UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 1:21-cr-719 (JEB)**
	:	
CYNTHIA BALLENGER, and CHRISTOPHER PRICE,	:	
	:	
Defendants.	:	

GOVERNMENT'S REPLY TO DEFENDANTS' OPPOSITION TO GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE ARGUMENT AND EVIDENCE ABOUT OTHER CAUSES TO THE DELAY OF THE JOINT SPECIAL SESSION OF CONGRESS

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this reply to the defendants' opposition to the government's motion *in limine* regarding evidence and argument of other causes to the delay of the joint special session of Congress. In its motion, the government seeks to preclude evidence and argument that conclude that 1) the placement of pipe bombs near the United States Capitol delayed the electoral college certification proceedings on January 6, 2021, and 2) unidentified third parties worked in concert with law enforcement to cause the same delay. ECF 83-1 (hereinafter "Gov't Mot."). The basis for this motion is that the causation element of 18 U.S.C. § 1752(a)(2) allows for multiple sufficient causes to result in the congressional delay, so-called duplicative causation, and that evidence of these "other causes" could not disturb a factual finding that the defendants' own actions "in fact" delayed the certification proceedings. Gov't Mot. at 3-4. In opposition, the defendants argue that the government offered the wrong legal standard for the causation element. ECF 90 at 10 (hereinafter "Def. Opp.").

Under Federal Rule of Evidence 401, 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. "In a criminal case, a fact is 'of consequence' if it makes it more or less likely that the defendant committed the charged conduct." *United States v. Hazelwood*, 979 F.3d 398, 409 (6th Cir. 2020). The court, therefore, must determine what the law of the charged conduct is to determine the relevance of any given piece of evidence. *See, e.g.*, *United States v. Miller*, 799 F.3d 1097, 1105 (D.C. Cir. 2015) (analyzing the language of the indictment to determine whether evidence was relevant).

In this case, Section 1752(a)(2) includes a causation element that requires the government to prove that the defendants' conduct "in fact[] impede[d] or disrupt[ed] the orderly conduct of Government business or official functions." In its motion, the government acknowledged that but-for causation is typically used in criminal statutes. Gov't Mot. at 3. However, courts may also permit the government to satisfy the causation element when there are multiple, independently sufficient causes to the harm. *Id.*; *see Burrage v. United States*, 571 U.S. 204, 214-15 (2014); *United States v. Monzel*, 746 F. Supp. 2d 76, 86 (D.D.C. 2010) (concluding that the victims' harm was "caused by" the defendant where there were "multiple sufficient causes" of the injury for purposes of criminal restitution). In this case, the United States Capitol was overrun by thousands of rioters on January 6, 2021 leading congressional members to recess and evacuate to safety. This situation indicates that the "special rule" regarding "multiple sufficient causes" applies in this case. *Burrage*, 571 U.S. at 215; *see also United States v. Rivera*, 607 F. Supp. 3d. 1, 9 (D.D.C. 2022); *United States v. MacAndrew*, No. 21-cr-730 (CKK), 2023 WL 196132, at *8 n.5 (D.D.C. Jan. 17, 2023). To adopt the defendants' position that but-for causation is required would mean that the government would need to prove that the defendants' actions were both necessary and sufficient to delay the congressional proceedings. In plain

language, the defendants argue that the court may only convict them of § 1752(a)(2) if their actions, and their actions alone, caused Congress to delay the electoral college certification.

To support their position, the defendants cite several portions of *Burrage* to reach the opposite result as the government. Def. Opp. at 9. In *Burrage*, the Court reviewed the causation element of a statute within the Controlled Substances Act, which imposes a heightened sentence when "death or serious bodily injury results from the use" of an unlawfully distributed narcotic. 571 U.S. at 206 (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C)). In its opinion, the Court held that the causal element "results from . . . requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Burrage*, 571 U.S. at 211 (internal quotations and citations omitted).

The defendants first argue that *Burrage* "declined to use the governments [sic] approach in that case." Def. Opp. at 9. This point clouds the holding in *Burrage*. In that opinion, the court explicitly rejected the government's secondary argument that causation could be found when the defendant's actions were "a substantial or contributing factor in producing a given result." 571 U.S. at 215 (internal quotations omitted). The government's primary argument, however, was that "results from" includes when "multiple sufficient causes independently, but concurrently, produce a result." *Id.* at 214. (emphasis removed). The court did not rule on this argument because "there was no evidence . . . that the [victim's] heroin use was an independently sufficient cause of his death." *Id.* The defendants next conclude that because "'in fact' and 'results from' are similar terms," this Court should transfer the *Burrage* holding to the causation element of § 1752(a)(2). Def. Opp. at 9. This rationale may make sense if the *Burrage* court had the opportunity to address the government's primary argument in that case, which the court plainly

stated it could not do because of the factual record.

The defendants continue that but-for causation is required here because *Burrage* quoted the Model Penal Code as saying such causation is "the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result." Def. Opp. at 10 (quoting *Burrage*, 571 U.S. at 211) (emphasis omitted). This assertion, however, ignores that the Model Penal Code is a general guideline that is not applicable in all cases. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978) ("The ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions" of law.). *Burrage* acknowledged as much when the court agreed with the government about "the undoubted reality that courts have not always required strict but-for causality, even where criminal liability is at issue" and that duplicative causation was "[t]he most common." *Id.*

The defendants next turn to the findings of fact and conclusions of law in *United States v. Rivera*. 607 F. Supp. 3d 1. The defendants argue that the opinion is of limited use because it is "not a complete analysis." Def. Opp. at 11. First, they assert that *Rivera* did not assess *Burrage*, implying that the *Rivera* court should have adopted, or at least addressed, the defendants' flawed analysis of *Burrage*. *Id.* Next, defendants note that the facts of *Rivera* are "much different" than their case. *Id.* Assuming this assertion is true, the different conduct between *Rivera* and the defendants' own speaks only to whether the government can meet its burden, not to what the burden is. The defendants raise a similar argument in citing the court's bench trial decision in *United States v. Matthew Martin*, No. 21-cr-394 (TNM), where the court found that the defendant's conduct did not disrupt the congressional proceedings. *Id.* at 12. The defendants state that this ruling suggests "the mere presence argument would not hold water." *Id.* This portion of

Martin, however, again speaks to the sufficiency of evidence, not to the legal standard for causation.

Lastly, the defendants assert that *Rivera* did not adopt duplicative causation. *Id.* When addressing the defendant's causation argument, *Rivera* held:

> The following metaphor is helpful in expressing what the statute *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 or official functions.

607 F. Supp. 3d. at 9 (emphasis in original). The final sentence of this analysis is particularly instructive, where the court said "Rivera's presence and conduct *in part* caused the continued interruption." *Id.* (emphasis added). This holding spells out exactly how duplicative causation functions.

CONCLUSION

For the reasons stated above, the government asks that the Court allow its motion *in limine* to preclude arguments and evidence about the pipe bombs and unidentified actors working in concert with law enforcement.

Respectfully submitted,

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