 118. As explained below, the defendant's claims lack factual and legal support, and thus, his motion must be denied.

I. The Jury Was Properly Empaneled and Discharged Their Duties Without Bias or Falsehoods.

Underlying the defendant's motion appears to be an allegation that juror #1437 (herein, "juror") lied to the Court about the juror's prior knowledge of and work in the U.S. Capitol. The defendant alleges that after the Court discharged the jury, in the presence of opposing counsel, along with "at least 7 other jurors," the juror in question disclosed that the juror "used to work at the Capital [sic] as an intern, and once you're in, you're in. Even I couldn't go on the floor." ECF No. 118, at 1. The juror allegedly continued by saying "this is our city. We live here. We know what went on." *Id.* In a rather gratuitous postscript, opposing counsel opined that she was "aghast"

at this "clearly biased statement" and determined that the juror had "not been forthcoming and honest." *Id.*

The facts are far less nefarious than suggested and such allegations of impropriety ring hollow. In reality, the juror appropriately responded to questions posed, did not lie to the Court or fail to disclose a material fact, and affirmed the ability to be fair and impartial. Finally, even assuming *arguendo* that the juror failed to disclose some fact unknown at the time, such alleged indiscretion would not result in the extraordinary remedy the defendant now seeks.

A. *Voir Dire*

On May 1, 2023, this Court conducted *voir dire* in the above case. The Court swore the jurors in at approximately 10:36 a.m. *See* 5-1-23 Tr. Transcript ("Tr."), at 3. After swearing in the panel, the Court asked extensive questions to the panel about their possible jury service. *Id.* at 3-21. The Court noted, *inter alia*, that the purpose of the process was to "pick a fair and impartial jury today." *Id.* While the Court asked a total of forty questions, questions nine through twelve dealt specifically with the United States Capitol:

> No. 9 is real easy hopefully. Do any of you live or work at or near the U.S. Capitol? If you do, say yes to No. 9.
>
> No. 10, anyone you are close to live or work at or near the U.S. Capitol?
>
> No. 11, were you at or near the U.S. Capitol on January 6, 2021? That's 11. Were you at or near the U.S. Capitol on January 6, 2021?
>
> No. 12, did any of you watch the events at the U.S. Capitol January 6, 2021 on live TV at that time? I'm not going to ask you if you ever saw it on TV. Everybody saw it on TV. Any of you watching it live at the time, I may ask you some follow-up. That's No. 12.

Id. at 13-14. On that same day, the Court interviewed the juror. *Id.* at 35-44. Neither the defendant nor the government challenged the juror for cause. *Id.* at 44. The colloquy between the Court and

the juror dealt with several questions posed by the Court and answered by the juror. Some of that back-and-forth included the following exchanges:

> THE COURT: You live or work near the Capitol?
> JUROR: I live about a mile from the Capitol.
> THE COURT: Where do you live?
> JUROR: Mount Vernon Square, Mount Vernon right north of us.
> THE COURT: Okay. And you watched this live on TV that day?
> JUROR: Yeah, I was watching the news that morning and working from home and watched it as it all unfolded.
> THE COURT: And you did say you thought you could put that aside and decide this case just on the evidence you saw here at the trial, is that right?
> JUROR: Yes, I have served on a jury before, so I have -- you know, aware of how to, like, think about the law and think about the evidence and would like to think I could do that here too.
> THE COURT: Okay. Any reason you couldn't be a fair and impartial juror if you were chosen to serve here?
> JUROR: No.
> THE COURT: Tell me how much you followed the investigation here. Did you watch the TV coverage?
> JUROR: I would say I would follow it just like a normal person reading news articles and major updates about it obviously.
> THE COURT: Like in the Post or --
> JUROR: Yeah, yeah. I mean, I wasn't one of those people that was watching all the hearings. I was, like, reading news articles about them afterwards. And, you know, in D.C. it's hard to avoid. And yeah, I was interested in it, so …
> THE COURT: Okay. Tell me your impression, if you can, of that day and what you have followed that has led you to what kind of impression?
> JUROR: I mean, it was a pretty major event. I wasn't happy that it was happening, both in my city and also that people were breaking into the Capitol and there seemed to be violence going on, and obviously people died on both sides of it. So, you know, I'm glad that these cases are going to trial because I think that's important. But yeah, I generally don't think it was a good thing. You know, I am very supportive of protesters. I am very supportive of activism and people's right to protest. I think there's always like a line you have to be -- you can't
> cross. And so was that line crossed on January 6? Probably I guess that's what the Court is trying to determine, so...
> THE COURT: Any reason you couldn't follow the law and decide whether this defendant really crossed that line under the instructions I give to this jury?
> JUROR: Yeah.
> THE COURT: That's what you would have to do here is decide what the facts are here in this case, whether this defendant really crossed the line of the instructions I would give the jury. Do you think you could do that fairly?
> JUROR: Yeah. I mean, I think that's what the purpose of these trials is, for each individual defendant to plead -- you know, for the government to give their case

> and defendants to give their case, and for us as the jury to determine that. And that's, you know, why I do think I could be an impartial juror, because on my last jury, I was really impressed with everybody and how thoughtful our jury was at examining the evidence . . . and think about the law and how to apply it even if we didn't particularly agree with the circumstances. So that would be my hope …
> THE COURT: I have found my juries contentious too. Now I will ask you the hardest question. If you are sitting over there in his seat, would you want somebody like you on your jury in this kind of case where you have some views?
> JUROR: Yeah, I think so, because like I said, I respect the court systems and I respect the rule of law. I almost went to law school. I didn't end up going, but, you know, I think what we have in this country is really important. And I have even said to friends, like my friends who always talk about how to get out of jury duty, I tell them, like, I don't think you should try to get out of it.
> ---
> THE COURT: … Let me ask you. Oh, I know what it was. I think you said something about you understand the defendant doesn't have to put on a case at all because the burden is on the government to prove everything?
> JUROR: Uh-huh.
> THE COURT: So the defendant doesn't have to testify, doesn't have to call any witnesses or do anything. The total effort has to be by the government. The defendant doesn't have the burden to even testify or call a witness or do anything. Do you understand the government has the burden of proof …
> JUROR: Yes.
> THE COURT: … and the burden of producing evidence? You don't have any problem with that?
> JUROR: No. In my last case [sitting on a jury], the defendant didn't testify, and that wasn't an issue in how we came to our conclusion.

Tr. at 37-40, 43. Notably, at no point did the Court, opposing counsel, or the government ever ask for the juror's (or any juror's) entire employment history, or whether a juror had *ever* previously worked or interned at the U.S. Capitol.

B. The Juror's Post-Trial Conversation

As a threshold matter, opposing counsel received permission from the Court's law clerk and courtroom deputy to speak to members of the jury panel. Government counsel was not present for this inquiry. Local Criminal Rule 24.2 states that that determination must be made by "the

Court." LCvR 24.2(b). Assuming the Court approved this colloquy[1], we turn to the defendant's account.

The account as described (ECF No. 118, at 1) appears to be based on an unrecorded and sudden anecdotal encounter, in a hallway of the courthouse. No member of the prosecution team was present for this conversation nor, does it appear, that any member of the Court's staff took part. Thus, as a starting point, the government cannot meaningfully probe the completeness of what happened without adducing further evidence. For example, what was the tone of the juror's statement? What were the exact words used? Is there a misunderstanding in what was heard or perceived? Did the juror say anything additional? What did the defendant or defense counsel ask to provoke these comments? None of these answers are readily apparent from the defendant's motion.

The defendant alleges that during this hallway exchange, the juror admitted that the juror used to work at the Capitol as an intern, and "once you're in, you're in. Even I couldn't go on the floor." *Id.* at 1. The juror then stated that this is "our city. We live here. We know what went on." *Id.* Based on this short and undistinguished colloquy, and despite the inherent incongruity in the first statement (how does "once you're in, you're in," square with not being allowed on the Senate floor?), the defendant now seeks the exceptional remedy of a new trial.

C. Legal Principles

Federal Rule of Criminal Procedure Rule 33(a) states, in relevant part, that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." While "[t]rial courts enjoy broad discretion in ruling on a motion for a new trial," the D.C. Circuit has "held that

[1] It is not clear whether the deputy courtroom clerk or law clerk speaks for "the Court" in this narrative, but as will be discussed, the success of the defendant's motion does not turn on this fact.

granting a new trial motion is warranted only in those limited circumstances where 'a serious miscarriage of justice may have occurred.'" *United States v. Wheeler*, 753 F.3d 200, 208 (D.C. Cir. 2014) (quoting *United States v. Rogers*, 918 F.2d 207, 213 (D.C. Cir. 1990)).

A defendant "is entitled to a fair trial but not a perfect one, for there are no perfect trials." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (quotations and citations omitted). "A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination." *Id.* at 555. In keeping with these principles, a defendant seeking a new trial based on a juror's statements during *voir dire* faces the heavy burden of establishing *both* that the juror deliberately lied, *and* that the juror otherwise would have been struck for cause. *Id.* at 556. *McDonough* ultimately reversed a Tenth Circuit decision that ordered a new trial in a personal injury case because a juror gave a mistaken though honest response to a jury question. *Id.* at 555.

In *United States v. North*, 910 F.2d 843, 904 (D.C. Cir. 1990) (vacated in part), the D.C. Circuit applied *McDonough* for the first time. In doing so, the Court recognized that an aggrieved party must show a falsehood at *voir dire* that would have "demonstrated actual bias." *Id.* at 904; *see also United States v. Holloman*, No. 89-381-SSH, 1990 WL 678953, at *1-2 (D.D.C. Nov. 5, 1990) (rejecting a Rule 33 challenge where a juror did not disclose a prior conviction and arrest even though the Court explicitly asked the venire to "come forward and reveal any arrests or convictions privately at the bench"). The Circuit reaffirmed this legal analysis in *United States v. Carson*, 455 F.3d 336, 352-53 (D.C. Cir. 2006); *see also United States v. Boney*, 977 F.2d 624, 634 (D.C. Cir. 1992) ("We do not now hold that any false statement or deliberate concealment by

a juror necessitates an evidentiary hearing. But we believe that a juror's refusal to admit his felony status is particularly troublesome."); *United States v. Boney*, 97 F. Supp. 2d 1, 5-7 (D.D.C. 2000) (after two separate remands from the Circuit, the district court rejected a similar challenge, finding that although the juror lied, the defendant failed to demonstrate any actual bias against the defendant himself).

Finally, while not directly on point – as the defendant does not appear to be seeking this relief – the courts and the law appropriately limit the inquiry into a jury's deliberative process in the event of a subsequent hearing. *See, e.g.*, FED. R. CRIM. P. 606(b)(1) ("[A] juror may not testify about . . . the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."); *see United States v. Stover*, 329 F.3d 859, 865 (D.C. Cir. 2003) (holding that Rule 606(b) "prohibits jurors from giving evidence about any matter pertaining to their verdicts except extrajudicial influences"); *United States v. Brooks*, 677 F.2d 907, 913 (D.C. Cir. 1982) (affirming trial court's decision not to conduct an evidentiary hearing regarding alleged juror misconduct based on a subconscious memory, because courts should refuse to consider "the mental processes through which [the jurors] arrived at their verdict") (internal citation and quotation omitted). Excluding such inquiries promotes several "values," including, "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." FED. R. CRIM. P. 606 cmt. (citing *McDonald v. Pless*, 238 U.S. 264, 268 (1915)).

D. Argument

The defendant's motion fails for two reasons. First, the juror never lied or misled the Court, and second, the defendant has unearthed no evidence of actual bias.

Nowhere in the record, let alone in the defendant's motion, do the facts support the contention that the juror deliberately or even recklessly omitted key information from the parties' consideration. Upon information and belief, at no point was the juror squarely asked whether the juror previously worked in the U.S. Capitol. No juror was asked for employment history, and certainly not for a complete accounting of every previous internship or volunteer position for the juror's entire life. At no point was the juror asked whether the juror previously interned for Congress. At no point was the juror asked whether the juror knew the layout of the Capitol or of the Senate Chamber. At no point was the juror asked whether the juror's knowledge of Congress or the building would render the juror incapable of being fair and impartial.[2] Unable to show that the juror "failed to answer honestly a material question on *voir dire*," *McDonough Power Equipment*, 464 U.S. at 556, the defendant's claim fails to meet this threshold requirement, and the Court must reject it.

Without evidence of a false statement or deliberate concealment, the defendant instead implies that the juror violated the spirit of *voir dire* by failing to detail the juror's full past experiences at the Capitol, including an internship of uncertain length at an uncertain time.[3] This stretches the standard far beyond *McDonough*, allowing for a potential new trial whenever defense

[2] The Court was correct to focus on prospective jurors' working and living situation *on* January 6; being at the Capitol on January 6 would make a juror a potential witness to the crime, and would raise a greater possibility that the day's events had an emotional impact than would having some sort of temporary employment at the building (such as an internship), potentially months or years in the past.

[3] Although this Court can clearly resolve this factual and legal matter on the record before it, to the extent the Court has any concerns whatsoever, the Court may, in its discretion, order a hearing to elicit limited testimony from the juror. *See United States v. Boney*, 977 F.2d 624, 634 (D.C. Cir. 1992) (remanding for an evidentiary hearing when a juror failed to disclose felon status when asked). Even if that occurred, the evidence will still not satisfy the first prong of *McDonough*, and thus, the defendant's endeavor fails.

counsel feels that a juror perhaps could have been more communicative about a potential issue, even if not directly asked a question on point by the Court or either party.

Nor do any of the juror's purported post-trial statements suggest that the juror falsely told the Court that the juror could be fair. Nothing the juror said after trial was inconsistent with the juror's responses to the Court's *voir dire* on this topic, which probed the juror's bias painstakingly before concluding the juror was fit to serve on the defendant's jury. Several statements to which the defendant now objects are of the same kind as the sentiments the juror expressed in open court during *voir dire*. In both conversations, the juror referred to Washington, D.C. in the possessive, referring to events in "our city" or "my city." After trial, the juror reportedly told counsel, "we know what went on." During *voir dire*, the juror described those events, *i.e.*, "what went on": "people were breaking into the Capitol and there seemed to be violence going on, and obviously people died on both sides of it." The responses are consistent.

The defendant's hyperbolic claims about these statements are further not supported by the statements themselves. For example, the defendant claims that the juror, who was an intern some unspecified number of years beforehand, was "a victim of the [January 6] riot" and "has the life experience of being in the exact same position as everyone present on January 6, 2021." ECF No. 118, at 6. This fact appears *nowhere* in the defendant's proffer.

Relatedly, the defendant has also failed to show actual bias, the second requirement to obtain a new trial based on a juror's responses during *voir dire*. *North*, 910 F.2d at 904. Case law compels this conclusion. In *North*, when asked, a juror failed to disclose that several of her brothers had pending criminal charges. *Id.* at 903. The Circuit rejected a Second Circuit case declaring juror dishonesty as *per se* evidence of a juror's partiality. *Id.* at 905 ("[J]uror dishonesty does not, without more, prove actual bias."). And the Court rejected the request for a new trial. In *Holloman*,

a juror lied about a prior conviction and arrest. Again, the judge rejected the request for a new trial. 1990 WL 678953, at *2 ("Although Mr. Jones's dishonesty about his own past suggests a greater potential for bias than the *North* juror's dishonesty about her brothers, there is no evidence that Mr. Jones harbored any actual bias against the defendants."). In *Boney*, the Circuit remarked that a juror's failure to admit his prior larceny crime was "particularly troublesome" and that there existed an inference that the juror "had an undue desire to participate in a specific case." 97 F. Supp. 2d at 5. After multiple hearings and appeals, the Court rejected the request for a new trial, holding that the juror's lies did not demonstrate actual or even implied bias. *Id.* at 6-8.[4]

A prominent case of alleged juror misconduct arose recently in *United States v. Ghislaine Maxwell*, where the defendant was convicted of helping to traffic and sexually abuse teenage girls. After the trial, the parties learned that a juror failed to disclose that he was previously sexually abused, on multiple occasions, by a stepbrother and the stepbrother's friends. *United States v. Maxwell*, 20-cr-330-AJN, ECF No. 653, at *10 (S.D.N.Y. Apr. 1, 2022). The juror testified that his answers to several *voir dire* questions were inaccurate. *Id.* He explained that he did not intentionally fail to disclose his personal history of sexual abuse – a key line of inquiry during *voir dire*. *Id.* After a hearing, the Court denied the Rule 33 motion, holding that the false answers were not deliberate, and that the defendant failed to show that a correct response would have provided a valid basis for a challenge for cause. *Id.* at *13. In denying the motion, the Court noted that even if *McDonough*'s first prong was satisfied – falsehoods at *voir dire* – the defendant did not establish

[4] These cases put into context the defendant's inability to make the threshold showing of a falsehood. Here, unlike in *North*, *Holloman*, and *Boney*, the defendant has failed to even establish that a falsehood occurred, regardless of whether the standard is deliberateness or inadvertence. The juror never lied in an answer to any question and reaffirmed the juror's ability to be fair and impartial in multiple ways. Moreover, the alleged omission is immaterial in comparison to a juror intentionally lying about a prior conviction to ensure his or her presence on the jury panel.

that the Court would have excused the juror for cause if he had answered the questions during jury selection accurately. *Id.* at *23. As stated by the Court, the juror "repeatedly and credibly affirmed that his personal history of sexual abuse would not affect his ability to serve as a fair and impartial juror." *Id.* at *24.

While the juror's alleged post-trial statements could be perceived as perhaps a bias against what happened on January 6, 2021 (a "bias" that many undoubtedly share, as in response to other national tragedies), the statements in no way imply actual, real bias against Leo Kelly, whose guilt was the actual question the juror was asked to decide at trial. In fact, the juror's statements accurately reflect the state of evidence, *see* 5-5-23 Tr. At 126 ("We were never allowed [on the Senate chamber floor]"), and the juror's familiarity with basic facts about security at the Capitol, much like someone who has traveled on an airplane after the September 11, 2001 terrorist attacks might know that passengers are not allowed in the cockpit during flight. Such knowledge hardly indicates bias. Moreover, as explained above, many of the juror's statements express the same understanding the juror expressed during *voir dire*, which the Court already probed and determined did not indicate bias. In sum, the defendant fails to identify any bias revealed by the post-trial conversation undermining the juror's ability to fairly evaluate whether "this defendant really crossed the line," as the Court asked during *voir dire.*

Assuming that the juror disclosed working as an intern in the Capitol, the juror would not have been struck for cause, just as the juror in *Maxwell* would not have been. Here, the juror repeatedly affirmed the ability to be fair, noting a prior jury service. The juror explained that the juror's exposure to January 6, while obvious, was like a "normal person reading [the] news." 5-1-23 Tr. at 37-40. Despite counsel's alleged awe at the juror's post-trial disclosure (*see* ECF No. 118, at 1), the reality is the same juror, during *voir dire*, also stated that January 6 was "a pretty

major event. I wasn't happy that it was happening, both in my city and also that people were breaking into the Capitol and there seemed to be violence going on, and obviously people died on both sides of it." 5-1-23 Tr. at 37-40. During *voir dire*, the juror indicated that the juror understood the gravity of the day, associated the event with the juror's city, and still, the defendant did not seek a for-cause strike at the time. That the juror previously interned in the Capitol (but did not work there on January 6) would not have resulted in the Court striking the juror for cause.

This is particularly true where, as in this trial, several jurors revealed connections to the Capitol similar to that of the juror, and the Court nevertheless qualified those other jurors. For example, Juror 1895 stated that, on January 6, 2021, the juror worked in an office right near the House Office Building, the juror had friends and clients who were staff and members of Congress inside the Capitol that had to evacuate on January 6, and the juror watched the events unfold live on television. 5-1-23 Tr. at 99-100. Even so, the defendant did *not* move to strike the juror for cause, and the Court qualified the juror. *Id.* at 105. Juror 0330 worked near the Capitol on January 6, 2021, and was at work that day, but neither party moved to strike the juror for cause, and the Court qualified that juror. *Id.* at 193, 196. Juror 2173 explained that the juror's sister currently works for a Congressperson at the Capitol but did not on January 6, 2021. *Id.* at 82. Even so, neither party moved to strike the juror for cause, and the Court qualified the juror. *Id.* at 83. Similarly, Juror 1753 stated that the juror's nephew had, at the time, worked for the U.S. Capitol Police since about December 2022. 5-1-23 Tr. at 186-187, 189. Even though that juror's nephew worked at the Capitol, neither party moved to strike the juror for cause, and the Court qualified the juror. *Id.* at 193. Finally, Juror 277 worked as a Senate staffer at the Capitol during 2021. *Id.* at 202. This time, however, the defendant, through counsel, moved to strike Juror 277 for cause because the juror's wife was formerly an Assistant United States Attorney, the juror worked on

Capitol Hill as a U.S. Senate staffer, and the juror stated that the juror's neighborhood was impacted by the events of January 6. *Id.* at 205. The court properly "found [the juror] to be very credible," and denied the challenge. *Id.* at 206. Defense counsel cannot meaningfully distinguish this juror from the other jurors, particularly when the juror's *voir dire* encompassed the substance of the juror's other post-trial statements Thus, even *if* the juror had disclosed the fact of a prior internship – despite it never being asked – the Court would have qualified the juror anyway, even over a defendant's potential objection.

II. The Evidence Clearly Supports the Verdicts When the Defendant Pushed Through to the Inner Senate Chamber, Praying in the Middle of a Riot Intending to Disrupt the Certification Proceeding.

In a mere two pages, the defendant tosses in a Hail Mary, for good measure, making a sweeping claim that the evidence was insufficient to prove the crimes charged because the government "could not point to any evidence . . . to show that the defendant intended to obstruct . . . the official proceeding . . . [and] [t]here was no evidence that he acted corruptly." ECF No. 118, at 6. According to the defendant, all he did was "pray and take photographs." *Id.* at 7. He points to the lack of "mountain of social media, text messages, emails, and [] statements that show a defendant's intent" in this case as proof. *Id.* His claim fails.

First, as noted by the defendant, the post-trial standard for a new trial on sufficiency is "highly deferential" to the jury verdict. *See United States v. Williams*, 836 F.3d 1, 6 (D.C. Cir. 2016). "[W]e *must* accept the jury's verdict if any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *Id.* (internal punctuation omitted and emphasis added). The Court "must view the evidence in the light most favorable to the government, drawing no distinction between direct and circumstantial evidence, and giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact." *Id.*

Examining the facts of this case through this highly deferential lens, the defendant's claim is meritless. In this case, before the defendant traveled to Washington, D.C., he was closely following alleged election fraud in the 2020 presidential election. *See, e.g.*, Govt Ex. 604.1 (text messages); 5-5-23 Tr. At 22-25. Contrary to the defendant's argument, there in fact were many messages, including ones claiming that "Joe Biden was not elected president," *id.* at 4, and "#Bidencheated," *id.* at 5. After the U.S. Supreme Court rejected a challenge to the results of the 2020 election, one of the defendant's cohorts told him that he was "[p]retty sure America just got sent to bed without dinner for the next four years." *Id.* at 10; 5-5-23 Tr. At 23. The defendant replied, "It's not over. It may get a lot messier, but it's not over." Govt Ex. 604.1 at 10; 5-5-23 Tr. At 24. The day before the riot, the defendant said he was going to Washington, D.C. and planning to "stop the steal" and it was "gonna be wild tomorrow, I suspect." Govt Ex. 604.1 at 14, 16.

The defendant came to the former President's rally the morning of January 6, 2021, near the Ellipse. 5-5-23 Tr. at 28-29. The former President spoke and encouraged his supporters to walk to the U.S. Capitol and not show weakness. *See* Govt Ex. 900. As the defendant approached the Peace Circle Monument on U.S. Capitol grounds, he took photographs and video, including video showing rioters playing the song "We're Not Gonna Take It," 5-5-23 Tr. at 32, rioters standing on a statue, Govt Ex. 403, and rioters climbing on scaffolding, Govt Ex. 404. The defendant approached the Upper West Terrace and took photographs and videos of rioters – some in tactical gear – swarming the building and holding weapons such as a baseball bat, and police officers standing guard behind a broken window at the Senate Wing Door. *See, e.g.*, Govt Exs. 405, 104.5, 406.

The defendant then entered the Capitol building through the door near the Parliamentarian's office at about 2:43 p.m., shortly after it was first breached (following a physical

confrontation between rioters and police). Govt Ex. 702. The defendant watched as another rioter bashed in an office door immediately upon entry into the building. *Id.* The defendant then walked into the Parliamentarian's Office, which was in a state of disarray. 5-5-23 Tr. at 52-53; Govt Ex. 703. The defendant rejoined the rioters in the hallway and confronted a line of police officers. Govt Exs. 107, 107.3, 107.3.1. As the defendant and rioters continued to move forward, the police line became overwhelmed by the rioters and dropped back. Rioters chanted, "WHOSE HOUSE?! OUR HOUSE!" and "STOP THE STEAL" and "USA!" as they approached the officers. Govt Exs. 306, 307.

Eventually, the rioters made it to the end of the first hallway, Govt Ex. 702, turned down a second hallway, and approached the North Appointment Desk, Govt Ex. 703, where another line of police stood guard. The defendant approached the police officers holding the line as the group of rioters quickly multiplied. The defendant – at the front of the line of rioters – stormed through the officer line, physically interacting with police, effectively breaking the line and allowing the mass of rioters to progress past the officers. Govt Ex. 703. The defendant then ascended the same set of stairs that the Vice President had used to evacuate not long before, Govt Ex. 202, and he headed towards the Senate Chamber, Govt Ex. 704.

The defendant entered the Senate Chamber, Govt Ex. 504, and quickly approached the dais – the place where the Vice President had presided over the Senate earlier that day to assist in the certification proceeding of the 2020 presidential election. While standing at the head of the Senate at the Vice President's desk, the defendant took photographs and videos of the desk and the items on it, including photographs of the Arizona election ballot, the Vice President's script, and a roster of U.S. senators. Govt Exs. at 108 – 108.2, 109, 410. The defendant also took a video of himself and other rioters "praying" to "send a message to all the tyrants, communists, and globalists that

this is our nation and not theirs . . . .” Govt Exs. 410, 313.1 at 3:43. The defendant then approached another desk and used his cell phone to take more images.

Police officers entered the Senate Chamber and successfully moved rioters out. Govt Ex. 505 at 34:01. Once cleared from the Senate Floor, the defendant descended the same steps he previously climbed and exited the building through the North Door. *Id.* As he walked outside, the defendant pumped his fist in the air. Govt Exs. 123.2, 123.3.

The defendant sent a text message to his mother saying that he was “not dead and not in jail,” and had “[o]nly a little tear [g]as in the back of [his] throat.” Govt Ex. 604.1 at 19. The defendant remained on Capitol grounds for more than fifty minutes after he exited the Capitol building. Govt Ex. 100, 100.11, 100.12. As the defendant remained on Capitol grounds, he took photographs of the barriers erected to keep rioters out, including snow fencing. Govt Ex. 100.8.

After January 6, the defendant sent numerous text messages about his participation in the riot, including several videos and photographs that he took while inside the Capitol building. For example, on the evening of January 6, the defendant sent a video of the rioters overwhelming the officers in the initial hallway through which he entered, with a caption, “crazy times.” Govt Ex. 604.1 at 22. The defendant sent three photographs that he took inside the Capitol, including a photo of the Arizona objection ballot that he found while inside the Senate Chamber. *Id.* at 24.

With respect to the defendant’s claim that he did not have “knowledge of . . . any so called perimeter . . . intended to keep out visitors,” the evidence shows the opposite. ECF No. 118, at 6. At every step of the way, the defendant understood that he could not enter the U.S. Capitol. From individuals on scaffolding, to tear gas, to law enforcement perimeters, the evidence established that he knew he was trespassing, and all reasonable inferences prove that beyond a reasonable doubt.

Even the defendant's own father acknowledged the nature of the riot and his son's desire to prevent the certification of Biden as the winner of the election. Mr. Christopher Kelly, who testified on behalf of the defendant and attended the rally with him, initially claimed that he did not know he was permitted on Capitol grounds. 5-5-23 Tr. at 205 (noting the lack of snow fencing). But even on direct, he acknowledged that it was "strange" to see people climbing on statues. *Id.* at 208. As he stated, "it didn't seem like they should be there." *Id.* at 209. On cross-examination, Mr. Kelly fully understood the political ramifications of the rally he and his son attended. *See id.* at 218 (discussing Dominion voting machines and election fraud). He was familiar with ballot harvesting. *Id.* at 219. His whole family understood that January 6, 2021 was about the certification of the Electoral College. *Id.* The defendant's attempt to contort this as protected prayer ignores that the underlying motivation was political in nature, as it related to the official proceeding. *Id.* at 217. When asked what his and his son's goals were that day, he stated "we were all praying and hoping that the truth would come out." *Id.* at 222. When asked about the Vice President's role in certifying the election (and potentially rejecting the electors on January 6), Mr. Kelly responded "I mean, from the vice president, it's unprecedented. But in general, in elections, that is not unprecedented." *Id.* As Mr. Kelly stated, he was hoping the Vice President would send the certification back to the states. *Id.* at 223.

Despite this underlying political knowledge, Mr. Kelly and his family (to include the defendant) walked to the Capitol as part of the mob. When asked whether Mr. Kelly would characterize the events as chaotic, he replied, "Yeah. It was just shocking." *Id.* He was uncomfortable with going onto the Capitol steps because of the tear gas and the "chaos." *Id.* at 224. He understood that going into Congress likely required passing through security checkpoints. *Id.* at 226. At the end of the day, Mr. Kelly appreciated the fact that his son was a 37-year-old adult

who was fully capable of making decisions on his own. *Id.* at 232. Where Mr. Kelly chose to stop, his son advanced, taking action to fulfill his desire to disrupt the proceedings.

All in all, this evidence clearly demonstrates that a jury could find that all the essential elements of the charged statutes were met beyond a reasonable doubt. Indeed, the defendant's actions of storming past several lines of police officers on the first floor of the Capitol in order to reach the Senate floor demonstrate the defendant's knowing intent to obstruct, impede, and interfere with law enforcement officers and the orderly conduct of government business. Moreover, the defendant's presence on the actual floor of the United States Senate – the very place where the Vice President of the United States had earlier convened with the Senate to fulfill their constitutional duty to certify the electoral college vote – was inherently disruptive and indicative of the defendant's corrupt intent. His actions on the Senate floor included rifling through official election-related documents, further confirming that his actions were deliberate and done with consciousness of wrongdoing (who would believe that he had permission to go through the Vice President of the United States' desk?) and corroborating his focus on the official proceeding that day. That conduct, in conjunction with the defendant's statements, was more than sufficient to permit the jury to find the defendant guilty beyond a reasonable doubt. It was plainly obvious that defendant sought to obstruct the certification that day, and that he acted through means he – like any reasonable adult – knew were unlawful, and the evidence easily sufficed to meet the other elements as well. It makes no difference whether defendant used force; he need only have acted "corruptly," as the Court instructed. 5-8-23 Tr. at 124. Despite all the tell-tale signs of caution, he moved undeterred, even forcing his way through an officer on his way to the Senate chamber. He did so intentionally, attempting to secure an unlawful benefit: that his preferred candidate would remain President of the United States. There is simply no First Amendment right to storm the

Capitol and break into the Senate Chamber with the purpose of disrupting the peaceful transfer of power.

III. CONCLUSION

For the foregoing reasons, the Court should deny the defendant's motion.

Respectfully submitted,

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