

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL NO. 22-cr-15 (APM)</b>
	:	
<b>v.</b>	:	
	:	
<b>ELMER STEWART RHODES III,</b>	:	
<b>KELLY MEGGS,</b>	:	
<b>KENNETH HARRELSON,</b>	:	
<b>JESSICA WATKINS, and</b>	:	
<b>THOMAS CALDWELL,</b>	:	
	:	
<b>Defendants.</b>	:	

**GOVERNMENT’S OPPOSITION TO DEFENDANTS’ JOINT MOTION IN LIMINE  
REGARDING ANTICIPATED TRIAL EVIDENCE RE: ZELLO COMMUNICATIONS**

Defendant Jessica Watkins’ audio communications as she approached and entered the Capitol on January 6, 2021, are properly admitted. The defendants’ motion to exclude, ECF No. 280, should be denied.

**FACTUAL BACKGROUND**

On January 6, 2021, around the time of the breach of the U.S. Capitol, a journalist accessed the publicly available audio feed on the “Stop the Steal J6” channel on the walkie-talkie application Zello. He audio-recorded about two hours of the feed and then published that recording. Defendant Watkins’ voice is audible on the recording of the Zello channel, discussing her group’s approach to the Capitol, her group’s “plan,” and her observations once inside the Capitol. Also audible on the recording are voices directing Defendant Watkins to enter the Capitol and arrest Members of Congress for treason, as well as providing her with helpful reconnaissance about the locations and movements of congresspeople, Vice President Pence, and responding law enforcement officers.

**A. Zello**

Zello is a push-to-talk application that operates like a walkie-talkie on a cellphone or computer. There are two primary methods of communication on Zello: a direct chat<sup>1</sup> or a channel. The communication at issue here was on a channel. When a user creates a channel, that user is the administrator of the channel; to talk or listen to that channel, other users must “subscribe” it. Zello offers administrators multiple types of channels, ranging from open (meaning anyone can talk or listen) to “Zelect” (meaning certain trusted users can talk, but anyone can listen) to password-protected (meaning a user needs an administrator-provided password to initially subscribe), and within each type an administrator has the option for various channel profile settings. An administrator can also change a channel’s type midstream. When online and subscribed to a channel, a user can talk or post in the channel; posts can contain text, photos, videos, and/or links.

According to the records produced by Zello in response to a subpoena, the “Stop the Steal J6” channel was likely originally a “Zelect.” This means that any user could subscribe to the channel and the administrator had the ability to manage the users by, for instance, blocking users and adding moderators and “trusted users” with special permissions. However, on January 6, 2021, at 1:48 p.m., the administrator of the channel appears to have changed the channel type to “open,” which would allow any subscribed user to talk or listen.

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<sup>1</sup> Zello’s website touts the benefit of using direct chats: “Real walkie talkies aren’t secure, Zello is. One-to-one and group conversations are fully encrypted end-to-end. Unlike real 2-way radios, Zello messaging is safe from anyone prying into your private discussions by intercepting a radio frequency. Messages are stored only on your own device, not on our servers.” *See* <https://blog.zello.com/ten-reasons-zello-is-best-walkie-talkie-app>.

According to the Zello records, the channel was created on January 1, 2021, by the user with the name “1%Watchdog.”<sup>2</sup> The user named “OhioRegularsActual – Oathkeeper” subscribed to the channel on the night of January 5, 2021, at approximately 9:30 p.m.<sup>3</sup>; as explained below, the government intends to prove at trial that this user is Defendant Watkins. As of January 6, 2021, at 12:30 p.m., the channel had a total of about 170 subscribers.

According to Zello, it does not retain any audio recordings on its servers. Depending on a user’s settings, however, the user may retain an audio recording on her phone for a period of time. Pursuant to a search warrant, the FBI seized and searched Defendant Watkins’ phone when she was arrested. The FBI did not locate any relevant Zello audio files on Defendant Watkins’ phone.

#### **B. Relevant Published Materials**

On January 13, 2021, *The Guardian* published an article titled “Revealed: walkie-talkie app Zello hosted far-right groups who stormed Capitol.”<sup>4</sup> The article stated that the authors (Micah Loewinger and Hampton Stall) had reviewed audio and chat logs from a “public” Zello channel called “Stop the Steal J6.”

On January 15, 2021, New York Public Radio’s On the Media published a podcast and accompanying article about the recording, titled “The Zello Tapes: The Walkie-Talkie App Used During The Insurrection.”<sup>5</sup> The article linked to a “high-fidelity” recording posted on SoundCloud

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<sup>2</sup> The government does not intend to argue that user 1%Watchdog is a named defendant.

<sup>3</sup> The records from Zello show that at the same time—January 5, 2021, at 9:30 p.m.—Watkins also subscribed to a channel titled “J6 BOTG Team.” *J6* likely stands for *January 6* and *BOTG* likely stands for *boots on the ground*.

<sup>4</sup> <https://www.theguardian.com/us-news/2021/jan/13/zello-app-us-capitol-attack-far-right>.

<sup>5</sup> <https://www.wnycstudios.org/podcasts/otm/segments/zello-tapes-walkie-talkie-app-used-during-insurrection-on-the-media>.

containing the 2-hour-and-22-minute long audio recording.<sup>6</sup> According to the SoundCloud description accompanying the audio file, “[t]his audio was first discovered by Micah Loewinger and Hampton Stall, who detailed their findings in the Guardian and on On the Media.” On SoundCloud, the authors further described it as “[a] recording of a far-right Zello chatroom on January 6th, 2021, featuring Jessica Watkins as ‘Ohio Regulars Actual – Oathkeeper’ narrating her march to and eventually inside the Capitol during the insurrection.”

On SoundCloud, the authors provided a link to YouTube<sup>7</sup> and wrote that the video in the link contained “[a] partial screen capture video of this tape.” While Google has since removed the video for violating YouTube’s community guidelines, and thus it is no longer publicly accessible, the government preserved a copy (Government Exhibit 1073).

The video, which is 1-hour-and-46-minutes long, contains most of the audio recording published to SoundCloud along with a synchronized view of the visual depiction of the channel’s chat log, on January 6, 2021, between 1:48 p.m. and 5:07 p.m.<sup>8</sup> As of 1:48 p.m., according to the video, there were 65 users online in the “Stop the Steal J6” channel. User “OhioRegularsActual – Oathkeeper,” who is Defendant Watkins (as explained below), spoke at the following relevant times, according to the video display of the chat log:

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<sup>6</sup> <https://soundcloud.com/user-403747081/jessica-watkins-on-stop-the-steal-j6-zello-channel-unedited>.

<sup>7</sup> <https://www.youtube.com/watch?v=nF1bud0rQYM>.

<sup>8</sup> The YouTube video file and the SoundCloud audio file start at the same time and are duplicates of one another for the first 1 hour and 46 minutes. After that, the YouTube video file ends and the SoundCloud audio file continues for another 36 minutes.



- At 1:49 p.m. (1:30 on the counter): “We’re boots on the ground here. We’re moving on the Capitol now. I’ll give you a boots-on-the-ground update here in a few. We have a good group. We have about 30, 40 of us. We’re sticking together and sticking to the plan.”
  - After user “Airborne America” said, “We’ll see you soon, Jess,” she responded, “Roger that, brother. Godspeed and fair winds to us.”
- At 1:58 p.m. (4:01 on the counter): “It has spread like wildfire that Pence has betrayed us and everybody’s marching on the Capitol. All million of us. It’s insane. We are about two blocks away from it now, and police are doing nothing. They’re not even trying to stop us at this point.”
- At 1:59 p.m. (5:09 on the counter): “Trump’s been trying to drain the swamp with a straw. We just brought a Shop-Vac.”
- At 2:00 p.m. (5:25 on the counter): “Y’all, we’re one block away from the Capitol now. I am probably going to go silent once I get there because I am going to be a little busy.”
- At 2:31 p.m. (18:30 on counter): “We are on the rear mezzanine, behind the dome. I’ll send a picture here in a bit. There is reports that Antifa was the ones who busted out the windows. It was not actual patriots. The police confronted them when they were smashing out the windows. They said, Fuck Trump; we don’t care about this. And they’re just out there smashing windows. So, I feel like it’s kind of a setup, really. They have the riot cops out now.”
- At 2:44 p.m. (27:19 on the counter): “We are in the mezzanine. We are in the main dome right now. We are rocking it. They are throwing grenades, they are fricking shooting people with paint balls. But we are in here.”
  - User “FreedomD0z3r91” responded, “Get it, Jess. Do your shit. This is what we fucking lived up for. Everything we fucking trained for.”

In addition to Defendant Watkins’ own statements, several statements from users 1%Watchdog (the creator of the channel), FreedomD0z3r91 (Person 32, Watkins’ known associate), and others are relevant evidence of defendant Watkins’ intent, because the statements provide context to Defendant Watkins’ own communications and/or the statements are directives to Defendant Watkins.

### **C. Authenticity**

The records from Zello corroborate that one of the journalists was a subscriber to the “Stop the Steal J6” Zello channel and was logged into the app during the relevant time period. The records also corroborate that Watkins was logged into the app during the relevant time period. The government will authenticate the recording through a New York Public Radio representative.

### **D. Defendant Jessica Watkins’ Use of Zello**

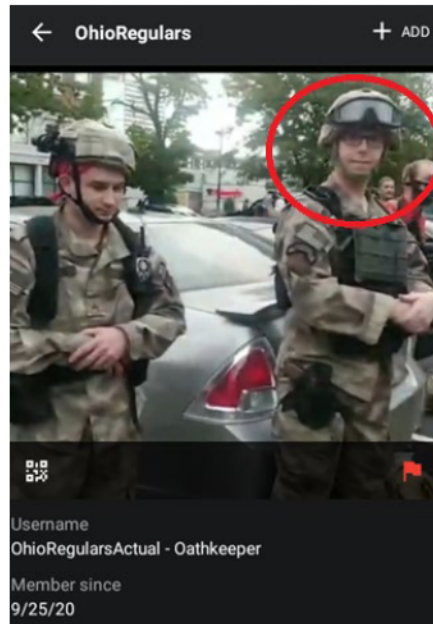
While Defendant Watkins’ phone did not contain the downloaded Zello app when it was searched by the FBI, the government located evidence on her phone strongly suggesting her usage of Zello. Specifically, she wrote in text messages to associates in November 2020 that she regularly used Zello.<sup>9</sup> Also, Watkins’ known monikers and affiliations link her to the “OhioRegularsActual – Oathkeeper” moniker on Zello: her username on Parler was “OhioStateRegulars,” and in 2020 she led an Ohio-based militia known as the “Ohio State Regulars Militia.”

In addition, records produced by Zello in response to subpoena not only tie Watkins to the “OhioRegulars” account<sup>10</sup> but also demonstrate her proficiency with Zello. User “OhioRegulars” registered with Zello using one of Defendant Watkins’ known email addresses. The profile picture for user “OhioRegulars” shows a person consistent with Defendant Watkins (circled in red):

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<sup>9</sup> Specifically, she wrote to others, “We all use Zello though for operations,” and “I will be on Zello PTT only. I won’t be able to text.” (PTT likely stands for “push to talk,” i.e., a walkie-talkie.)

<sup>10</sup> Watkins’ immutable Zello *username* was “OhioRegulars,” but her *display name* (which can be changed at whim) on January 6 was “OhioRegularsActual – Oathkeeper.”



According to the records from Zello, Watkins created the channel “OK DC Op” on November 13, 2020. Other evidence shows that Watkins was in D.C. with other Oath Keeper members on November 14, 2020, related to the Million MAGA March. And the Zello records show that other known Oath Keeper affiliates, some of whom are coconspirators here, subscribed to Watkins’ “OK DC Op” channel shortly after she created it: CAG SPY (Defendant Caldwell); kamden11414 (Person 32), the leader of the Illinois Oath Keepers; and J Paul 9 (Person 3) and rangersmith11 (Person 5), both leaders of the North Carolina Oath Keepers.

The Zello records further show that on the evening of January 5, 2021, Defendant Watkins subscribed to both the “Stop the Steal J6” and “J6 BOTG” channels. And she was logged into the Zello app as of around 1:00 p.m. on January 6, 2021, meaning that Watkins was likely listening to

the “Stop the Steal J6” channel even before the moderator “opened” the channel at 1:48 p.m., as Watkins was on her way—with several of her coconspirators—from the Ellipse to the Capitol.<sup>11</sup>

Finally, there is additional evidence from the Zello recording itself demonstrating that Defendant Watkins was the person speaking on the recording as “OhioRegularsActual – Oathkeeper.” Two other subscribers to the channel—“FreedomD0z3r91” and “Airborne America”—referred to her as “Jess” on the recording; both men are Oath Keepers members who are known associates of Defendant Watkins. There is a video on Defendant Watkins’ phone, taken at 2:36 p.m. (Government Exhibit 192.V.3), on which she can be seen taking a video panning the crowd on the top of the east side steps of the Capitol and then turning the camera on herself for a selfie. On this video, a male’s voice can be heard saying, “Who’s putting that out? Incoming missile? Fuck,” and on the Zello audio recording, at the same time (2:36 p.m.) that same voice (listed as user 1%Watchdog) and phrase can be heard. Similarly, there is a video on Watkins’ phone, taken at 2:44 p.m. (Government Exhibit 192.V.4), while Watkins was inside the Rotunda, on which a male’s voice can be heard saying, “pretty freakin radical to me.” On the Zello audio recording, at the same time (2:44 p.m.), the same voice (listed as user Jim Fitzgerald) and phrase can be heard. In other words, these two videos from Defendant Watkins’ own phone corroborate that she was a participant in the “Stop the Steal J6” Zello channel and was listening to the channel on her phone while she was on the Capitol steps and inside the Rotunda.

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<sup>11</sup> According to a representative, Zello tracks a user’s logging into (but not out of) the app. The Zello records show that on January 6, 2021, Watkins logged into the app at 5:33 a.m., 12:58 p.m., 12:59 p.m., 1:01 p.m., and 5:43 p.m. The three successive midday logins suggest network congestion, as Watkins was at the Ellipse. But the lack of a login between 1:01 p.m. and 2:44 p.m. (when she was in the Rotunda speaking to the “Stop the Steal J6” channel) means that Watkins had not logged out of the app during this critical time period.

**E. Defendant Jessica Watkins' Connection to Person 32**

Watkins' communications with user "FreedomD0z3r91" are particularly relevant, due to their connection to each other. The true identity of FreedomD0z3r91 is Person 32, an unindicted coconspirator. While Person 32's changeable *display name* on January 6, 2021, was FreedomD0z3r91, his immutable *username* was kamden11414. At the time, Person 32 was the leader of the Illinois chapter of the Oath Keepers. Like Watkins, Person 32 subscribed to both the "Stop the Steal J6" channel and the "J6 BOTG Team" on the evening of January 5 and was logged into the Zello app on January 6.

Person 32 had numerous communications with Watkins before, during, and after January 6, 2021. For instance, in November 2020, in a text message, Watkins invited Person 32 to attend "basic training." (Person 32 later told Watkins, on the Zello recording at 2:46 p.m., that what she was doing inside the Capitol was "everything we trained for.") On January 7, 2021, Person 32 and Watkins exchanged text messages about both of them unsuccessfully trying to contact Defendant Rhodes. And the following day, Person 32 sent a text message Watkins: "I fucking hope you guys had your face covered when going into the capital."

**F. Relevant Government Exhibits**

Government Exhibit 1073 is the complete hour-and-forty-six-minute-long recording of the "Stop the Steal J6" channel that was posted to YouTube. Government Exhibit 1073.1 is a clip of this recording that contains approximately 12 minutes of relevant audio, for the period between 1:48 p.m. and 2:46 p.m. Government Exhibit 1073.1.Tr is a transcript of this clip. For the Court's convivence and review, the government has enclosed Government Exhibits 1073.1 and 1073.1.Tr in a single media file that displays the transcript synched with the audio.



At trial, the government also intends to introduce Government Exhibit 1502, which is a compilation that contains Government Exhibits 1073.1 (clip of Zello audio), 1073.1.Tr (transcript of same), 192.V.2 (video from Watkins' phone at 2:04 p.m., as she walked to the Capitol), 192.V.3 (video from Watkins' phone at 2:36 p.m. as she was on the Capitol steps), 192.V.4 (video from Watkins' phone at 2:44 p.m. as she was in the Rotunda), 135.V.2 (video from coconspirator Sandra Parker's phone at 2:44 p.m., showing Watkins using her phone in the Rotunda), 200.V.2 (video from coconspirator Crawl's phone at 2:45 p.m., showing Watkins with Crawl in the Rotunda), and an annotated map showing Watkins' approximate location as she approached and then entered the Capitol. Government Exhibit 1502 is also being provided for the Court's convenience and review, as it demonstrates the probative value of the pertinent statements on the Zello recording.<sup>12</sup>

### **ARGUMENT**

Defendant Watkins is the person speaking as "OhioRegularsActual – Oathkeeper" on the Zello recording. Government Exhibit 1073.1 is a 12-minute clip of the recording.<sup>13</sup> Each statement on the recording is admissible, pursuant to Federal Rule of Evidence 801(d)(2)(A) (opposing party statement), 803(1) (present sense impression), 803(3) (statement of future intent), 804(b)(3) (statement against interest), 801(d)(2)(E) (coconspirator during and in furtherance of

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<sup>12</sup> The defendants' motion states that the government notified the defense of its intent to introduce this evidence on August 25, 2022. While, during the parties' recent pretrial discussion about exhibits, the government informed the defense about these specific exhibits, the government provided the Zello recording and underlying records in discovery over a year ago, March 10, April 9, and April 26, 2021. And Watkins' statements on the Zello recording are some of the "acts in furtherance of the conspiracy" contained in the indictment. *See* First Superseding Indictment, ECF No. 167, at ¶¶ 80, 81, 102.

<sup>13</sup> The portion of the recording that the government seeks to admit, as reflected in Government Exhibit 1703.1 and described more fully below, is slightly different from the version attached to the defense's motion.

conspiracy), or 801(d)(2)(B) (adoptive admission), and/or for a non-hearsay purpose of providing context for Watkins' statements or elucidating Watkins' state of mind.

## **I. LEGAL STANDARD**

Pursuant to Rule 901(a), the government will produce evidence “sufficient to support a finding that the item is what the proponent claims it is”—i.e., that the Zello recording that is Government Exhibit 1703.1 is a recording of Defendant Watkins' voice, and people providing directions and information to her, on January 6, 2021.

### **A. Watkins' own statements**

Watkins' own statements are all admissible against her under Rule 801(d)(2)(A), as she is an opposing party. Watkins' statements are also admissible against all defendants under four non-mutually exclusive theories:

#### *1. Present-sense impression*

Some of Watkins's statements are present-sense impressions under Rule 803(1) because they describe or explain an event or condition made while or immediately after Watkins perceived it, such as the location of her and her coconspirators. For instance, she said, “We’re moving on the Capitol now” (1:49 p.m.); “We are one block away from the Capitol now” (2:00 p.m.); “We are on the rear mezzanine, behind the dome” (2:31 p.m.); and “We are in the mezzanine. We are in the main dome right now” (2:44 p.m.). At 2:44 p.m., Watkins also described the police's actions while or immediately after she perceived it: “They are throwing grenades, they are fricking shooting people with paint balls.”

These statements are “not excluded by the rule against hearsay,” Fed. R. Evid. 801, and, assuming they are relevant pursuant to Rule 401, are thus admissible against all defendants.

2. *Statement of future intent*

Some of Watkins's statements are statements of future intent under Rule 803(3) because they are statement of Watkins' then-existing state of mind, such as her intent or plan. These statements about what Watkins planned to do once she got to the Capitol are "not excluded by the rule against hearsay," Fed. R. Evid. 801. For instance, at 1:59 p.m., she declared, "Trump's been trying to drain the swamp with a straw. We just brought a shop vac." And at 2:00 p.m., she stated, "We are one block away from the Capitol now. I am probably going to go silent once we get there because I am going to be a little busy." These statements are admissible against all defendants.

3. *Statement against interest*

Some of Watkins's statements are statements against her own interest under Rule 804(b)(3) because "a reasonable person in [Watkins'] position would have made [the statement] only if [Watkins] believed it to be true because, when made, it . . . had so great a tendency . . . to expose the declarant to civil or criminal liability." The trustworthiness requirement in Rule 804(b)(3)(B) is also satisfied, because Watkins' statements are "supported by corroborating circumstances that clearly indicate [their] trustworthiness." A statement may be admitted under Rule 804(b)(3)'s hearsay exception for statements against interest if a reasonable person in the declarant's shoes would perceive the statement as detrimental to her own penal interest. *See Williamson v. United States*, 512 U.S. 594, 599-603 (1994) (holding that a court may admit those portions of a declarant's statement under this rule if those statements are truly self-inculpatory).

Watkins made statements on the Zello recording that "30, 40 of us" are "moving on the Capitol now," and are "sticking together and sticking to the plan." These statements expose her to criminal liability and a reasonable person in her position would have made them only if she

believed them to be true. Her statement that the police are “not even trying to stop us at this point” is similarly against her own interest. Importantly, her statements implicate others—her codefendants—as well as herself.

A statement against interest is not excluded by the rule against hearsay, so long as the declarant is unavailable as a witness. Fed. R. Evid. 804(b). A criminal defendant such as Watkins is “unavailable” as a witness within the meaning of Rule 804. *United States v. Slatten*, 865 F.3d 767, 805 (D.C. Cir. 2017).

A declarant’s statement against interest made in a testimonial setting is often inadmissible against other defendants, both because of those defendants’ Confrontation Clause rights, *Crawford v. Washington*, 541 U.S. 36, 68 (2004), and because the statement is likely to be unreliable based on the declarant’s inherent motive to shift blame, *Lilly v. Virginia*, 527 U.S. 116, 137 (1999). However, hearsay statements such as Watkins’ that inculcate both herself and others, and not made in a testimonial setting, often carry sufficient indicia of reliability to make them trustworthy (and thus admissible pursuant to Rule 804(b)(3)). *See, e.g., United States v. Robbins*, 197 F.3d 829, 840 (7th Cir. 1999) (finding that the circumstances in which statement was made—voluntarily in a private conversation—provided no reason to suspect any coercion, ulterior motive, any motive to curry favor with authorities, and thus statement possessed sufficient indicia of reliability); *Padilla v. Terhune*, 309 F.3d 614, 618 (9th Cir. 2002) (“[W]hen an accomplice makes a statement in private, to a friend, without mitigating his own role in the crime, the circumstances surrounding the statement provide a particularized guarantee of trustworthiness which satisfies the Confrontation Clause.”) (internal quotation marks and citation omitted).

Watkins’ statements are thus admissible against her codefendants under Rule 804(b)(3).

4. *Coconspirator statement during and in furtherance of conspiracy*

Many of Watkins' statements are admissible against all defendants because they are statements of a coconspirator made in furtherance of a conspiracy pursuant to Rule 801(d)(2)(E). *See Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (“[C]o-conspirators’ statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion.”). The D.C. Circuit has made clear that statements are admissible under Rule 801(d)(2)(E) even if the declarants were acting in furtherance of a lawful joint enterprise rather than an unlawful conspiracy. *United States v. Brockenborough*, 575 F.3d 726, 725 (D.C. Cir. 2009). The government submits that Watkins’ statements were in furtherance of an unlawful seditious conspiracy to oppose by force the authority of the United States and unlawful conspiracies to obstruct Congress and prevent Members of Congress from discharging their duties. However, even were to the Court to find otherwise, her statements to others on the Zello recordings were, at minimum, in furtherance of a joint enterprise, and are therefore admissible under Rule 801(d)(2)(E).

Under Rule 801(d)(2)(E), admissible statements include “those that keep a coconspirator updated on the status of the business, motivate a coconspirator’s continued participation, or provide background information on key conspiracy members.” *United States v. Miller*, 738 F.3d 361, 374 (D.C. Cir. 2013). Statements are made in furtherance of a conspiracy if they “can reasonably be interpreted as encouraging a co-conspirator or other person to advance the conspiracy, or as enhancing a co-conspirator or other person’s usefulness to the conspiracy.” *Id.*

Rather than “casual comments” or a recounting of “past victories and losses,” *id.* (citations omitted), the statements here were made during the conspiracy and in furtherance of it. Here, the



“temporal element,” *id.*, is easily satisfied, because Watkins made the statements as she was approaching and then actually inside of the Capitol building, during the heart of the conspiracy. And Watkins was receiving information from other individuals as she was leading a group of her coconspirators towards and into the Capitol. Indeed, Watkins performed both a leadership and coordination role within the conspiracy, recruiting Sandra and Bennie Parker from Ohio and then coordinating on behalf of the Ohio contingent with Kelly Meggs from Florida, Thomas Caldwell from Virginia, and Stewart Rhodes from Texas. Her communications with other participants on the Zello channel for the critical hour between 1:48 p.m. and 2:46 p.m. enabled her to receive and provide real-time information about the attack on the Capitol, Vice President Pence’s movements and location, Congress’s actions, and law enforcement’s response.

Watkins’ statements do not need to have been made directly to coconspirators to have been made “in furtherance” of the conspiracy. As the D.C. Circuit has held, a statement is made in furtherance of a conspiracy if it “can reasonably be interpreted as encouraging a co-conspirator *or other person* to advance the conspiracy, or as enhancing a co-conspirator or *other person’s* usefulness to the conspiracy.” *United States v. Tarantino*, 846 F.2d 1384, 1412 (D.C. Cir. 1988) (emphasis added). There is simply no requirement that the person to whom the statement is made also be a member of the conspiracy. *United States v. Edmond*, 52 F.3d 1080, 1111 (D.C. Cir. 1995). “Statements designed to induce the listener’s assistance with respect to the conspiracy’s goals satisfy the Rule’s in-furtherance requirement”—even if the listener is not a member of the conspiracy. *United States v. Gupta*, 747 F.3d 111, 125 (2d Cir. 2014).

Indeed, in *Tarantino*, one of the bases for the court’s holding was that the statements “helped keep [the listener] current on the status of the business.” *Id.*; *see also Edmond*, 52 F.3d at

1111 (updates to others, including descriptions of efforts to avoid detection, were in furtherance of conspiracy); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir. 1989) (finding that trial court properly admitted under Rule 801(d)(2)(E) a statement that coconspirator *A* made to a non-conspirator about what coconspirator *B* had told *A*, because statement was made to “reassure” and “encourage” the non-conspirator to not “reveal incriminating information”).

Here, Watkins’ statements show on their face that they were explicitly made to keep others on the recording apprised of her actions—and the actions of her coconspirators who were with her on her endeavor. Because these statements were made on a radio channel on which others were passing along real-time information about the reactions of congresspeople and law enforcement to the actions of Watkins and her coconspirators the statements can “reasonably be interpreted as . . . enhancing another person’s usefulness to the conspiracy.” *Tarantino*, 846 F.2d at 1412.

#### **B. Other Declarants’ Statements**

Some of the statements of the other individuals on Government Exhibit 1073.1 are admissible against all five defendants because Watkins manifested an intent to adopt them. *See* Fed. R. Evid. 801(d)(2)(B).

The remainder of the other declarants’ statements are admissible against Watkins (but not the other defendants) because the statements are non-hearsay being admitted for their effect on the listener (Watkins), rather than for the truth of the matter asserted. *See* Fed. R. Evid. 801(c)(2) (defining hearsay as a statement “a party offers in evidence to prove the truth of the matter asserted in the statement”).

For those statements admitted only for their effect on Watkins and/or only against Watkins, the government is amenable to a limiting instruction pursuant to Federal Rule of Evidence 105.

1. *Adoptive admissions*

For a defendant to adopt the statement of another, such that the statement is admissible against the defendant, the defendant “must have understood and unambiguously assented to [the statement], but his understanding and assent may be established through conduct as well as through words.” *United States v. Beckham*, 968 F.2d 47, 52 (D.C. Cir. 1992) (alterations, quotation marks, and citations omitted). The defendant must have “manifested an adoption or belief in its truth.” *Id.* (quoting Fed. R. Evid. 801(d)(2)(B)).

Watkins adopted many of the declarants’ statements by her own words (e.g., “right,” “roger that,” “yeah,” informing the channel of her movements, etc.), and actions (e.g., storming the Capitol with a metaphorical “shop vac” to “drain the swamp” after 1%Watchdog said that Congress had committed “treason” and that those individuals performing the role of “boots on the ground” should conduct a “citizen’s arrest” of the “treasonous bastards” inside the Capitol building).

For hearsay purposes, an adopted statement pursuant to Rule 801(d)(2)(B) functions as if the declarant uttered the statement herself. *See Poole v. Perini*, 659 F.2d 730, 733 (6th Cir. 1981) (“[T]he words of the hearsay become the words of the defendant. If the defendant accepts the out-of-court statement as his own, cross-examination of the declarant of the hearsay becomes unnecessary and irrelevant. The out-of-court statement is no more damaging than the defendant’s own.”). Therefore, the other declarants’ statements that Watkins adopted on the Zello recording are admissible against the other defendants so long as they fall within at least one of the other hearsay exceptions described above (e.g., preset-sense impression, statement of future intent, statement against interest, and/or statement in furtherance of the conspiracy).

Indeed, because Watkins often adopted the others' statements in furtherance of the conspiracy, the others' statements are admissible against both Watkins *and the other coconspirators*. For instance, in *United States v. Wolf*, 839 F.2d 1387, 1395 (10th Cir. 1988), a non-conspirator declarant made a statement to coconspirator *A*, which *A* adopted by *A*'s actions. The Tenth Circuit held that the non-conspirator declarant's statement was properly introduced at trial against coconspirator *B*, because *A*'s adoptive statement was made in furtherance of the conspiracy. *Id.* So, too, here: Others made statements to Watkins on the Zello recording, Watkins then adopted those statements by her own actions and words, those adopted statements were in furtherance of the conspiracy, and therefore those adopted statements are properly admitted against all coconspirators.

## 2. *Statements admitted for non-hearsay purposes*

Some of the other declarants' statements are admissible only against Watkins (rather than all defendants), as they provide context for Watkins' own statements and/or elucidate her state of mind. *See United States v. Williams*, 358 F.3d 956, 963 (D.C. Cir. 2004) (statement is admissible to "elucidat[e] . . . a listener's state of mind"); *United States v. Stover*, 329 F.3d 859, 870 (D.C. Cir. 2003) (statement may be admissible to provide "context" to another statement); *United States v. Lemonakis*, 485 F.2d 941, 948 (D.C. Cir. 1973) (others' statements in a conversation may be admissible because, as a "a reciprocal and integrated utterance" among multiple speakers, others' statements are necessary "to make [the defendant's] responses intelligible to the jury").

On the recording, others made statements that provide directions, encouragement, or information and are thus admissible for their effect on Watkins (the listener). *See United States v. Thompson*, 279 F.3d 1043, 1047 (D.C. Cir. 2002) ("An out-of-court statement that is offered to

show its effect on the hearer's state of mind is not hearsay under Rule 801(c).") These statements, for instance, informed Watkins about the movements and actions of Vice President Pence, congresspeople, and responding police officers.

## **II. ADMISSIBILITY OF SPECIFIC STATEMENTS**

### **A. 1:48 p.m. to 1:52 p.m.**

Around this time, Watkins was at approximately 14th Street and Pennsylvania Avenue NW, en route on foot from the Ellipse towards the Capitol. Notably, about a half hour earlier, at 1:25 p.m., Defendant Rhodes sent the following message to the "DC OP: Jan 6 21" Signal chat, of which Watkins was a member: "Pence is doing nothing. As I predicted." Two minutes later, according to a video recovered from Watkins' phone (Government Exhibit 192.V.1), Watkins and other coconspirators started walking from the Ellipse to the Capitol. On that video, in fact, after someone said, "We're moving, let's go," Watkins echoed: "Move!"

At 1:38 p.m., Rhodes sent another message to the same Signal thread: "All I see Trump doing is complaining. I see no intent by him to do anything. So the patriots are taking it into their own hands. They've had enough."

Then, just ten minutes later, from 1:48 p.m. to 1:52 p.m., Watkins was an active participant in a conversation on the Zello channel. In fact, she was the first person to speak immediately after the channel moderator, 1%Watchdog, opened the channel and made his own statement. And her first words were "Right, brother," indicating concurrence with what 1%Watchdog had just said. She promised others on the channel a "boots-on-the-ground"<sup>14</sup> update in a few" minutes, indicating

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<sup>14</sup> Watkins' phrasing is important, as she was also a member of the Zello channel J6 BOTG, indicating that part of her role in the conspiracy was to be the person doing the grunt work and  
(continued . . . )



her active participation and that she was keeping others updated on her own team's progress—i.e., enhancing her own usefulness to her coconspirators, like in *Tarantino*, 846 F.2d at 1412.

The comments on the Zello channel from 1:48 p.m. to 1:52 p.m. are below:

EXHIBITATION

2  
3 (1:48 p.m.) 1%Watchdog: Okay, guys. We're on open  
4 channel here now. Everybody can hear and talk, so their  
5 barricades in the National Capitol are being challenged,  
6 and -- yeah. It looks like Pence is doing his traitorous  
7 bullshit, and the election stealing progress -- it looks to  
8 me, at this point, that that's a felony high-crime and  
9 treason in process inside the National Capitol building,  
10 headed by the president of the Senate, Vice President Pence,  
11 at this point. Apparently, they're debating the issues, the  
12 objections over the electoral ballots, and there's patriots  
13 who want to get inside and give their First Amendment speech  
14 to these traitorous bastards -- treasonous bastards.

15 (1:49 p.m.) 1%Watchdog: Bitch McConnell has rebuked  
16 those who are challenging the Electoral College votes that  
17 constitute the fucking communist revolution election steal  
18 of 2020 by these treasonous fucking bastards. So, yeah,  
19 Bitch McConnell, the head of the Senate, the fucking RINO  
20 bastard, treasonous bastard is objecting and saying it  
21 should go to Biden basically.

22 (1:49 p.m.) OhioRegularsActual-Oathkeeper: Right,  
23 brother. We're boots on the ground here. We're moving on  
24 the Capitol now. I'll give you a boots-on-the-ground update  
25 here in a few.

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providing real-time updates on the ground while others provided information and assistance from afar.

1 (1:49 p.m.) Jim Fitzgerald: Be safe down there.  
 2 That's all I gotta say. Just be safe, be alert, and stay in  
 3 groups.  
 4 (1:50 p.m.) OhioRegularsActual-Oathkeepers: Yeah. We  
 5 have a good group. We've got about 30, 40 of us. We're  
 6 sticking together and sticking to the plan.  
 7 (1:50 p.m.) Airborne America: We'll see you soon,  
 8 Jess. Airborne.  
 9 (1:50 p.m.) OhioRegularsActual-Oathkeepers: Roger  
 10 that, brother. God speed and fair winds to us.  
 11 (1:50 p.m.) Airborne America: Amen, sister. Stay  
 12 safe.  
 13 (1:52 p.m.) Senior: To all the boots on the ground in  
 14 D.C., we are praying stoutly for you that you will get to  
 15 accomplish what God has put you there for. Be safe and be  
 16 firm in your faith, knowing that you are there for a reason.

Watkins further reported that she had “30, 40 of us,” and that the group was “sticking together and sticking to the plan.” This comment indicates that Watkins endorsed the “plan” and that she perceived the march by her and her co-defendants towards the Capitol as consistent with that plan. The comments that follow, such as Senior’s counsel to Watkins that “God has put you there . . . for a reason,” likely referring to Watkins’ presence with a group of “30, 40” people who were in the process of, in Watkins’ own words, “moving on the Capitol,” are being introduced for their effect on the listener, namely, the encouragement it gave Watkins to follow through on what she was doing: using her group, as well as her coconspirators, to attack the Capitol.

**B. 1:56 p.m. to 2:00 p.m.**

About five minutes later, Watkins was farther east on Pennsylvania Avenue NW with other members of her conspiracy. (The government recovered a photograph from Defendant Crowl’s

phone, showing the group walking east at 1:53 p.m. at approximately 11th Street and Pennsylvania Avenue NW.)

2 (1:56 p.m.) iWatchDirectorLaureen: (Indiscernible).  
 3 Pence is a coward, a fraud, and worse. Vice President Mike  
 4 Pence announced and 8220 (verbatim), the Constitution  
 5 restrains me from climbing unilateral authority to determine  
 6 which electric -- electoral votes should be counted, and  
 7 8821 and 8230.  
 8 (1:57 p.m.) iWatchDirectorLaureen: I think the VP  
 9 folded, friends.  
 10 (1:57 p.m.) i%Watchdog: Okay, guys, apparently the tip  
 11 of the spear has entered the Capitol building and police are  
 12 coming from the Washington Monument side, if you want to  
 13 correct me, Bonvon, and moving in two directions towards the  
 14 Capitol. So, watch your back.  
 15 (1:57 p.m.) iWatchDirectorLaureen: Yes, he folded. I  
 16 got the letter. I'll post it.  
 17 (1:58 p.m.) i%Watchdog: What kind of numbers do we  
 18 have going to the Capitol? Any estimates? What percentage  
 19 of the crowd is going to the Capitol?  
 20 (1:58 p.m.) OhioRegularsActual-Oathkeeper: 100  
 21 percent. It is -- it has spread like wildfire that Pence  
 22 has betrayed us, and everybody's marching on the Capitol,  
 23 all million of us. It's insane. We're about two blocks  
 24 away from it now, and police are doing nothing. They're not  
 25 even trying to stop us at this point.

1 (1:58 p.m.) 1%Watchdog: Yeah, guys. Police can't stop  
 2 you. This is a constitutional enforcement authority, the  
 3 civilian authority of We The People, constitutional  
 4 enforcement action, direct action. There is no legitimate  
 5 authority in the federal government. The Congress has  
 6 failed, the Executive Branch has failed -- other than Trump  
 7 -- and the Judicial Branch has failed, Supreme Court. This  
 8 is the civilian exercise of civilian power to alter and  
 9 abolish this fucking tyrannical, treasonous government piece  
 10 of shit and drain this fucking swamp.  
 11 (1:59 p.m.) 1%Watchdog: Fucking swamp. Yeah.  
 12 (1:59 p.m.) OhioRegularsActual-Oathkeeper: Trump's  
 13 been trying to drain the swamp with a straw. We just  
 14 brought a shop vac.  
 15 (1:59 p.m.) iWatchDirectorLaureen: Stop the steal. He  
 16 folded. He folded. He completely folded. A coward.  
 17 (1:59 p.m.) 1%Watchdog: I think you -- instead of a  
 18 shop vac, I think you brought a fleet of A-10 Warthogs.  
 19 (2:00 p.m.) OhioRegularsActual-Oathkeeper: Yeah, we're  
 20 one block away from the Capitol now. I'm probably gonna go  
 21 silent when I get there because I'm gonna be a little busy.

Defendant Watkins was also an active member of the conversation during this exchange. First, at 1:56 p.m., user iWatchDirectorLaureen told the group that Vice President Pence “folded,” meaning that he refused to acknowledge that he had unilateral authority to not count certain states’ Electoral College votes. Indeed, at approximately 1:00 p.m., just as he began presiding over Congress’s Joint Session, Vice President Pence released a letter that read in part, “It is my considered judgment that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not.” Based on the language and timing, user iWatchDirectorLaureen appears to have been

reading this letter aloud to the members of the Zello channel who were physically present—the “boots on the ground”—in D.C.

At 1:57 p.m., user 1%Watchdog advised those members of the group headed to the Capitol to be careful—“watch your back”—because law enforcement was also headed to the Capitol to help fortify it. A minute later, he advised Watkins, “The police can’t stop you.” These statements are important evidence about Watkins’ knowledge and state of mind: She was leading her group towards the Capitol not to assist law enforcement but rather in spite of their presence. At 1:58 p.m., user 1%Watchdog told Watkins that she and her group would be conducting a “civilian exercise of civilian power to alter and abolish this fucking tyrannical, treasonous government piece of shit and drain this fucking swamp.” In other words, he advised that Watkins and her group ought to take over Congress (“abolish” it). And Watkins explicitly endorsed and adopted this statement: She told the channel that President Trump had been ineffective in “drain[ing] the swamp” because, metaphorically, he had only been using a straw. Watkins stated that she and her group would now be able to accomplish what President Trump had not; in comparison to President Trump’s efforts, Watkins and her group “just brought a shop vac” (a powerful vacuum cleaner).

Building on the analogy, at 1:59 p.m., 1%Watchdog told Watkins that rather than bringing a shop vac, she brought a “fleet of A-10 Warthogs” (the U.S. Air Force’s primary low-altitude close-air-support aircraft). Defendant Watkins immediately responded by informing the group of her location and plans, thereby adopting the prior statement. (While she said, “we’re one block away from the Capitol now,” she was actually several blocks away from the Capitol; at 2:04 p.m., a video from her phone shows her and the group walking east on Pennsylvania Avenue NW at 6th Street.) Watkins’ next statement indicated that while she had been an active participant in the



conversation until that point, the other members of the channel could no longer depend on her for real-time “boots-on-the-ground updates,” as she was expecting to be “a little busy” after she and her group arrived at the Capitol. This is a clear statement of expectation and intent about Watkins’ plans for once she arrived at the Capitol. In addition to being admissible against her, it is admissible as circumstantial evidence of the intent and plans of the other four defendants standing trial alongside her pursuant to Rules 803(3) (Watkins’ statement of future intent) and 804(b)(3) (Watkins’ statement against her own interest).

**C. 2:01 p.m. to 2:24 p.m.**

Notably, in her statement at 2:00 p.m., Watkins told the members on the channel that she would “probably” “go silent” when she arrived at the Capitol. She did not say that she would cease listening to the channel. And she said her silence would start when she got to the Capitol, which, according to surveillance video, occurred at around 2:21 p.m., when she and other members of the conspiracy entered the Capitol grounds on the north side of the building.

During this time, Watkins likely continued to listen to the others’ statements on the channel. As discussed above, it is clear from videos recovered from her phone that Watkins’ phone, acting like a traditional walkie-talkie, continued to loudly broadcast the Zello channel. The other declarants reported on what Congress, the Vice President, the police, and the rioters were doing, and they also provided directives to Watkins as the “boots-on-the-ground” representative who was approaching the Capitol grounds. The government seeks to admit the statements between 2:01 p.m. and 2:24 p.m. solely against Defendant Watkins, as these statements are “context” for what Watkins later says and also have probative value for their effect on Watkins as the listener.

Thus, from 2:01 p.m. to 2:06 p.m., the members on the channel reported:

3 (2:01 p.m.) 1%Watchdog: The U.S. military news is  
 4 reporting that the National Capitol has been breached.  
 5 That's right, motherfuckers.

6 (2:01 p.m.) 1%Watchdog: This is a can of whoopass made  
 7 in America. Fuck yeah.

8 (2:02 p.m.) General Mark Davis CFA: Witnessing  
 9 history, Watchdog.

10 (2:02 p.m.) 1%Watchdog: You're making it, guys. Get  
 11 it on like Donkey Kong.

12 (2:02 p.m.) General Mark Davis CFA: Are they actually  
 13 inside the Capitol ground -- inside the Capitol?

14 (2:02 p.m.) 1%Watchdog: Yes, sir-e-bob, indeed.

15 (2:03 p.m.) 1%Watchdog: Citizen's arrest. Arrest this  
 16 assembly, these fucking treasonous bastards. We have  
 17 probable cause: treason, acts of treason, election fraud,  
 18 all kinds of felony crimes. No competent authority, no  
 19 competent law enforcement authority is standing up to arrest  
 20 these treasonous bastards. You are executing citizen's  
 21 arrest under the constitutional authority of the civilian  
 22 authority of We the People of the United States, first  
 23 branch of government, force of last resort. The federal  
 24 government has fallen, all three branches have fallen,  
 25 certified by the President of the United States. Congress

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1 has fallen; Supreme Court has fallen; Department of Justice,  
 2 FBI has fallen. You are the last resort to save this  
 3 republic.

4 (2:06 p.m.) 1%Watchdog: I mean, the House is still  
 5 debating, so they're not bothered so far by whoever got in  
 6 the front door.

7 (2:06 p.m.) Chitownjohnny72: The House released  
 8 Pence's statement saying that it's already over all over the  
 9 news, so they've already -- they're just going through the  
 10 motions. It's already over.

Notably, 1%Watchdog told Watkins and others to perform a “citizen’s arrest” of congresspeople for “treason.” He also told Watkins and others that, even though rioters had made it “in the front door” of the Capitol building, the House of Representatives was continuing its session. The implication of this statement was that someone (Watkins) needed to do something (like physically detaining congresspeople) to actually stop the House from proceeding any further.

At 2:17 p.m. and 2:18 p.m., 1%Watchdog told the channel about Vice President Pence’s and Speaker Nancy Pelosi’s movements:

13	(2:17 p.m.) 1%Watchdog: Okay. We’ve got reports that
14	Pence is hightailing it underground. They’re trying to move
15	him out of the building. I don’t know how, probably
16	underground. Yeah. You can run, but you can’t hide.
19	(2:18 p.m.) 1%Watchdog: Pence has been ushered out of
20	the building. The Senate is sheltering in place.
21	(2:18 p.m.) Bonvon: Not just Pence; Pelosi as well has
22	been taken into custody. From what I’m understanding it,
23	she’s being brought out -- trying to be brought out through
24	protected exits.

Another user then told the “boots on the ground” to find out which tunnels the protectees were using for their escape and “block them”:

4	(2:18 p.m.) SGT E: Find out where the tunnels exit and
5	block them too.

A minute later, at 2:19 p.m., user FreedomD0z3r91 (Person 32) reported to the channel that rioters had breached the Capitol building and were “fighting the police” inside. He asked someone (presumably Watkins) to “confirm” what was occurring inside the Capitol:

15 (2:19 p.m.) FreedomD0z3r91: From what I'm hearing,  
 16 they have breached the Capitol, they are inside, still  
 17 fighting the police. Can we get a confirmed on that?

A minute after that, at 2:20 p.m., user Badlands reported to the members of the channel that the House had gone into recess. This was correct, as, according to the Congressional Record, Representative McGovern gavelled the House into recess at 2:18 p.m.

23 (2:20 p.m.) Badlands: The livestream on the House has  
 24 just went into recess and the stream has been terminated, so  
 25 there's no further view into the council chambers.

User FreedomD0z3r91 (Person 32) then advised the members of the channel who were present at the Capitol ("patriots") to enter the building and sit in the congresspeople's chairs:

1 (2:20 p.m.) FreedomD0z3r91: Until they turn it back on  
 2 and they see fucking motherfucking patriots in that fucking  
 3 chamber sitting in their goddamn chairs.

Finally, at 2:24 p.m., a user advised Watkins and other members who were present at the Capitol that riot police were arriving at the building. The implication is that the user was warning Watkins and others of the police's presence.

18 (2:24 p.m.) Arkansas\_patriots: Hey, y'all, just heads  
 19 up, I just witnessed about four vans full of riot control  
 20 turning left off of Madison onto 3rd, and it looks like  
 21 they're heading towards the Capitol.  
 22 (2:24 p.m.) Gnomie: RSN is reporting that the Capitol  
 23 has been breached and their feed has been shut off.

**D. 2:26 p.m. to 2:30 p.m.**

During this time, according to surveillance video, Defendant Watkins was on the Capitol grounds with other members of the conspiracy, including notably Kelly Meggs and Kenneth Harrelson. Like with the preceding segment, the government seeks to admit these statements solely against Defendant Watkins.

First, at 2:26 p.m., user FreedomD0z3r91 (Person 32), the Illinois Oath Keeper leader who knew Watkins, explicitly advised her by name to “pull as much intel as you can”:

13	(2:26 p.m.) FreedomD0z3r91: Jess, pull as much intel	
14	as you can, keep up with everything. I have to, I have to	

He was obviously under the impression that Watkins was listening. At 2:27 p.m., some users reported factually that the House was back in session, and then a minute later that the House had recessed again:

18	(2:27 p.m.) Badlands: They've called the House back.	
19	We've got a stream.	
23	(2:27 p.m.) iWatchDirectorLaureen: Yeah. They called	
24	the House back in, the bastards.	
1	(2:28 p.m.) i%Watchdog: Here's the House live. (Plays	
2	broadcast over Zello.) This guy's looking nervous, man.	
3	Four million people outside. (Continues to play broadcast	
4	over Zello.) This guy's losing his shit. (Continues to	
5	play broadcast over Zello.) He's with us and he's nervous.	
6	(Continues to play broadcast over Zello.) You got nothing	
7	to worry about, brother. We're with you. (Continues to	
8	play broadcast over Zello.) (Laughter.) The guy -- the	
9	Patriots are coming in. They cut it again. Those	
10	motherfuckers. Patriots got in and were screaming and then	
11	they recessed.	
12	(2:30 p.m.) FreedomD0z3r91: Fuck yeah. I heard them	
13	myself.	



According to the Congressional Record, the House did in fact briefly reconvene between 2:26 p.m. and 2:29 p.m.

**E. 2:30 p.m. to 2:36 p.m.**

During this time, according to surveillance video, Defendant Watkins and certain other members of the conspiracy, including notably Kelly Meggs and Kenneth Harrelson, moved up the east side steps of the Capitol in a “stack” formation. Watkins was still actively engaged on the channel, speaking to others at 2:31 p.m. to report her own position.

16 (2:30 p.m.) KWICKI: Hey. My girlfriend is at the  
17 Capitol right now and she said that cops are coming in from  
18 the right of the building. She is by the pond and she said  
19 that they are coming in from the right of the building.

23 (2:31 p.m.) OhioRegularsActual - Oathkeeper: We're on  
24 the rear mezzanine behind the dome. I'll send some pictures  
25 here in a bit, but there is reports that Antifa was the ones

1 who busted out the windows and it was not actual patriots.  
2 The police confronted them while they were smashing out the  
3 windows and they said, Fuck Trump, we don't care about this,  
4 and they're just out there smashing windows. So, I feel  
5 like it's kind of a set-up really, but they've got the riot  
6 cops out now.

7 (2:31 p.m.) Driverjames45 IN: PBS News has them  
8 fighting the patriots, police are, inside the Capitol.  
9 Repeat, the police are fighting with the Ppatriots inside  
10 the Capitol on PBS News stream.

11 (2:31 p.m.) 1%Watchdog: All right. Well, whatever.  
12 Antifa or whoever, doesn't matter. This shit needs to go  
13 down. This treason needs to be stopped. This process needs  
14 to be arrested, and all these bastards who are stealing this  
15 election and treason, federal election fraud, aiding and  
16 abetting, accessories, all these motherfuckers, they need to  
17 be arrested. That's all there is to it, and there's no  
18 fucking law enforcement standing up to do it, so We the  
19 People, citizen arrest. Just arrest all these motherfucking  
20 treasonous bastards.

21 (2:32 p.m.) Badlands: Be advised, the livestream just  
 22 came on and they had just prepped and told them to get into  
 23 their -- under their chairs because there are people  
 24 entering the rotunda.

5 (2:33 p.m.) iWatchDirectorLaureen: They're live in  
 6 C-SPAN. I see them walking in. I think they're walking  
 7 into the Capitol building; it looks like it to me. The  
 8 Trump supporters.

9 (2:33 p.m.) l%Watchdog: Yeah. It's not a set-up.  
 10 It's -- this is going on anyway, with or without Antifa. If  
 11 they want to join in, fucking join in.

12 (2:33 p.m.) Badlands: Patriots, if this doesn't tell  
 13 the people that we are not gonna take this lying down, I  
 14 don't know what will aside from bloodshed.

15 (2:34 p.m.) Sheepdog1978 southern IL: Amen.

16 (2:34 p.m.) l%Watchdog: Yeah, guys. NAP,  
 17 Non-Aggressive Principal. Don't kill anybody unless you're  
 18 being attacked and you're life's in danger, then  
 19 self-defense. But this is a citizen -- this is a crime in  
 20 process. Felony high-crime treason. Citizen's arrest is  
 21 legal. I'm not a lawyer, but consult your lawyer. But it  
 22 is legal when there's a felony in progress and no law  
 23 enforcement is standing up. So fucking take care of  
 24 business.

Finally, at 2:36 p.m., according to a video recovered from Watkins' phone (Government Exhibit 192.V.3), Watkins can be seen standing on the top of the east side stairs of the Capitol filming herself and the crowd. During the video, the voice of l%Watchdog can be clearly heard emanating from Watkins' phone. This is strong evidence that Watkins was able to—and in fact

did—listen to the other speakers’ voices on the channel over the preceding half hour.<sup>15</sup> These voices offered her critical insight into what both Congress and law enforcement were doing at the Capitol, which assisted Watkins and her group with knowing how and when to take action.

**F. 2:39 p.m. to 2:46 p.m.**

During this time, according to surveillance video, Defendant Watkins and certain other members of the conspiracy, including notably Kelly Meggs and Kenneth Harrelson, entered the Capitol building and penetrated into the Rotunda.

17	(2:39 p.m.) 1*Watchdog: Capitol Police can't do shit.
18	Marines are coming to the White House for the President.
19	They're not sending them to the Capitol. That's Trump.
20	Trump's security guards.
21	(2:39 p.m.) FreedomD0z3r91: Yeah. Don't worry about
22	the Marines. They're not leaving the White House's grounds.
7	(2:42 p.m.) Jim Fitzgerald: CNN just said that they
8	evacuated all members of Congress into a safety room.
9	(2:42 p.m.) 1*Watchdog: There's no safe place in the
10	United States for any of these motherfuckers right now. Let
11	me tell you.
12	(2:43 p.m.) Gnomie: I hope they understand that we are
13	not joking around.
14	(2:43 p.m.) 1*Watchdog: Military principle 105,
15	military principle 105, cave means grave.
16	(2:43 p.m.) Jim Fitzgerald: Trump just tweeted, Please
17	support our Capitol Police, they are on our side, do not
18	harm them.
19	(2:43 p.m.) 1*Watchdog: That's saying a lot by what he
20	didn't say. He didn't say not to do anything to the
21	Congressmen.

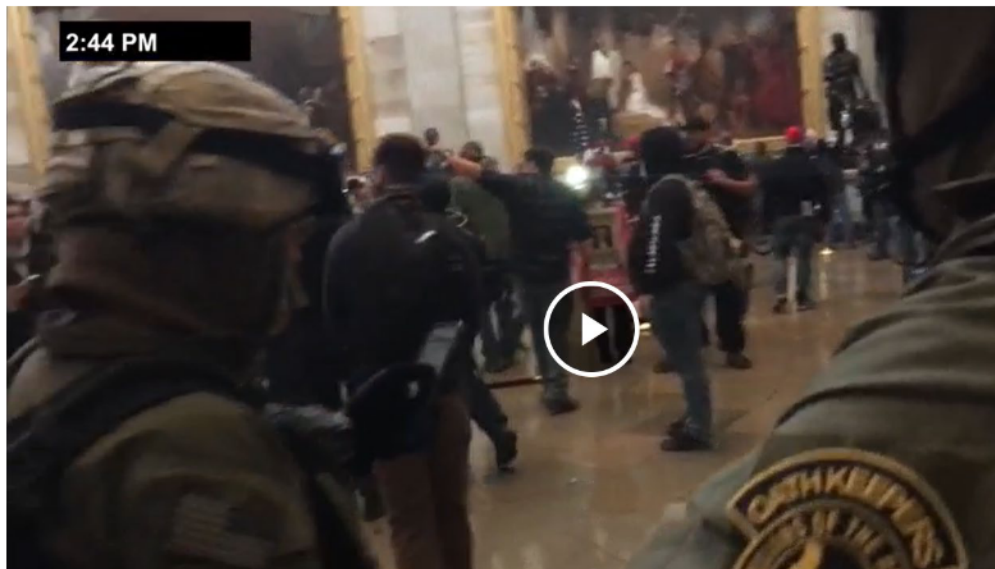
<sup>15</sup> The government intends to present evidence about how Zello works on a smart phone: the app turns the phone into a walkie talkie such that, once a person is logged into a channel, other individuals’ voices play through the speakers without any action required by the user.

At 2:43 p.m., user Jim Fitzgerald picked up on 1%Watchdog's statement about President Trump's tweet (which was in fact issued just five minutes earlier, at 2:38 p.m.):

22       (2:43 p.m.) Jim Fitzgerald: Well, he did not ask them  
 23       to stand down. He just said stand by the Capitol Police,  
 24       they are on our side and they are good people. So it's  
 25       getting real down there. I got it on TV and it's, it's  
 1       looking pretty freaking radical to me.

During this time, the Zello audio was audible emanating from Defendant Watkins' phone. Indeed, on Government Exhibit 192.V4, which is a video recovered from Defendant Watkins' cellphone that was filmed at 2:44 p.m., user Jim Fitzgerald's voice is audible.

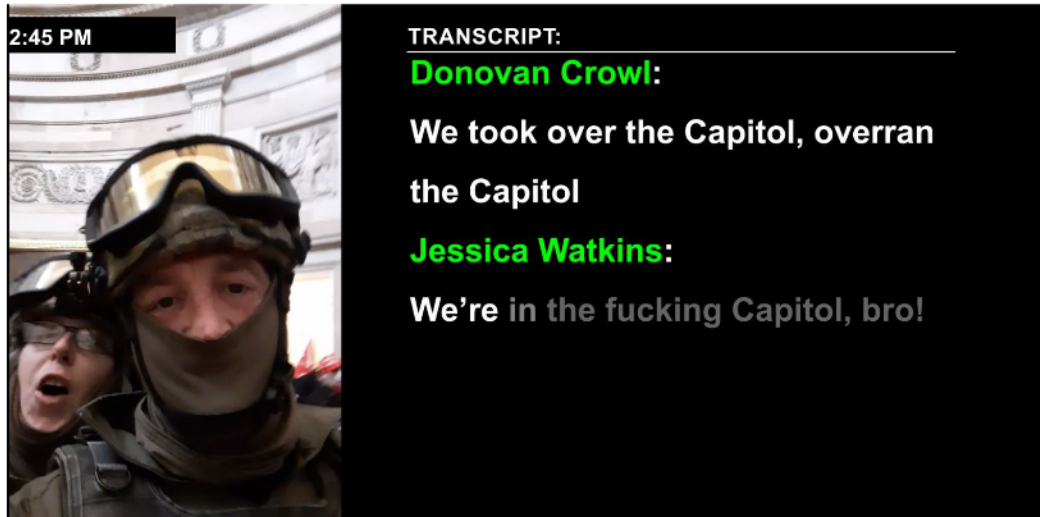
Within that same minute (2:44 p.m.), on a video recovered from coconspirator Sandra Parker's cellphone (Government Exhibit 135.V.2), Defendant Watkins can be seen manipulating her cellphone with her finger (as if pushing a button to talk) and then putting her cellphone to her ear (as if she is about to speak):



And, according to the Zello recording, at this precise time (2:44 p.m.), Watkins spoke on the Zello channel:

7           (2:44 p.m.) OhioRegularsActual - Oathkeeper: We are in  
8           the mezzanine. We are in the main dome right now. We are  
9           rocking it. They're throwing grenades, they're freaking  
10          shooting people with paintballs, but we're in here.  
11          (2:44 p.m.) Jim Fitzgerald: Be safe, be safe. God  
12          bless and God speed and keep going.

Immediately following Watkins' real-time update to those listeners on the channel, user Jim Fitzgerald directed Watkins to "keep going"—and she did. The next minute (2:45 p.m.), she filmed a selfie video with coconspirator Donovan Crowl on his cellphone (Government Exhibit 200.V.2), bragging that they "took over" the Capitol:



Finally, at 2:46 p.m., user FreedomD0z3r91 (Person 32), addressing Defendant Watkins by name ("Jess"), encouraged her to "Do your shit," noting that what she was doing was "[e]verything we fucking trained for":



13 | (2:46 p.m.) FreedomD0z3r91: Get it, Jess. Do your  
14 | shit. This is what we fucking lived up for. Everything we  
15 | fucking trained for.

Immediately after this Zello communication (at approximately 2:46 p.m.), Defendant Watkins, accompanied by six other members of the conspiracy—Graydon Young, Laura Steele, Donovan Crawl, Sandra Parker, Donovan Crawl, and James Beeks—attempted to penetrate even further into the building, down the hallway connecting the Rotunda to the Senate chamber. There, they were rebuffed by a line of MPD officers in riot gear.

While pushing north in the Senate hallway, Watkins would have been able to see the ornate wooden doors of the Senate chamber just on the other side of the line of MPD officers. At the same time that Watkins tried to push past those officers—approximately 2:47 p.m.—other rioters were just beginning to break into the Senate chamber. Rioters first breached the Senate gallery (one floor above the level where Watkins was pushing into the officers) at approximately 2:46 p.m. Some of those rioters jumped from the Senate gallery to the Senate floor and then opened, from the inside of the chamber, some of the ornate wooden doors on the main floor of the Senate chamber. The police were not able to clear the Senate of rioters for another approximately 20 minutes, until 3:09 p.m. In other words, had Watkins been successful in pushing past the MPD officers—she literally called out, as captured on video, “they can’t hold us” as she pushed forward—she would have had ready access to the Senate chamber itself. Circumstantially, attempting to access the Senate chamber is evidence that Watkins sought access to the senators themselves.

For the period between 2:39 p.m. and 2:46 p.m., the statements made on the Zello recording by Watkins were present-sense impressions, statements against interest, and statements in

furtherance of the conspiracy. Her descriptions of what she was observing and doing were both against her own interests and furthering the objectives of the conspiracy in keeping others updated and informed about the respective successes or troubles of the police and the rioters inside the Capitol building. Moreover, by her own words and actions, Watkins also adopted some of the statements made by others, notably (a) 1%Watchdog's suggestion that congresspeople should be targeted and (b) Person 32's recognition that Watkins' efforts were "[e]verything we fucking trained for." She manifested an intent to adopt these statements by not refuting them and by her actions of immediately pushing down the hallway towards the Senate chamber, telling those around her that the riot police "can't stop us." Like her own statements, these adopted statements are similarly statements against interest and in furtherance of the conspiracy.

During this time period, Watkins' own statements and adopted statements are therefore admissible against all five defendants.

### **III. RULE 403 DOES NOT PRECLUDE THE INTRODUCTION OF THE STATEMENTS**

The defendants' motion, at 7-8, perfunctorily cites to Rule 403, but it does not expand on the argument. Regardless, the statements here do not carry any danger of unfair prejudice, let alone such prejudice that is "substantially outweighed" by the probative value of the statements. The other declarants' statements on the Zello recording are not hearsay statements being introduced for their truth; they are being introduced because Watkins adopted them and/or for their effect on Watkins. The only factual assertions by these declarants concern what is contemporaneously occurring—i.e., the Senate going into recess, police arriving at the Capitol, President Trump sending out a tweet, Vice President Pence releasing a letter. None of those facts are disputed, and the government does not need to rely on any of those facts, as stated on the

recording, to prove them; they are all independently provable. And the government is, of course, amenable to limiting instructions, as noted above.

## CONCLUSION

The government respectfully submits that the Zello recording, Government Exhibit 1073.1, should not be excluded.

Respectfully submitted,

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