UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21 Cr. 35 (RC)**
	:	
CLAYTON RAY MULLINS and RONALD COLTON McABEE,	:	
	:	
Defendants.	:	

UNITED STATES' MOTIONS IN LIMINE

The United States of America moves in limine, pursuant to Fed. R. Evid. 401, 403, and 611(b) –

(1) to limit the cross-examination of witnesses with the United States Secret Service;

(2) to restrict the presentation of evidence regarding the specific position of U.S. Capitol Police surveillance cameras;

(3) to preclude defendants from introducing evidence of "other good acts," or from making arguments or introducing evidence regarding their culpability relative to other actors on January 6, 2021; and

(4) to preclude defendants from making arguments or otherwise encouraging jury nullification.

I. LEGAL BACKGROUND

It is well-established that a district court has the discretion to limit a criminal defendant's presentation of evidence and cross-examination of witnesses. *See Alford v. United States,* 282 U.S. 687 (1931) ("The extent of cross-examination [of a witness] with respect to an appropriate subject of inquiry is within the sound discretion of the trial court."); *United States v. Whitmore*, 359 F.3d 609, 615-16 (D.C. Cir. 2004) ("The district court . . . has considerable discretion to place

reasonable limits on a criminal defendant's presentation of evidence and cross-examination of government witnesses."). A court has the discretion to prohibit cross-examination that goes beyond matters testified to on direct examination. Fed. R. Evid. 611(b). This is particularly so when the information at issue is of a sensitive nature. *See e.g., United States v. Balistreri,* 779 F.2d 1191, 1216-17 (7th Cir. 1985) (upholding district court's decision to prohibit cross-examination of agent about sensitive information about which that agent did not testify on direct examination and which did not pertain to the charges in the case), *overruled on other grounds* by *Fowler v. Butts,* 829 F.3d 788 (7th Cir. 2016). Other permissible reasons for limiting cross-examination include preventing harassment, prejudice, confusion of the issues, or repetitive, cumulative, or marginally relevant questioning. *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986).

While limiting the defendant's opportunity for cross-examination may implicate the constitutional right to confront witnesses, the Confrontation Clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Even evidence that may be relevant to an affirmative defense should be excluded until a defendant sufficiently establishes that defense through affirmative evidence presented during his or her own case-in-chief. *See United States v. Lin,* 101 F.3d 760, 768 (D.C. Cir. 1996) (acknowledging trial court has discretion to limit cross-examination on prejudicial matters without reasonable grounding in fact); *United States v. Sampol,* 636 F.2d 621, 663-64 (D.C. Cir. 1980) (holding that trial court properly limited cross-examination of alleged CIA murder scheme until defense put forth sufficient evidence of the affirmative defense in its case-in-chief); *United States v. Stamp,* 458 F.2d 759, 773 (D.C. Cir. 1971) (finding trial court properly excluded cross examination of government's witness with response to matter only related to an affirmative

defense and not elicited through direct exam). Preventing the defendants from exploring the topics above will not infringe their Confrontation Clause right because, as explained below, such topics have little probative value, provide no basis for impeachment, and will distract the jury.

II. FACTUAL BACKGROUND

On January 6, 2021, defendants Clayton Ray Mullins and Ronald Colton McAbee engaged in a vicious assault of multiple police officers from the Metropolitan Police Department ("MPD") who were positioned in an archway (the "Archway") at the top of a set of steps on the lower west terrace ("LWT") of the U.S. Capitol building, preventing rioters from gaining access to the interior of the building at that point. Specifically, Officer A.W. was knocked to the ground in the Archway by codefendant Justin Jersey, and then had his baton snatched out of his hands by codefendant Jeffrey Sabol. As Officer A.W. lay on the ground, McAbee grabbed at Officer A.W.'s leg and torso and Mullins grabbed Officer A.W.'s other leg. Together, they pulled Officer A.W. toward the crowd of rioters, while officers tried to pull Officer A.W. in the opposite direction, back into the Archway.

Codefendant Jack Wade Whitton struck Officer B.M. with a crutch, then Whitton, Sabol, and codefendant Barnhart dragged Officer B.M. out of the Archway and down the stairs, where he was beaten by codefendants Peter Stager and Mason Courson. As another MPD officer – Officer C.M. – stepped out of the Archway in an attempt to assist Officers A.W. and B.M., McAbee stood upright and began shouting and swinging his arms at Officer C.M. McAbee then turned back to Officer A.W., grabbed his torso, and continued pulling him out of the Archway. McAbee ultimately fell on top of Officer A.W., and the two slid down the stairs and into the crowd together, with McAbee on top of Officer A.W.

As Officer B.M. tried to make his way back to the Archway by climbing up the steps, Mullins placed his hand on Officer B.M.'s head and shoved him back down the stairs into the crowd.

Based on their actions on January 6, 2021, Mullins has been charged with Assaulting, Resisting, or Impeding a Law Enforcement Officer and Inflicting Bodily Injury, in violation of 18 U.S.C. § 111(a)(1) and (b) (A.W.) (Count Nine); Assaulting, Resisting, or Impeding a Law Enforcement Officer , in violation of 18 U.S.C. § 111(a)(1) (B.M.) (Count Eleven); Civil Disorder, in violation of 18 U.S.C. § 231(a)(2) (Count Fourteen); Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1) (Count Twenty-One); Disorderly and Disruptive Conduct in a Restricted Building or Grounds in violation of 18 U.S.C. § 1752(a)(2) (Count Twenty-Two), Engaging in Physical Violence in a Restricted Building or Grounds in violation of 18 U.S.C. § 1752(a)(4) (Count Twenty-Three), and Act of Physical Violence in the Capitol Building or Grounds in violation of 40 U.S.C. § 5104(e)(2)(F) (Count Twenty-Four). McAbee has been charged with Assaulting, Resisting, or Impeding a Law Enforcement Officer and Inflicting Bodily Injury, in violation of 18 U.S.C. § 111(a)(1) and (b) (A.W.) (Count Nine); Assaulting, Resisting, or Impeding a Law Enforcement Officer , in violation of 18 U.S.C. § 111(a)(1) (C.M.) (Count Twelve); Civil Disorder, in violation of 18 U.S.C. § 231(a)(2) (Count Fourteen); Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(1) and (b)(1)(A) (Count Eighteen); Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon in violation of 18 U.S.C. § 1752(a)(2) and (b)(1)(a) (Count Nineteen), Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon in violation of 18 U.S.C. § 1752(a)(4) and (b)(1)(A) (Count Twenty), and Act of Physical

Violence in the Capitol Building or Grounds in violation of 40 U.S.C. § 5104(e)(2)(F) (Count Twenty-Four).

III. ARGUMENT

A. Cross-Examination of Secret Service Witnesses Should Be Limited to Whether the Capitol was Restricted on January 6, 2021 and the Riot's Effect on the Agency's Functions

Each defendant is charged, among other counts, with violations of 18 U.S.C. § 231(a)(3) (Count Fourteen) and of 18 U.S.C. § 1752 (Counts Eighteen, Nineteen, and Twenty with respect to McAbee, Counts Twenty-One, Twenty-Two, and Twenty-Three with respect to Mullins). To prove these charges, the government intends to offer limited testimony about the Secret Service's protection of certain officials on January 6, 2021.

First, to establish a violation of 18 U.S.C. § 231(a)(3), the government must prove, among other things, that a civil disorder interfered with a federally protected function. 18 U.S.C. § 231(a)(3); *United States v. Red Feather,* 392 F. Supp. 916, 918-19 (D. S.D. 1975). A "federally protected function" includes any lawful function, operation, or action by a federal agency or officer. 18 U.S.C. § 232(3). Thus, the government must prove that the January 6 breach interfered with a federal agency or federal officer's performance of lawful duties. To meet this element, the government intends to offer testimony that pursuant to authority under 18 U.S.C. § 3056(a)(1), on January 6, 2021, Secret Service agents were at the Capitol to protect Vice President Mike Pence and two members of his immediate family.[1] A Secret Service official is further expected to explain how the events at the Capitol on that date affected the Secret Service's ability to protect Vice President Pence and his family.

[1] The Secret Service is authorized to protect the Vice President and his immediate family. 18 U.S.C. §§ 3056(1) and (2).

Second, to prove Counts Eighteen through Twenty-Three, which charge violations of § 1752(a)(1), (2), and (4), the government must prove that the Capitol and its grounds were "restricted" because the Vice President and his family were present there and being protected by the Secret Service. *See* 18 U.S.C. § 1752(c)(1)(B) (defining restricted buildings and grounds).

However, the very nature of the Secret Service's role in protecting the Vice President and his family implicates sensitive information related to that agency's ability to protect high-ranking members of the Executive branch and, by extension, national security. Thus, the government seeks an order limiting the cross-examination of the Secret Service witnesses to questioning about the function performed by the Secret Service as testified to on direct exam. The defendants should be specifically foreclosed from questioning the witnesses about the following:

1. Specific information pertaining to the location to which the Vice President was re-located following the breach of the U.S. Capitol;
2. Secret Service protocols related to the locations where protectees or their motorcades are taken at the Capitol or other government buildings when emergencies occur; and
3. Details about the nature of Secret Service protective details, such as the number and type of agents the Secret Service assigns to protectees.

Cross-examination of Secret Service witnesses about these extraneous matters beyond the scope of direct examination should be excluded as irrelevant or unduly prejudicial. The Secret Service's general protocols about relocation for safety, for instance, should be excluded as irrelevant because such evidence does not tend to make a fact of consequence more or less probable. Fed. R. Evid. 401 (defining relevant evidence). Similarly, evidence of the nature of Secret Service protective details is not relevant in this case. The number or type of assigned agents on a protective detail does not alter the probability that the Capitol and its grounds were restricted

at the time. None of the other elements to be proven, or available defenses, implicates further testimony from the Secret Service.

As discussed above, even assuming the evidence to be excluded is marginally relevant, such relevance is substantially outweighed by the danger of confusion of the issues, mini-trials, undue delay, and waste of time. *See United States v. Mohammed,* 410 F. Supp. 2d 913, 918 (S.D. Cal. 2005) (finding that information having broader national security concerns can be excluded under Rule 403 because its tendency to confuse the issues, mislead the jury, create side issues or a mini-trial can result in undue prejudice that substantially outweighs any probative value). Broader cross-examination of Secret Service witnesses could compromise national security without adding any appreciable benefit to the determination of the truth, or the veracity or bias of witnesses. *Id.*

If this court determines that a hearing is necessary to determine the admissibility of testimony by a witness from the Secret Service, the government requests the hearing be conducted *in camera* and *ex parte*. As noted, in this case, disclosure of certain information could prove detrimental to the Secret Service's ability to protect high-level government officials and affect our national security. Courts have found such considerations justify *ex parte, in camera* proceedings. *See Gilmore v. Palestinian Interim Self-Gov't Auth.,* 843 F.3d 958, 968 (D.C. Cir. 2016) (finding that while *ex parte* proceedings should be employed to resolve discovery disputes only in extraordinary circumstances, they are appropriate where disclosure could lead to substantial adverse consequences, such as where a party sought intelligence materials generated in the midst of a geopolitical conflict); *United States v. Nixon,* 418 U.S. 683, 714 (1974) (affirming district court's order for *in camera* inspection of subpoenaed presidential materials); *United States v. Kampiles,* 609 F.2d 1233, 1248 (7th Cir. 1979) ("It is settled that *in camera ex parte* proceedings to evaluate bona fide Government claims regarding national security information are proper."); *In*

re Taylor, 567 F.2d 1183, 1188 (2d Cir. 1977) (finding that *in camera* proceedings "serve to resolve, without disclosure, the conflict between the threatened deprivation of a party's constitutional rights and the Government's claim of privilege based on the needs of public security."); *United States v. Brown,* 539 F.2d 467, 470 (5th Cir. 1976) (per curiam) (same). At any such hearing, the defendant should be required to make "a proffer of great specificity" regarding the need for the evidence and the scope of his questions. *Cf. United States v. Willie*, 941 F.2d 1384, 1393 (10th Cir. 1991) (requiring such proffer where evidence of defendant's belief might have permissible and impermissible purposes, and careless admission would raise issues under Fed. R. Evid. 403).

B. This Court Should Preclude The Defendants From Seeking Testimony or Introducing Evidence Regarding The Location of Specific Capitol Police Security Cameras.

To meet its burden of proof at trial, the government will present video evidence from a variety of sources, including Capitol Police surveillance footage. As detailed in the Declaration of Thomas A. DiBiase (Exhibit 1), the Capitol Police maintains an extensive closed-circuit video system, which includes cameras inside the Capitol Building, inside other buildings within the Capitol complex, and outside on Capitol grounds. These cameras captured thousands of hours of footage from the breach of the Capitol and have been instrumental in documenting the events of January 6, 2021.

However, the U.S. Capitol Police's surveillance system also serves an important, and ongoing, function in protecting Congress and, by extension, national security. In particular, the footage from the system is subject to limitations and controls on access and dissemination. *See* Exhibit 1. To find relevant footage from the Capitol Police's surveillance system and adequately prepare for trial, one would need to use maps, which display the locations of the interior and exterior cameras. The government has therefore provided the defense with maps that display these

locations. However, due to the sensitive nature of these items, the government seeks an order limiting the defense from probing, during cross-examination, the exact locations of Capitol Police surveillance cameras or from using the maps, which show each camera's physical location, as an exhibit at trial.[2]

Here, the bulk of the government's video evidence will come from sources other than the Capitol Police: body-worn camera footage and videos taken by other members of the crowd. Nonetheless, to establish a violation of 18 U.S.C. § 231(a)(3), the government must prove that a civil disorder occurred. In addition, unlike the Capitol Police surveillance footage, which contains a timestamp, video footage from "unofficial" sources, such as other individuals who were filming on the Capitol grounds, often does not contain a verified indication of the time at which it was captured. Thus, to prove Count Fourteen, to provide time-stamped comparators for open source videos, and to otherwise contextualize the events of January 6, 2021, the government will offer footage from Capitol Police cameras showing the crowd occupying restricted areas, breaching police lines, and assaulting police.

Evidence about the exact locations of cameras, and the maps used to locate the cameras, should be excluded in light of the ongoing security needs of the Capitol. The defense can probe what Capitol Police's cameras show -- and what they do not -- by asking about the general location of each camera. For example, a camera positioned inside the Lower West Terrace tunnel can be described as "inside the tunnel, facing out" without describing its exact height and depth within the tunnel and without showing a picture of the camera itself. Absent some concrete and specific

[2] These maps have been disclosed to the defendants but, pursuant to the terms of the protective order, have been designated Highly Sensitive. Moreover, these maps have been designated as "Security Information" under 2 U.S.C. §1979 which forbids their use without the approval of the Capitol Police Board.

defense need to probe the camera's location, there is nothing to be gained from such questioning. A general description, and the footage from the camera itself, will make clear what the camera recorded and what it did not. Additionally, presenting the map of all Capitol Police cameras would risk compromising these security concerns for no additional probative value: the map contains numerous cameras installed in parts of the Capitol that the defendants did not visit.

Even assuming the evidence to be excluded is marginally relevant, such relevance is substantially outweighed by the danger to national security. *See United States v. Mohammed,* 410 F. Supp. 2d 913, 918 (S.D. Cal. 2005) (finding that information having broader national security concerns can be excluded under Rule 403 because its tendency to confuse the issues, mislead the jury, create side issues or a mini-trial and can result in undue prejudice that substantially outweighs any probative value). If the map of the Capitol cameras is introduced in this trial, or in any trial, it becomes available to the public. Immediately, anyone could learn about the Capitol Police's camera coverage as of January 6, 2021, and—importantly—could learn about the parts of the Capitol where cameras were not installed. Broader presentation of evidence about camera locations could compromise national security without adding any appreciable benefit to the determination of the truth, or the veracity or bias of witnesses. *Id.*

As with the Secret Service information discussed above, if the defense believes that presentation of the exact locations of the Capitol Police cameras is necessary, or that presentation of the Capitol Police map is necessary, the government requests that the Court conduct a hearing *in camera* to resolve the issue.

C. This Court Should Preclude The Introduction of The Defendants' Good Conduct Or Culpability Relative To Other Rioters

In his filings and other printed statements, Mullins has repeatedly asserted that, prior to the assault of Officers A.W., B.M., and C.M., he was providing assistance to another rioter, who

was in need of medical assistance. *See* ECF No. 323 (Mullins Motion to Sever) at 1 ("He tried to assist Roseanne Boyland who lay dying at the West Terrace Archway."); *id.* at 3 (describing a portion of video as "Clayton still helping others"); Barry, Dan, Alan Feuer, and Matthew Rosenberg, "90 Seconds of Rage," *New York Times*, October 16, 2021, *available at* https://www.nytimes.com/interactive/2021/10/16/us/capitol-riot.html?searchResultPosition=1 (Mullins "later said he was trying to stand over Ms. Boyland to protect her"). Similarly, several minutes after the assault of Officers A.W., B.M., and C.M., McAbee returned to the Archway and was part of a group of rioters who attempted to render aid to the same rioter who was in medical distress, and helped to carry/drag that rioter to the entrance of the Archway. *See* ECF No. 108 (Government Motion for Emergency Stay and for Review and Appeal of Release Order) at 16-17. Yet, neither defendant has asserted that he was attempting to help this individual – who was lying on the ground near the Archway – during the charged assaults. And both defendants have made assertions – in other contexts -- regarding their culpability relative to other rioters on January 6. *See* ECF No. 191 (McAbee Motion for Reconsideration of Detention) at 11 (comparing McAbee favorably with another January 6 defendant who "came with weapons and tactical gear to cause violence and interfere with the election process"); ECF No. 331 (Mullins Reply in Support of Motion to Sever) at 2 ("By contrast, Officer McAbee is battle ready and fighting officers in the Archway.").

Any testimony concerning this allegedly helpful conduct – or lack of additional or even more serious criminal conduct on January 6, 2021 – should be precluded pursuant to Federal Rules of Evidence 404(b) and 405.

Rule 404(a) of the Federal Rules of Evidence prohibits either party from offering evidence of character to prove that a person acted in conformity therewith on any particular occasion. The

rule applies to prior good acts as well as prior bad acts of the defendant. As the Sixth Circuit has explained, "For the same reason that prior 'bad acts' may not be used to show a predisposition to commit crimes, prior 'good acts' generally may not be used to show a predisposition not to commit crimes." *United States v. Dimora*, 750 F.3d 619, 630 (6th Cir. 2014). In other words, "evidence of good conduct is not admissible to negate criminal intent." *United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008) (internal citation omitted).

The Rule contains three exceptions, one of which governs the admissibility of evidence of a defendant's character. Fed. R. Evid. 404(a)(2)(A). Such evidence is admissible only if it relates to a "pertinent" or relevant character trait. *Id.* Consistent with Rule 405, "[w]hen evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion." Fed. R. Evid. 405(a). "When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct," Fed. R. Evid. 405(b). Although courts have held that the general character trait of law-abidingness is pertinent to almost all criminal offenses, *In re Sealed Case*, 352 F.3d 409, 412 (D.C. Cir. 2003), here, the relevant trait evidence by the defendants' alleged acts is not law abidingness; it is helpfulness to others. The defendants' "helpful" or "good" acts directed towards a third party with whom the defendants were at least superficially aligned are not probative of their intent toward law enforcement officers who are attempting to prevent them from gaining entrance to the Capitol building.[3]

[3] In any event, the form of the evidence of any particular trait that the defendants wished to offer would be governed by Rule 405(a), which limits such evidence to "testimony as to reputation or by testimony in the form of an opinion." Fed. R. Evid. 405(a). Proof of specific instances of conduct is not permitted under the Rule, unless the trait or character of a person is an essential element of the charge, claim, or defense—which, in this case, it is not. *See United States v.*

Further, evidence of other "good acts" by a defendant is generally not probative unless a defendant is alleged to have always or continuously committed bad acts or engaged in ceaseless criminal conduct, that is, when it is alleged that all of the defendant's actions were illegal. *United States v. Damti*, 109 Fed. Appx. 454, 455-56 (2nd Cir. 2004) (citations omitted). When that is not alleged and the prosecution can point to specific criminal acts, then evidence of good acts is not probative of the issue of guilt at trial. *Id. See also United States v. Marrero*, 904 F.2d 251, 259–60 (5th Cir. 1990) (affirming decision to exclude evidence that the defendant "provided more services to some clients than they were actually billed for and that sometimes she rendered services free of charge," which the defendant sought to introduce to show that she did not intend to improperly bill a government agency for medical services, as "not relevant to whether she, in fact, overcharged as alleged in the indictment"). Setting aside that all of the defendants' conduct occurred within the restricted perimeter around Capitol building, the government has alleged specific assaults that the defendants engaged in– the assaults of Officers A.W., B.M., and C.M. Evidence of non-assaultive behavior, directed at dissimilarly situated individuals, is therefore not probative of the defendants' intent to assault the officers. *See United States v. Camejo*, 929 F.2d 610, 612-13 (11th Cir. 1991) (witness's proffered testimony that a defendant declined to participate in a separate, contemporaneous narcotics conspiracy was an inadmissible "attempt to portray [the defendant] as a good character through the use of prior 'good acts'"); *United States v. Craige-Roberson*, No. 16 Cr. 109, 2017 WL 3894694, at *1 (E.D.La. Sept. 6, 2017) (precluding defendants from introducing evidence regarding arguably legitimate expenditures that were unrelated to the charted fraud).

Washington, 106 F.3d 983, 999 (D.C. Cir. 1997).

And, even if probative, introducing evidence about the defendants' irrelevant conduct risks confusing the issues by inviting the jury (a) to engage in a fact finding endeavor regarding the defendants' conduct at other points during the day, (b) to weigh the defendants' culpability relative to other rioters, and (c) to nullify. This evidence therefore ought to be excluded. *See United States v. King*, 254 F.3d 1098, 1100 (D.C. Cir. 2001) ("Evidence that is admissible under Rule 404 may nonetheless be excluded under Rule 403 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'"). Any alleged specific good acts by the defendants are not connected to the issues of this case. Introducing evidence of such acts carries an unnecessary risk of distracting the jury by allowing it to decide based, not on whether the evidence showed that the defendants committed the charged crimes, but instead on whether the defendants performed unrelated good deeds.

D. This Court Should Preclude The Defendants From Arguing In A Manner That Encourages Jury Nullification

The defendants should be prohibited from arguing or introducing evidence that encourages jury nullification, whether during voir dire or at trial. As the D.C. Circuit has made clear,

> A jury has no more "right" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.

United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983). Evidence that only serves to support a jury nullification argument or verdict has no relevance to guilt or innocence. *See United States v. Gorham*, 523 F.2d 1088, 1097-98 (D.C. Cir. 1975); *see also United States v. Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998) ("No reversible error is committed when evidence, otherwise

inadmissible under Rule 402 of the Federal Rules of Evidence, is excluded, even if the evidence might have encouraged the jury to disregard the law and to acquit the defendant").

The government has identified the following subject areas that are not relevant to the issues before the jury and that could serve as an improper invitation for the jury to nullify its fact-finding and conclusions under the law. The Court should preclude any reference to these issues, or similar arguments, either during voir dire, argument or questioning by counsel, or in the defense case-in-chief.

1. Selective Prosecution

The defendants may claim that they have been unfairly singled out for prosecution because of their political views. However, a "selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). Regardless of whether alleged discrimination based on political views is a proper basis for challenging the indictment—which the defendants have not claimed to date—it has no place in a jury trial. *See United States v. King*, No. 08-cr-002, 2009 WL 1045885, at *3 (D. Idaho Apr. 17, 2009) ("The Court will therefore exclude any evidence or argument as to selective prosecution at trial."); *United States v. Kott*, No. 3:07-cr-056, 2007 WL 2670028, at *1 (D. Alaska Sept. 10, 2007) (precluding the defendant from educing evidence to support a selective prosecution claim at trial). Rather, such an argument could serve as an improper invitation for the jury to nullify its fact-finding and conclusions under the law; the defendants should therefore be precluded from making it.

2. Statements Regarding The Alleged Offenses' Punishment Or Collateral Consequences of Conviction

The defendants may face prison time were they to be found guilty in this case, and they should not be permitted to arouse the jury's sympathy by introducing any evidence of or attempting to argue about the hardships of prison or the potential effect of incarceration on their families or employment prospects.

It is settled law that the jury should not consider such penalties in reaching its verdict. *See, e.g.*, *United States v. Reed*, 726 F.2d 570, 579 (9th Cir. 1984) (a defendant's possible sentence "should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused."); *Rogers v. United States*, 422 U.S. 35, 40 (1975) (jury should have been admonished that it "had no sentencing function and should reach its verdict without regard to what sentence might be imposed"). Courts in this district often give a jury instruction stating exactly that:

> The question of possible punishment of the defendant in the event a conviction is not a concern of yours and should not enter into or influence your deliberations in any way. The duty of imposing sentence in the event of a conviction rests exclusively with me. Your verdict should be based solely on the evidence in this case, and you should not consider the matter of punishment at all.

D.C. Redbook 2.505. Thus, the above-mentioned issues are irrelevant, and any reference to them would invite jury nullification. *See United States v. Bell*, 506 F.2d 207, 226 (D.C. Cir. 1974) ("evidence which has the effect of inspiring sympathy for the defendant or for the victim . . . is prejudicial and inadmissible when otherwise irrelevant") (internal citation omitted); *United States v. White*, 225 F. Supp. 514, 519 (D.D.C 1963) ("The proffered testimony (which was clearly designed solely to arouse sympathy for defendant) was thus properly excluded."). As such, they should be excluded.

IV. CONCLUSION

Motions in limine are "designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions." *Graves v. District of Columbia*, 850 F.Supp.2d 6, 10 (D.D.C. 2011) (quoting *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1070 (3d Cir. 1990)). The government presents these issues to the Court to prepare this case for an efficient trial. For the reasons described above, the United States respectfully requests that this Court grant the government's motion in limine.

Respectfully submitted,

DATED: July 17, 2023

MATTHEW M. GRAVES
United States Attorney
D.C. Bar No. 481052

By: /s/ *Benet J. Kearney*
BENET J. KEARNEY
New York Bar No. 4774048
Assistant United States Attorneys
United States Attorney's Office
For the District of Columbia
601 D Street, NW
Washington, DC 20530
Benet.Kearney@usdoj.gov
(212) 637 2260

ALEXANDRA F. FOSTER
Washington, D.C. Bar No. 470096
United States Attorney's Office
For the District of Columbia
601 D Street, NW
Washington, DC 20530
Alexandra.Foster@usdoj.gov
(619) 546-6735