

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

UNITED STATES OF AMERICA :
 :
 CASE NO. 21-cr-626-PLF
 v. :
 :
 DEREK COOPER GUNBY, :
 :
 Defendant. :

**UNITED STATES’ OPPOSITION TO DEFENDANT’S
MOTION TO TRANSFER VENUE**

Defendant Derek Cooper Gunby, who is charged in connection with events at the U.S. Capitol on January 6, 2021, has moved to transfer venue in this case to the District of South Carolina. Gunby fails to establish that he “cannot obtain a fair and impartial trial” in this district, Fed. R. Crim. P. 21(a), and this Court should deny his motion.¹

BACKGROUND²

At 1:00 p.m., on January 6, 2021, a joint session of the United States Congress, consisting of the House of Representatives and the Senate, convened in the Capitol Building. The Joint

¹ Every judge on this Court to have ruled on a motion for change of venue in a January 6 prosecution has denied the motion. *See United States v. Garcia*, No. 21-cr-129, ECF No. 83 (D.D.C. July 22, 2022) (ABJ); *United States v. Bledsoe*, No. 21-cr-204 (July 15, 2022) (Minute Order) (BAH); *United States v. Williams*, No. 21-cr-377 (June 10, 2022) (Minute Entry) (BAH); *United States v. McHugh*, No. 21-cr-453 (May 4, 2022) (Minute Entry) (JDB); *United States v. Webster*, No. 21-cr-208, ECF No. 78 (D.D.C. Apr. 18, 2022) (APM); *United States v. Alford*, 21-cr-263, ECF No. 46 (D.D.C. Apr. 18, 2022) (TSC); *United States v. Brooks*, No. 21-cr-503, ECF No. 31 (D.D.C. Jan. 24, 2022) (RCL); *United States v. Bochene*, No. 21-cr-418-RDM, 2022 WL 123893 (D.D.C. Jan. 12, 2022) (RDM); *United States v. Fitzsimons*, No. 21-cr-158 (D.D.C. Dec. 14, 2021) (Minute Order) (RC); *United States v. Reffitt*, No. 21-cr-32 (D.D.C. Oct. 15, 2021) (Minute Order) (DLF); *United States v. Caldwell*, 21-cr-28, ECF No. 415 (D.D.C. Sept. 14, 2021) (APM).

² The facts in this section are taken from the Statement of Facts filed with the Criminal Complaint. *See* ECF No. 1-1.

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 Michael Richard Pence presiding, a large crowd gathered outside the U.S. Capitol. “The mob [. . .] scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol,” with the first rioters entering shortly after 2:00 p.m. *Trump v. Thompson*, 20 F.4th 10, 10 (D.C. Cir. 2021).

Shortly thereafter, at approximately 2:20 p.m., members of the House and Senate, including the President of the Senate, Vice President Pence, were instructed to—and did—evacuate the chambers. The siege of the Capitol lasted for several hours and represented a violent attack that forced an interruption of Congress’s certification of the 2020 Electoral College vote count, threatened the peaceful transfer of power after the 2020 Presidential election, injured more than one hundred police officers, and resulted in more than 2.7 million dollars in damage and losses. The siege of the U.S. Capitol on January 6, 2021, was “the most significant assault on the Capitol since the War of 1812.” *Trump*, 20 F.4th at 18-19.

For his part, on January 6, 2021, Gunby posted photographs to his Facebook page showing himself in Washington, D.C. near the Capitol. He captioned one of his photographs with “Up at Zero Dark Thirty to stop this steal.” Additional posts on his Facebook page show him at the “Stop the Steal” rally held on the Ellipse, in front of the Washington Monument, and on the Capitol Grounds. Open-source video and closed circuit television cameras (CCTV) show Gunby entering the Capitol through what is known as the Senate Parliamentarian Door. The CCTV video shows him walking down a hallway, and after a few minutes, he turns around and exits through the same door.

Later that day, Gunby posted a video to his Facebook page that shows him riding the Metro in Washington, D.C. During the video, Gunby stated, in part, the following:

So yeah we went, we were in front of the White House earlier this morning, and then going into the afternoon, everyone headed down to the National Mall towards the Capitol. And we all pretty much surrounded the Capitol. We are at a point now in this country where they're going to listen to us. They have to listen to us. Your congressional leaders are not afraid of you. They are more afraid of the Chinese Communist party. They're more afraid of left wing media. And they are more afraid of ANTIFA and Black Lives Matter than they are of the American patriot, the American conservative, the American libertarian. The person who is on the right side of the Constitution.

....

The American patriot in this country has been, we've been saints. Saints. Because the capability of America, and Americans, especially if we were the kind of people that the media always portrays us to be, we can take this country back pretty quickly. We didn't bring weapons. Americans that came here for this event did not bring weapons. That's saying a lot considering how late it is in this game. How much they have tried to take from us, and we are still not taking up arms against our government, against the Capitol. So, we surrounded the Capitol today. Eventually tear gas started flying. They started shooting tear gas. I got, I'm still, my lips are still burning from it.

....

They detonated, it was like a flash bang with a, they did a lot of flash bangs and things, and people stayed peaceful. I don't care what the media is telling you. The media told you that, that we terrorized anybody, that the American patriot, that the Trumps supporters, that the people that were here to protest the stealing of the votes, of the election in this country.

....

Came a little closer to some nightsticks and rubber bullets than we wanted to. But, this was ultimately peaceful. I do believe that the Metro police here in Washington do understand the stark difference between Trump supporters, the patriots, what have you, than say ANTIFA, Black Lives Matter. The character is completely different. There couldn't be more of a stark difference in justification, and intent, and capability. If the American patriot wanted to storm this Capitol, take over this building, and take care of all of Congress in there, they could do it. They could do it.

....

They just tried to steal this election right in front of everybody's face. And any of you, any of you, who are gonna sit there and look anybody in the face, and say that that didn't happen, that this election fraud didn't happen, that we're making it up, that it's unsubstantiated, you need to wake up.

Based on his actions on January 6, 2021, Gunby is charged with violating 18 U.S.C. § 1752(a)(1), 18 U.S.C. § 1752(a)(2), 40 U.S.C. §5104(e)(2)(D), and 40 U.S.C. §5104(e)(2)(G).

Gunby now moves for a change of venue. ECF No. 36. Gunby contends that prejudice should be presumed in this district for: (1) the characteristics of the D.C. jury pool, (2) the pretrial publicity surrounding the events of January 6, and (3) evidence of juror partiality. Each of the defendant's arguments is without merit, and the motion should be denied.

ARGUMENT

The Constitution provides that “[t]he trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.” U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment similarly guarantees the right to be tried “by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI. These provisions provide “a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.” *United States v. Cores*, 356 U.S. 405, 407 (1958). Transfer to another venue is constitutionally required only where “extraordinary local prejudice will prevent a fair trial.” *Skilling v. United States*, 561 U.S. 358, 378 (2010); *see* Fed. R. Crim. P. 21(a) (requiring transfer to another district if “so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there”).

The primary safeguard of the right to an impartial jury is “an adequate voir dire to identify unqualified jurors.” *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (italics omitted). Thus, the best

course when faced with a pretrial publicity claim is ordinarily “to proceed to voir dire to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity.” *United States v. Campa*, 459 F.3d 1121, 1146 (11th Cir. 2006) (en banc). “[I]f an impartial jury actually cannot be selected, that fact should become evident at the voir dire.” *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976) (en banc) (per curiam). And, after voir dire, “it may be found that, despite earlier prognostications, removal of the trial is unnecessary.” *Jones v. Gasch*, 404 F.2d 1231, 1238 (D.C. Cir. 1967).

I. The Characteristics of the District of Columbia’s Jury Pool Do Not Support a Change of Venue.

The defendant contends that a D.C. jury cannot be impartial because of various characteristics of the District’s jury pool: the political makeup of the District’s electorate, the impact of January 6 on D.C. residents, and the prevalence of federal employees in the District. Def.’s Mot. Change Venue (“Mot.”) at 6.³ None of these claims has merit.

A. The District of Columbia’s political makeup does not support a change of venue.

The defendant contends that he cannot obtain a fair trial in the District of Columbia because more than 90% of its voters voted for the Democratic Party candidate in the 2020 Presidential Election. Mot. at 8. The en banc D.C. Circuit rejected a nearly identical claim in *Haldeman*, where the dissent concluded that a venue change was required because “Washington, D.C. is unique in its overwhelming concentration of supporters of the Democratic Party” and the Democratic candidate received 81.8% and 78.1% of the vote when Nixon ran for President in 1968 and 1972, respectively. *Haldeman*, 559 F.2d at 160 (MacKinnon, J., concurring in part and dissenting in

³ Defendant’s Motion does not include page numbers, so citations are to the ECF pagination.

part). The majority rejected the relevance of this fact, observing that authority cited by the dissent gave no “intimation that a community’s voting patterns are at all pertinent to venue.” *Id.* at 64 n.43; *see also United States v. Chapin*, 515 F.2d 1274, 1286 (D.C. Cir. 1975) (rejecting the argument that “because of [the defendant’s] connection with the Nixon administration and his participation in a ‘dirty tricks’ campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District’s heavily black, and overwhelmingly Democratic, population”).

If “the District of Columbia’s voting record in the past two presidential elections” is not “at all pertinent to venue” in a case involving high-ranking members of a presidential administration, *Haldeman*, 559 F.2d at 64 n.43, it cannot justify a change of venue here. To be sure, *some* potential jurors might be unable to be impartial in January 6 cases based on disagreement with the defendants’ political aims. But whether individual prospective jurors have such disqualifying biases can be assessed during voir dire. This Court should not presume that every member of a particular political party is biased simply because this case has a political connection. Indeed, the Supreme Court has stated in the context of an election-fraud trial, that “[t]he law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity of national elections, and that his political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute.” *Connors v. United States*, 158 U.S. 408, 414 (1895). The same is true here. The District’s voting record does not establish that this Court will be unable to select “an unbiased jury capable of basing its verdict solely on the evidence introduced at trial.” *Haldeman*, 559 F.2d at 70.

To the contrary, as the nation’s capital and seat of the federal government, the District has been home to its fair share of trials in politically charged cases. High-profile individuals strongly

associated with a particular party, such as Marion Barry, John Poindexter, Oliver North, Scooter Libby, Roger Stone, and Steve Bannon have all been tried in the District. See *United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (per curiam); *United States v. Libby*, 498 F. Supp. 2d 1 (D.D.C. 2007); *United States v. Stone*, No. 19-cr-0018 (ABJ), 2020 WL 1892360 (D.D.C. Apr. 16, 2020); *United States v. Bannon*, No. 210-cr-670 (CJN). Indeed, the Court in *Stone* rejected the argument that jurors “could not possibly view [Roger Stone] independently from the President” because of his role in the presidential campaign or that “if you do not like Donald Trump, you must not like Roger Stone.” 2020 WL 1892360, at *30-31. Similarly here, the fact that most District residents voted against Donald Trump does not mean those residents could not impartially consider the evidence against those charged in connection with the events on January 6.

B. The number of federal employees who reside in the District of Columbia does not support a change of venue.

The defendant argues that the Court should presume prejudice in this District because the jury pool would contain a high percentage of federal government employees or their friends and family members. Mot. at 8, 18. But the defendant does not explain how merely being employed by the federal government would render a person incapable of serving as an impartial juror. Although some federal employees, such as the U.S. Capitol Police, were affected by the events of January 6, many others were neither directly nor indirectly affected. Indeed, many federal employees were nowhere near the Capitol on January 6 given the maximum telework posture at the time. And the storming of the Capitol on January 6 was not aimed at the federal government in general, but specifically at Congress’ certification of the electoral vote. There is therefore no reason to believe that federal employees with little or no connection to the events at the Capitol

could not be impartial in this case. *See United States v. Bocheno*, No. CR 21-418 (RDM), 2022 WL 123893, at *2 (D.D.C. Jan. 12, 2022) (January 6 defendant’s claim that federal employees would “have a vested interest in supporting their employer” was “exactly the kind of conjecture that is insufficient to warrant transfer prior to jury selection”).

Even assuming (incorrectly) that every federal employee is affected by improper bias, the Court could draw a jury from those District residents who are not employed by the federal government. According to the Office of Personnel Management, around 141,000 non-Postal Service employees worked in Washington, D.C., in 2017. OPM, Federal Civilian Employment, available at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/>. But many federal employees who work in the District live outside the District and would not be part of the jury pool. And the District has nearly 700,000 residents. Thus, even if every federal employee were disqualified, the Court would be able to pick a jury in this District.

II. The Pretrial Publicity Related to January 6 Does Not Support a Presumption of Prejudice in This District.

The defendant contends that a change of venue is warranted based on pretrial publicity. Mot. at 9-12. “The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity.” *United States v. Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995); *see Murphy v. Florida*, 421 U.S. 794, 799 (1975) (juror exposure to “news accounts of the crime with which [a defendant] is charged” does not “alone presumptively deprive[] the defendant of due process”). Indeed, “every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.” *Reynolds v. United*

States, 98 U.S. 145, 155-56 (1878). Thus, the “mere existence of any preconceived notion as to the guilt or innocence of an accused, without more,” is insufficient to establish prejudice. *Irvin*, 366 U.S. at 723. “It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Id.*

The Supreme Court has recognized only a narrow category of cases in which prejudice is presumed to exist without regard to prospective jurors’ answers during voir dire. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). In *Rideau*, the defendant’s confession—obtained while he was in jail and without an attorney present—was broadcast three times shortly before trial on a local television station to audiences ranging from 24,000 to 53,000 individuals in a parish of approximately 150,000 people. *Id.* at 724 (majority opinion), 728-29 (Clark, J., dissenting). The Court concluded that, “to the tens of thousands of people who saw and heard it,” the televised confession “in a very real sense *was* Rideau’s trial—at which he pleaded guilty to murder.” *Rideau*, 373 U.S. at 726. Thus, the Court “d[id] not hesitate to hold, without pausing to examine a particularized transcript of the voir dire,” that these “kangaroo court proceedings” violated due process. *Id.* at 726-27.

Since *Rideau*, the Supreme Court has emphasized that a “presumption of prejudice . . . attends only the extreme case,” *Skilling*, 561 U.S. at 381, and the Court has repeatedly “held in other cases that trials have been fair in spite of widespread publicity,” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976). In the half century since *Rideau*, the Supreme Court has never presumed prejudice based on pretrial publicity. *But see Estes v. Texas*, 381 U.S. 532 (1965) (presuming prejudice based on media interference with courtroom proceedings); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (same). In fact, courts have declined to transfer venue in some of the most high-profile prosecutions in recent American history. *See In re Tsarnaev*, 780 F.3d 14,

15 (1st Cir. 2015) (per curiam) (capital prosecution of Boston Marathon bomber); *Skilling*, 561 U.S. at 399 (fraud trial of CEO of Enron Corporation); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (trial of participant in 1993 World Trade Center bombing); *United States v. Moussaoui*, 43 F. App'x 612, 613 (4th Cir. 2002) (per curiam) (unpublished) (terrorism prosecution for conspirator in September 11, 2001 attacks); *Haldeman*, 559 F.2d at 70 (Watergate prosecution of former Attorney General John Mitchell and other Nixon aides).

In *Skilling*, the Supreme Court considered several factors in determining that prejudice should not be presumed where former Enron executive Jeffrey Skilling was tried in Houston, where Enron was based. *Skilling*, 561 U.S. at 382-83. First, the Court considered the “size and characteristics of the community.” *Id.* at 382. Unlike *Rideau*, where the murder “was committed in a parish of only 150,000 residents,” Houston was home to more than 4.5 million people eligible for jury service. *Id.* at 382. Second, “although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.” *Id.* Third, “over four years elapsed between Enron’s bankruptcy and Skilling’s trial,” and “the decibel level of media attention diminished somewhat in the years following Enron’s collapse.” *Id.* at 383. “Finally, and of prime significance, Skilling’s jury acquitted him of nine insider-trading counts,” which undermined any “supposition of juror bias.” *Id.*

Although these *Skilling* factors are not exhaustive, courts have found them useful when considering claims of presumptive prejudice based on pretrial publicity. *See, e.g., In re Tsarnaev*, 780 F.3d at 21-22; *United States v. Petters*, 663 F.3d 375, 385 (8th Cir. 2011). And contrary to the defendant’s contention, those factors do not support a presumption of prejudice in this case.

A. Nature of the District of Columbia

The defendant suggests that an impartial jury cannot be found in Washington, D.C., despite the District's population of nearly 700,000. Mot. at 9-11. Although this District may be smaller than most other federal judicial districts, it has a larger population than two states (Wyoming and Vermont), and more than four times as many people as the parish in *Rideau*. The relevant question is not whether the District of Columbia is as populous as the Southern District of Texas in *Skilling*, but whether it is large enough that an impartial jury can be found. In *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991), the Court cited a county population of 182,537 as supporting the view that an impartial jury could be selected. And *Skilling* approvingly cited a state case in which there was "a reduced likelihood of prejudice" because the "venire was drawn from a pool of over 600,000 individuals." *Skilling*, 561 U.S. at 382 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991)). There is simply no reason to believe that, out of an eligible jury pool of nearly half a million, 12 impartial individuals could not be empaneled." *Id.*

Additionally, the defendant contends that a D.C. jury could not be impartial because D.C. residents have been particularly affected by events surrounding January 6, including the deployment of the National Guard, the mayor's declaration of a state of emergency, road closures, and a curfew. Mot. at 10-11. But January 6 is now more than a year in the past. Many D.C. residents do not live or work near the Capitol where the roads were closed and the National Guard was deployed. There is no reason to believe that the District's entire population of nearly 700,000 people was so affected by these events that the Court cannot seat an impartial jury here.

Indeed, courts routinely conclude that defendants can receive a fair trial in the location where they committed their crimes, despite the fact that some members of the community were victimized. See *In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015) (Boston Marathon bombing);

Skilling, 561 U.S. at 399 (Enron collapse); *Yousef*, 327 F.3d at 155 (1993 World Trade Center bombing); *Moussaoui*, 43 F. App'x at 613 (September 11, 2001 attacks, including on the Pentagon). In *Skilling*, the Supreme Court rejected the contention that Enron's "sheer number of victims" in the Houston area "trigger[ed] a presumption of prejudice." *Skilling*, 561 U.S. at 384 (quotation omitted). "Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to Enron," the voir dire was "well suited to that task." *Id.* In this case too, voir dire can adequately identify those D.C. residents who were so affected by January 6 that they cannot impartially serve as jurors. There is no reason to presume prejudice.

B. Nature of the pretrial publicity

Nor does this case involve an inadmissible "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 561 U.S. at 382. Even news stories that are "not kind," *Skilling*, 561 U.S. at 382, or are "hostile in tone and accusatory in content," *Haldeman*, 559 F.2d at 61, do not alone raise a presumption of prejudice. As in *Skilling* and *Haldeman*, the news coverage of Gunby is "neither as inherently prejudicial nor as unforgettable as the spectacle of Rideau's dramatically staged and broadcast confession." *Id.* Indeed, Gunby does not cite to a single news article that specifically discusses his role in January 6.

The defendant asserts that a fair trial cannot be had in D.C. because of the volume of news coverage of January 6. Mot. at 9. But even "massive" news coverage of a crime does not require prejudice to be presumed. *Haldeman*, 559 F.2d at 61. Unlike most cases involving pretrial publicity, where the news coverage focuses on the responsibility of a single defendant (as in *Rideau* or *Tsarnaev*) or small number of co-defendants (as in *Skilling* and *Haldeman*), the events of

January 6 involved thousands of participants and have so far resulted in charges against more than 800 people. The Court can guard against any spillover prejudice from the broader coverage of January 6 by conducting a careful voir dire and properly instructing the jury about the need to determine a defendant's individual guilt.

And, in any event, any threat of such spillover prejudice is not limited to Washington, D.C. because much of the news coverage of January 6 has been national in scope. *See Haldeman*, 559 F.2d at 64 n.43 (observing that “a change of venue would have been of only doubtful value” where much of the news coverage was “national in [its] reach” and the crime was of national interest); *United States v. Boche*, No. 21-cr-418-RDM, 2022 WL 123893, at *3 (D.D.C. Jan. 12, 2022) (“The fact that there has been ongoing media coverage of the breach of the Capitol and subsequent prosecutions, both locally and nationally, means that the influence of that coverage would be present wherever the trial is held.” (internal quotation marks omitted)).

C. Passage of time before trial

In *Skilling*, the Court considered the fact that “over four years elapsed between Enron’s bankruptcy and Skilling’s trial.” *Skilling*, 561 U.S. at 383. In this case, 20 months have already elapsed since the events of January 6, and more time will elapse before trial. This is far more than in *Rideau*, where the defendant’s trial came two months after his televised confession. *Rideau*, 373 U.S. at 724. Although January 6 continues to be in the news, the “decibel level of media attention [has] diminished somewhat,” *Skilling*, 561 U.S. at 383.

D. The jury verdict

Because Gunby has not yet gone to trial, the final *Skilling* factor—whether the “jury’s verdict . . . undermine[s] in any way the supposition of juror bias,” *Skilling*, 561 U.S. at 383—does not directly apply. But the fact that *Skilling* considered this factor to be “of prime significance,”

id., underscores how unusual it is to presume prejudice before trial. Ordinarily, a case should proceed to trial in the district where the crime was committed, and courts can examine after trial whether the record supports a finding of actual or presumed prejudice. In short, none of the *Skilling* factors supports the defendant’s contention that the Court should presume prejudice and order a transfer of venue without even conducting voir dire.

III. Voir Dire Is the Appropriate Means of Selecting an Impartial Jury.

The defendant contends that voir dire is ineffective at addressing pretrial publicity. Mot. at 14. The defendant cites a 30-year-old study, conducted with mock juries, which concluded that “[t]he net effect of careful *voir dire* concerning pretrial publicity . . . was nil” and that “the bias created by the publicity survived *voir dire* unscathed.” Kerr, N L, et al., *On the Effectiveness of Voir dire in Criminal Cases With Prejudicial Pretrial Publicity: An Empirical Study*, 40 Am. Univ. L. Rev. 665, 697 (1991). The study also found that the prejudicial effect of “emotional publicity” (as opposed to factual publicity) “was not attenuated at all” where there was a short delay between the exposure to publicity and the trial. *Id.* at 675; *see id.* at 672.

This study does not support the defendant’s claim that a careful voir dire cannot ensure an impartial jury in this case. The Supreme Court and the D.C. Circuit have long made clear that a careful voir dire is the appropriate way to address prejudicial pretrial publicity, except in those extreme cases where prejudice is presumed. *See Skilling*, 561 U.S. at 381-82. The Supreme Court observed in *Skilling* that voir dire was “well suited to th[e] task” of probing the crime’s “widespread community impact.” *Id.* at 384. And the Court has said that “[i]t is fair to assume that the method we have relied on since the beginning”—*i.e.* voir dire—“usually identifies bias.” *Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (citing *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (Marshall, C.J.)). Similarly, the D.C. Circuit has said that “voir dire has long

been recognized as an effective method of routing out [publicity-based] bias, especially when conducted in a careful and thoroughgoing manner.” *In re Nat’l Broadcasting Co.*, 653 F.2d 609, 617 (D.C. Cir. 1981); *see Haldeman*, 559 F.2d at 63 (“[I]f an impartial jury actually cannot be selected, that fact should become evident at the voir dire.”).

The study that the defendant cites cannot overcome this clear precedent. Only one federal case has cited that study in its 30-year lifespan, and it did so when *denying* a motion for change of venue. *United States v. Houlihan*, 926 F. Supp. 14, 17, n.4 (D. Mass. 1996). And the study itself acknowledged that it was “certainly possible that, under other experimental or field conditions, voir dire would have been more effective in eliminating publicity-induced bias.” *Id.* at 699. The study does not support the defendant’s claim that voir dire is ineffective to protect the right to an impartial trial.

Nor does the study support the defendant’s claim that the effects of “emotional publicity” cannot be cured through the passage of time or continuances. Mot. at 16. If the defendant were correct, then a defendant could *never* be tried where, as here, exposure to “emotional publicity” is both pervasive and nationwide. But the study does not support this extreme view. The study purported to measure the effect of “a continuance” on prejudice arising from emotional publicity. Kerr, et al., 40 Am. Univ. L. Rev. at 672. But to do so, it exposed mock jurors to prejudicial publicity “several days (on average, 12 days) before the trial began.” *Id.* This 12-day period is far too short to conclude that continuances are not effective. And, in any event, the Supreme Court has clearly indicated that the passage of time can reduce the prejudicial effect of pretrial publicity. *See Skilling*, 561 U.S. at 383 (“[U]nlike cases in which trial swiftly followed a reported crime, over four years elapsed between Enron’s bankruptcy and Skilling’s trial.”); *Patton*, 467 U.S. at 1034 (“That time soothes and erases is a perfectly natural phenomenon, familiar to all.”). The

study does not support a conclusion that prejudice arising from exposure to “emotional publicity” cannot dissipate with time.

IV. The January 6-Related Jury Trials That Have Already Occurred Have Demonstrated the Availability of a Significant Number of Fair, Impartial Jurors in the D.C. Venire.

At this point, multiple January 6 cases have proceeded to jury trials, and the Court in each of those cases has been able to select a jury without undue expenditure of time or effort. *See Murphy*, 421 U.S. at 802-03 (“The length to which the trial court must go to select jurors who appear to be impartial is another factor relevant in evaluating those jurors’ assurances of impartiality.”); *Haldeman*, 559 F.2d at 63 (observing that “if an impartial jury actually cannot be selected, that fact should become evident at the voir dire”). Instead, the judges presiding over those trials were able to select a jury in one or two days. *See United States v. Reffitt*, 21-cr-32, Minute Entries (Feb. 28 and Mar. 1, 2022); *United States v. Robertson*, 21-cr-34, Minute Entry (Apr. 5, 2022); *United States v. Thompson*, 21-cr-161, Minute Entry (Apr. 11, 2022); *United States v. Webster*, No. 21-cr-208, Minute Entry (Apr. 25, 2022); *United States v. Hale-Cusanelli*, 21-cr-37, Minute Entry (May 23, 2022); *United States v. Williams*, 21-cr-377, Minute Entry (June 27, 2022); *United States v. Bledsoe*, No. 21-cr-204, Minute Entry (July 18, 2022). And, using the first five jury trials as exemplars, the voir dire that took place undermines the defendant’s claim that prejudice should be presumed.⁴

In *Reffitt*, the Court individually examined 56 prospective jurors and qualified 38 of them (about 68% of those examined). *See Reffitt* Trial Tr. 521. The Court asked all the prospective jurors whether they had “an opinion about Mr. Reffitt’s guilt or innocence in this case” and whether

⁴ Because they remain restricted on PACER, the transcripts from the voir dire proceedings in these cases are being submitted under separate cover to the Court and counsel.

they had any “strong feelings or opinions” about the events of January 6 or any political beliefs that it would make it difficult to be a “fair and impartial” juror. *Reffitt* Trial Tr. 23, 30. The Court then followed up during individual voir dire. Of the 18 jurors that were struck for cause, only nine (or 16% of the 56 people examined) indicated that they had such strong feelings about the events of January 6 that they could not serve as fair or impartial jurors.⁵

In *Thompson*, the Court individually examined 34 prospective jurors, and qualified 25 of them (or 73%). *See Thompson* 4-11-22 Tr. 169, 171, 180, 189, 192. The court asked the entire venire 47 standard questions, and then followed up on their affirmative answers during individual voir dire. *Id.* at 3-4, 34. Of the nine prospective jurors struck for cause, only three (or about 9% of those examined) were stricken based on an inability to be impartial, as opposed to some other cause.⁶

Similarly, in *Robertson*, the Court individually examined 49 prospective jurors and qualified 34 of them (or about 69% of those examined). *See Robertson* Trial Tr. 302. The Court asked all prospective jurors whether they had “such strong feelings” about the events of January 6 that it would be “difficult” to follow the court’s instructions “and render a fair and impartial verdict.” *Id.* at 14. It asked whether anything about the allegations in that case would prevent

⁵ For those struck based on a professed inability to be impartial, see *Reffitt* Trial Tr. 49-54 (Juror 328), 61-68 (Juror 1541), 112-29 (Juror 1046), 172-73 (Juror 443), 174-78 (Juror 45), 202-09 (Juror 1747), 223-35 (Juror 432), 263-74 (Juror 514), 358-69 (Juror 1484). For those struck for other reasons, see *Reffitt* Trial Tr. 168-172 (Juror 313, worked at Library of Congress), 209-24, 281 (Juror 728, moved out of D.C.), 284 (Juror 1650, over 70 and declined to serve), 340-51 (Juror 548, unavailability), 382 (Juror 715, anxiety and views on guns), 398 (Juror 548, medical appointments), 441-43 (Juror 1240, health hardship), 453-65 (Juror 464, worked at Library of Congress), 465-81 (Juror 1054, prior knowledge of facts).

⁶ For the three stricken for bias, see *Thompson* 4-11-22 Tr. 52 (Juror 1242), 85 (Juror 328), 158 (Juror 999). For the six stricken for hardship or inability to focus, see *id.* at 43 (Juror 1513), 44 (Juror 1267), 49 (Juror 503), 40 (Juror 1290), 92 (Juror 229), 109 (Juror 1266).

prospective jurors from “being neutral and fair” and whether their political views would affect their ability to be “fair and impartial.” *Id.* at 13, 15. The Court followed up on affirmative answers to those questions during individual voir dire. Of the 15 prospective jurors struck for cause, only nine (or 18% of the 49 people examined) indicated that they had such strong feelings about the January 6 events that they could not be fair or impartial.⁷

In *Webster*, the Court individually examined 53 jurors and qualified 35 of them (or 66%). *Webster* 4-26-22 AM Tr. 6, though it later excused one of those 35 based on hardship, *Webster* 4-25-22 PM Tr. 217-18. The Court asked all prospective jurors whether they had “strong feelings” about the events of January 6 or about the former President that would “make it difficult for [the prospective juror] to serve as a fair and impartial juror in this case.” *Webster* 4-25-22 AM Tr. 19. During individual voir dire, the Court followed up on affirmative answers to clarify whether prospective jurors could set aside their feelings and decide the case fairly. *See, e.g., id.* at 32-33, 41-42, 54-56, 63, 65-66. Only 10 out of 53 prospective jurors (or about 19%) were stricken based on a professed or imputed inability to be impartial, as opposed to some other reason.⁸ The *Webster*

⁷ For those struck based on a professed inability to be impartial, see *Robertson* Trial Tr. 26-34 (Juror 1431), 97-100 (Juror 1567), 121-30 (Juror 936), 136-42 (Juror 799), 160-71 (Juror 696), 189-93 (Juror 429), 256-65 (Juror 1010), 265-68 (Juror 585), 287-92 (Juror 1160). For those struck for other reasons, see *Robertson* Trial Tr. 23-26 (Juror 1566, hardship related to care for elderly sisters), 83-84 (Juror 1027, moved out of D.C.), 156-60 (Juror 1122, language concerns), 193-96 (Juror 505, work hardship), 245-50 (Juror 474, work trip); 279-82 (Juror 846, preplanned trip).

⁸ Nine of the 19 stricken jurors were excused based on hardship or a religious belief. *See Webster* 4-25-22 AM Tr. 46 (Juror 1464), 49-50 (Juror 1132), 61 (Juror 1153), 68 (Juror 951), 78 (Juror 419); *Webster* 4-25-22 PM Tr. 102-04, 207, 217 (Juror 571), 188 (Juror 1114), 191 (Juror 176), 203-04 (Juror 1262). Of the ten other stricken jurors, three professed an ability to be impartial but were nevertheless stricken based on a connection to the events or to the U.S. Attorney’s Office. *See Webster* 4-25-22 AM Tr. at 58-60 (Juror 689 was a deputy chief of staff for a member of congress); *Webster* 4-25-22 PM Tr. at 139-41 (Juror 625’s former mother-in-law was a member of congress); 196-98 (Juror 780 was a former Assistant U.S. Attorney in D.C.).

Court observed that this number “was actually relatively low” and therefore “doesn’t bear out the concerns that were at root in the venue transfer motion” in that case. *Webster*, 4-26-22 AM Tr. 7.

In *Hale-Cusanelli*, the Court individually examined 47 prospective jurors and qualified 32 of them (or 68%). *Hale-Cusanelli* Trial Tr. 226, 231. The Court asked prospective jurors questions similar to those asked in the other trials. *See id.* at 72-74 (Questions 16, 20). Of the 15 prospective jurors struck for cause, 11 (or 23% of those examined) were stricken based on a connection to the events of January 6 or a professed inability to be impartial.⁹

In these first five jury trials, the percentage of prospective jurors stricken for cause based on partiality is far lower than in *Irvin*, where the Supreme Court said that “statement[s] of impartiality” by some prospective jurors could be given “little weight” based on the number of other prospective jurors who “admitted prejudice.” *Irvin*, 366 U.S. at 728. In *Irvin*, 268 of 430 prospective jurors (or 62%) were stricken for cause based on “fixed opinions as to the guilt of petitioner.” *Id.* at 727. The percentage of partiality-based strikes in these first five January 6-related jury trials—between 9% and 23% of those examined—is far lower than the 62% in *Irvin*. The percentage in these cases is lower even than in *Murphy*, where 20 of 78 prospective jurors (25%) were “excused because they indicated an opinion as to petitioner’s guilt.” *Murphy*, 421 U.S. at 803. *Murphy* said that this percentage “by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.” *Id.* As in *Murphy*, the number of prospective jurors indicating bias does not call into question the qualifications of others whose statements of impartiality the Court has credited.

⁹ *See Hale-Cusanelli* Trial Tr. 62 (Juror 499), 67-68 (Juror 872), 84-85 (Juror 206), 92-93 (Juror 653), 124-25 (Juror 1129), 152 (Juror 182), 156 (Juror 176), 182 (Juror 890), 197-98 (Juror 870), 217 (Juror 1111), 224 (Juror 1412). For the four jurors excused for hardship, *see id.* at 77-79 (Juror 1524), 99 (Juror 1094), 132 (Juror 1014), 151 (Juror 899).

Far from showing that “an impartial jury actually cannot be selected,” *Haldeman*, 559 F.2d at 63, the first five January 6-related jury trials have confirmed that voir dire can adequately screen out prospective jurors who cannot be fair and impartial, while leaving more than sufficient qualified jurors to hear the case. The Court should deny the defendant’s request for a venue transfer and should instead rely on a thorough voir dire to protect the defendant’s right to an impartial jury.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that Gunby’s Motion to Transfer Venue be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 28th day of October 2022, a copy of the foregoing was served upon all parties listed on the Electronic Case Filing (ECF) System.

/s/ Kyle M. McWaters

Kyle M. McWaters
Assistant United States Attorney