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 12 UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT
 14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
 16 Plaintiff,
 17 v.
 18 ALEXANDER SMIRNOV,
 19 Defendant.

No. CR 2:24-cr-00091-ODW

GOVERNMENT’S RESPONSE IN
 OPPOSITION TO DEFENDANT’S
 MOTION IN LIMINE TO PRECLUDE
 ANY REFERENCES TO DEFENDANT’S
 ALLEGED DISLOYALTY;
 MEMORANDUM IN SUPPORT

Hearing Date: November 25, 2024
 Hearing Time: 10:00 a.m.
 Location: Courtroom of the Hon.
 Otis D. Wright II

24 Plaintiff, the United States of America, by and through its counsel of record, hereby
 25 responds in opposition to the defendant’s Motion In Limine to Preclude Any References
 26 to Defendant’s Alleged Disloyalty (ECF No. 147). As addressed in this motion and
 27 contrary to the defendant’s assertions, the United States is entitled to argue, based on the
 28

1 charges in this case and their elements as well as the evidence that will be adduced at trial,
2 that during an interview on June 26, 2020, the defendant lied and was deceitful toward the
3 Federal Bureau of Investigation, for whom he served as a confidential human source for
4 more than a decade. Similarly, the government may argue that the defendant, in lying to
5 and deceiving the FBI, betrayed the trust and confidence bestowed upon him by the FBI
6 and on which the FBI relied during its relationship with him. Lastly, the government
7 should be permitted to present the defendant's statements made during a subsequent
8 interview with federal law enforcement on September 27, 2023, in which he made
9 statements that are evidence that he lied during his FBI interview on June 26, 2020, and
10 made representations about his self-professed foreign contacts, all as alleged in the
11 indictment. Evidence and argument relating to the above-referenced matters and issues
12 are relevant to the charges and conduct at issue in this case, would cause no unfair
13 prejudice, and, thus, are admissible at trial.

14 This motion is based on the attached memorandum of points and authorities, the
15 filings and records in this case, and any further argument as the Court may deem necessary.

16 Dated: November 15, 2024

Respectfully submitted,

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18 Special Counsel

19 /s/_____

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28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On October 31, 2024, the defendant moved in limine to preclude the government
3 from making any references at trial about his “alleged disloyalty” to the United States.
4 ECF No. 147 (“Def. Mot.”). In particular, the defendant argues that the government
5 should not be able to “‘dirty him up’ by seeking to portray him as a ‘Russian Spy’ or some
6 sort of equally derogatory, disloyal type of operative.” *Id.* at 4. The “derogatory” terms
7 and phrases proffered by the defendant and which he now seeks to preclude at trial—*e.g.*,
8 “‘dirty him up’” and “‘Russian Spy,’” *id.*, “unpatriotic” and “‘double agent,’” *id.* at 5,
9 “‘deceitful’” and “‘disloyal,’” *id.* at 10—are not quotations drawn from any government
10 statements or briefs but are his own concoctions. The defendant’s purported loyalty or
11 patriotism is not relevant to the trial—for all the reasons, for example, set forth in the
12 government’s own motion in limine seeking to preclude the defense from referencing or
13 arguing such at trial, *see* ECF No. 154. However, the converse, to the extent that is what
14 the defendant is trying to exclude, as it relates to the specific false statement charged in
15 the indictment, is relevant. The charges in this case are that the defendant lied during, and
16 caused the creation of a false federal record as a result of, his interview with his FBI
17 handler on June 26, 2020. *See* ECF No. 1 (“Indict.”). And in so doing, the government is
18 entitled to argue that, in committing the charged conduct, the defendant was—to borrow
19 the defense’s term—“‘deceitful,’” Def. Mot. at 10, and breached and violated the trust and
20 confidence afforded him by the United States government, vis-a-vis the FBI and his
21 handler. The government also is entitled to introduce at trial, pursuant to Federal Rule of
22 Evidence 801(d)(2), the defendant’s own statements proffered during an interview with
23 federal law enforcement on September 27, 2024, wherein he made statements that are
24 evidence of the falsity of his June 26, 2020 statement and provided a new false narrative
25 that, according to the defendant, derived in part from “four different Russian officials.”
26 Such argument and evidence, as it relates to the particular facts and charges in this case,
27 are permissible under the Federal Rules of Evidence, and the defendant’s motion,
28 therefore, should be denied.

1 **I. Background**

2 As alleged in the indictment, the defendant was a confidential human source with
3 the Federal Bureau of Investigation (“FBI”) for approximately 13 years, including during
4 the time when he committed the criminal conduct at issue. *See* Indict. ¶¶ 1–6. Specifically,
5 during an interview with his FBI handler on June 26, 2020, the defendant lied about “two
6 purported meetings and two purported phone calls” that he had with Burisma Holdings
7 officials about Public Official 1 and Businessperson 1. *Id.* ¶ 23. During those meetings,
8 according to the defendant and as set forth in the indictment, Burisma officials “told him
9 that they were paying Businessperson 1 to ‘protect us, through his dad, from all kinds of
10 problems,’ and later that they had specifically paid \$5 million each to Public Official 1,
11 when he was in office, and Businessperson 1 so that ‘[Businessperson 1] will take care of
12 all those issues through his dad,’ referring to a criminal investigation being conducted by
13 the then-Ukrainian Prosecutor General into Burisma and to ‘deal with’ the then-Ukrainian
14 Prosecutor General.” *Id.* ¶ 24. Regarding the phone calls, the defendant stated in part, a
15 Burisma official further recounted the illicit payments that he was “‘pushed to pay’” Public
16 Official 1 and Businessperson 1. *Id.* Prior to those statements to the FBI, the defendant
17 had expressed bias against Public Official 1 in a series of messages exchanged between
18 himself and his handler. *Id.* ¶¶ 8–21.

19 The defendant’s statements and representations concerning his meetings and calls
20 with Burisma officials, as conveyed during the June 26, 2020 interview, were lies. As
21 alleged in the indictment and as will be proven at trial, the defendant did not meet with
22 Burisma officials in late 2015 or 2016, as he claimed, *see id.* ¶¶ 6(d), 27–34, nor did he
23 speak with a Burisma official in 2016/2017 or 2019, as he claimed, *see id.* ¶¶ 35–37. In
24 addition, the indictment alleges that on September 27, 2023, the defendant met with FBI
25 investigators and repeated some of the false claims that he originally made during his June
26 26, 2020 interview, changed his story as to other claims, and shared a new false narrative
27 concerning Businessperson 1. *Id.* ¶¶ 45–50. Regarding the new false narrative, the
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1 defendant claimed that he saw video footage of Businessperson 1 visiting a particular hotel
2 in Kiev, Ukraine, and that the defendant learned this story from “a high-level official in a
3 foreign country” and “four different Russian officials.” *Id.* ¶¶ 51–54.

4 As a result of his lies, the defendant was charged by indictment, on February 14,
5 2024, with one count of making false statements to the FBI, in violation of 18 U.S.C. §
6 1001, and one count of causing the creation a false record, in violation of 18 U.S.C. §
7 1519.

8 **II. The United States May Argue at Trial that the Defendant Was Deceitful and**
9 **Betrayed His Relationship with the FBI, and May Introduce and Argue His**
10 **Statements Concerning a New False Narrative Provided by Foreign Actors**

11 At trial, the government expects to present evidence, *inter alia*, that (1) the
12 defendant long served as an FBI CHS, and (2) during an interview with his FBI handler
13 on June 26, 2024, the defendant lied about meetings and calls he allegedly had with
14 Burisma officials in which those officials supposedly admitted to bribes involving Public
15 Official 1 and Businessperson 1. In addition, the government intends to present the
16 defendant’s own statements made during his interview with FBI on September 27, 2023,
17 which are evidence of the falsity of his June 26, 2020 statement and promoted a new false
18 narrative after communicating with Russian officials.¹ *See* Indict. ¶¶ 41–55.

19 To convict the defendant at trial of Count One—making false statements to the
20 FBI—the government will need to prove that “the defendant 1) made a statement, 2) that
21 was false, and 3) material, 4) with specific intent, 5) in a matter within the agency’s
22 jurisdiction.” *United States v. Fortenberry*, 89 F.4th 702, 705 (9th Cir. 2023); 18 U.S.C.
23 § 1001(a). And to convict the defendant at trial of Count Two—causing a false entry in
24 an FBI record—the government will need to prove that “the defendant (1) knowingly

25 ¹ The defendant has moved in limine to preclude the government from introducing any of
26 the defendant’s statements that he made during his interview on September 27, 2024. *See*
27 ECF No. 149. The government will address that motion and the admissibility of the
28 defendant’s statements in its opposition to that motion. The government respectfully
incorporates the arguments set forth in that opposition brief here, insofar as those
arguments have any bearing on this matter. Similarly, the government respectfully
incorporates here its motion in limine to exclude specific instances of conduct, *see* ECF
No. 152, insofar as that motion also is relevant to the present issues as explained above.

1 committed one of the enumerated acts in the statute, such as [causing the making of a false
2 entry]; (2) [in] ‘any record, document, or tangible object’; (3) with the intent to obstruct
3 an actual or contemplated investigation by the United States of a matter within its
4 jurisdiction.” *United States v. Singh*, 979 F.3d 697, 715 (9th Cir. 2020); 18 U.S.C. § 1519;
5 *see also* 18 U.S.C. ¶ 2(b) (causing another to commit criminal act).

6 Given the allegations and evidence in this case, and the offenses charged and their
7 essential elements, the government is entitled to argue that the defendant was deceitful
8 toward the FBI, and breached and violated the FBI’s trust and confidence in him. The
9 defendant’s state of mind deceit is an element of the offenses against him. To be
10 convicted, he must have intentionally lied to the FBI and knowingly caused a false entry
11 to be made in a federal record. *See* 18 U.S.C. §§1001(a), 1519. The government,
12 therefore, may—and, indeed, must—present evidence and argue that the defendant
13 deceived (or attempted to deceive) the FBI when claiming that he met and spoke with
14 Burisma officials who told him about a bribery scheme involving Public Official 1 and
15 Businessperson 1. In other words, evidence and argument relating to the defendant’s
16 deceit and deceitful conduct is relevant to the charges at issue. *See* Fed. R. Evid. 401.
17 Moreover, evidence and argument relating to the defendant’s deceit is not unfairly
18 prejudicial pursuant to Federal Rule of Evidence 403; rather, it is essential to the
19 government’s case. Proving and arguing the defendant’s deceit is at the heart of the
20 criminal charges in this case.

21 Similarly, the government may argue at trial that the defendant, a longtime FBI
22 CHS, breached and violated the FBI’s trust by intentionally providing false information to
23 the FBI. The fact that the FBI trusted the defendant, and he betrayed that trust, is relevant
24 to the materiality element of Section 1001. *See* 18 U.S.C. ¶ 1001(a)(1); *Fortenberry*, 89
25 F.4th at 705. And the defendant’s longstanding CHS relationship and familiarity with the
26 FBI is relevant in showing that he knew and understood that his false statements could
27 influence an actual or contemplated investigation as encompassed in Section 1519. *See*

1 18 U.S.C. ¶ 1519; *Singh*, 979 F.3d at 715. Therefore, the government is entitled to argue
2 that the defendant betrayed his relationship with, and the confidence entrusted in him by,
3 the FBI. Such argument is relevant to the two criminal charges, *see* Fed. R. Evid. 401,
4 and, given its relevance and centrality to the charges, will not unfairly prejudice the
5 defendant, *see* Fed. R. Evid. 403.

6 Further, insofar as the defendant’s motion seeks to preclude the government from
7 referencing or admitting into evidence his contacts with foreign actors including Russian
8 officials, his motion should be denied. Again, the indictment alleges that the defendant
9 shared a new false narrative with the FBI during his interview on September 27, 2024.
10 *See* Indict. ¶¶ 51–54. The defendant, by his own admission, learned the story from “a
11 high-level official in a foreign country” and “four different Russian officials.” *Id.* ¶ 52.
12 During that same interview with the FBI, the defendant repeated some of the false claims
13 that he originally made during his June 26, 2020 interview, which are the subject of the
14 charged offenses here, and changed his story as to other claims. *See id.* ¶¶ 45–50.
15 Consequently, the defendant’s statements concerning this new false narrative and the
16 alleged source of that narrative are inextricably intertwined with his continued, ongoing
17 false statements to the FBI related to Burisma; are relevant to the conduct charged in this
18 case; and should be admissible at trial. There is nothing unfairly prejudicial in admitting
19 the defendant’s own statements about the new false narrative when they concern the
20 same person as the false statements for which the defendant is charged (*i.e.*,
21 Businessperson 1), relate to foreign affairs just as the charged false statements do, and,
22 like the charged statements, are demonstrably false. The government, therefore, should
23 be able to present the jury with the defendant’s own admitted contacts with foreign
24 actors, including Russian officials, as it relates to the specific conduct alleged and
25 charged in the indictment. The government does not intend to argue at trial, based on his
26 September 27, 2023 interview, that the defendant is a “Russian Spy,” a “double agent,”
27 or “unpatriotic,” thereby further ameliorating any risk of unfair prejudice. Def. Mot. at
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1 4–5. The government will simply introduce the defendant’s statements as he presented
2 them to federal law enforcement and as they are alleged in the indictment.

3 The defendant proffers no legal authority justifying the exclusion of the above-
4 referenced arguments or evidence. And the cases cited by the defendant are inapposite to
5 the present matter. *See, e.g., United States v. Lawrence*, 189 F.3d 838 (9th Cir. 1999)
6 (concerning admissibility of evidence about defendant’s “unconventional” marriage in
7 unrelated mail and bankruptcy fraud case); *United States v. Fawbush*, 634 F.3d 420 (8th
8 Cir. 2011) (admissibility of adult daughters’ testimony about defendant’s prior sexual
9 abuse in case involving sexual abuse of other minor children approximately eight or more
10 years later, decided primarily on Rule 404(b) grounds); *United States v. Schulte*, S-2 17
11 Cr. 548, 172020 U.S. Dist. LEXIS 9818 (S.D.N.Y. Jan. 17, 2020) (admissibility of
12 defendant’s post-arrest statements regarding his anger toward government for arrest and
13 indictment and racist remarks in classified information case). What is relevant and
14 admissible under the Federal Rules of Evidence depends largely on the specific facts,
15 charges, and circumstances in each particular case, and here it is clear that the defendant’s
16 deceit, betrayal, and admissions are relevant and admissible as they relate to the charges
17 of making false statements to the FBI and causing false entries in an FBI record.

18 With all this in mind, it bears highlighting that a critical distinction, *inter alia*,
19 between the government’s motion in limine to exclude irrelevant factual issues (including
20 any argument or references to the defendant’s general patriotism and loyalty to the United
21 States), *see* ECF No. 154, and the government’s opposition to the defendant’s present
22 motion is that any arguments or references that the government will make at trial about
23 the defendant’s deceit and “disloyalty” toward the FBI or about his foreign contacts *will*
24 *be specific to only the criminal conduct charged in the indictment*. In other words, should
25 the government argue that the defendant deceived the FBI and betrayed its trust and
26 reliance upon him, those arguments will be tethered to the false statement made by the
27 defendant to the FBI on June 26, 2020, as charged in the indictment. Similarly, should the
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1 government present evidence that the defendant had contacts with foreign actors, that
2 evidence and any related arguments will be tethered to the indictment’s averments
3 (specifically those concerning the September 27, 2023 interview). The government will
4 not do as the defendant proposes to do impermissibly—present evidence (or argument) of
5 specific instances of conduct that are entirely unrelated, temporarily or substantively, from
6 the charged crimes and conduct. *See* Def. Mot. at 4 (noting that defendant seeks to present
7 at trial “specific instances of [defendant] providing helpful information, with reproach-
8 free conduct”); *see also* ECF No. 152 (government’s motion in limine to exclude specific
9 instances of conduct).³ But the government is entitled to argue the evidence and its
10 significance to the jury with vigor and incisiveness. *See, e.g., United States v. Baker*, 10
11 F.3d 1374, 1415 (9th Cir. 1993) (“[C]ourts must allow the prosecution to strike ‘hard
12 blows’ based on the evidence presented and all reasonable inferences therefrom.”
13 (citations omitted)); *United States v. Boyd*, 640 F.3d 657, 669 (6th Cir. 2011) (affording
14 “wide latitude to a prosecutor during closing argument” and noting that “[t]he prosecution
15 is not required to present closing arguments that are devoid of all passion” (citations and
16 internal quotation marks omitted)); *United States v. Johnson*, 89 F.4th 997, 1002 (7th Cir.
17 2024) (reversing district court’s exclusion of government evidence under Rule 403 where
18 there is “general presumption that the prosecution is entitled to tell ‘a colorful story with
19 descriptive richness’ and ‘evidentiary depth’” (quoting *Old Chief v. United States*, 519
20 U.S. 172, 187–90 (1997))); *United States v. Hobbs*, 2024 U.S. App. LEXIS 27066, at *4
21 (10th Cir. Oct. 25, 2024) (in rejecting defendant’s Rule 403 argument against
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23 ³ According to the defendant, another related basis for excluding references to his
24 “disloyalty” at trial is—in the defense’s estimation—evidence that demonstrates the
25 defendant’s “undivided, years-long loyalty to the United States.” Def. Mot. at 4–5. Thus,
26 the defendant argues, such references to his “disloyalty” “would be false” and precluded
27 by Federal Rule of Evidence 402. *Id.* at 7. But, of course, whether the defendant was
28 honest and truthful to the FBI *at the time and about the matter for which he is charged* is
a matter for the jury to decide. And that issue cannot be addressed or resolved by specific
instances of past conduct. *See* Fed. R. Evid. 404(a)(1), 405(b); ECF Nos. 152.

1 government’s trial evidence, “we think it is the government’s call on how to try the case
2 and address potential inferences from the testimony (citing *Old Chief*, 519 U.S. at 186–
3 87)); *United States v. Gregory*, 54 F.4th 1183, 1210–11 (10th Cir. 2022) (“Arguments may
4 be forceful, colorful, or dramatic,” so long as they are “supported by the facts and
5 circumstances properly in evidence[.]”).

6 Therein lies the key difference between what is admissible under the Federal Rules
7 of Evidence and what is not: the government may present evidence and argue that which
8 is central to the charges and criminal conduct at issue—*e.g.*, the defendant’s lies, deceit,
9 and betrayal of his trusted relationship with the FBI as it is specifically charged and related
10 to the elements of the two criminal counts in this case. But the defendant cannot simply
11 present generalized evidence or argument concerning his supposed good deeds or conduct
12 over the years in a generalized attempt to disprove the specific lies and misconduct for
13 which he is charged or to invite jury nullification. *See* Fed. R. Evid. 404(a)(1) (“Evidence
14 of a person’s character or character trait is not admissible to prove that on a particular
15 occasion the person acted in accordance with the character or trait.”); *see also* ECF No.
16 152 (government’s motion in limine to exclude specific instances of conduct); ECF No.
17 154 at 7–8 (government’s motion in limine to exclude argument or evidence that the
18 defendant was “loyal” to or “servant of the United States”); *cf. United States v. Covington*,
19 No. 3:23-cr-68, 2023 U.S. Dist. LEXIS 218458, at *8 (E.D. Va. Dec. 7, 2023) (granting
20 government’s motion to exclude evidence of specific instances of conduct) (“[E]ven if the
21 jurors were presented with evidence—and believed—that the Defendants . . . possessed
22 general truthful or honest character, the jurors would be free to find that the Defendants
23 nevertheless made the alleged false statements or false report in the instances in
24 question.”).

25 **III. Conclusion**

26 For the reasons set forth above, the Court should deny the defendant’s Motion In
27 Limine to Preclude Any References to Defendant’s Alleged Disloyalty.