UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Case No. 22-cr-92 (DLF)**
v.	:	
	:	
BRIAN GLENN BINGHAM,	:	
	:	
Defendant.	:	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S NOTICE OF PUBLIC AUTHORITY DEFENSE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully requests that this Court preclude Defendant Brian Bingham from raising a public authority defense at trial. *See* ECF No. 57. Defendant's assertion that he cannot be held criminally liable because his actions were authorized by the former President is nothing more than an attempt to deflect responsibility for his conduct on January 6, 2021. Courts in this district have consistently rejected the application of the public authority defense in the January 6 context. *See, e.g.*, *United States v. Chrestman*, 525 F. Supp. 3d 14, 32-33 (D.D.C. 2021); *United States v. Easterday*, No. 22-404 (JEB), 2023 WL 6646384, at *2-3 (D.D.C. Oct. 12, 2023); *United States v. Baez*, No. 21-0507 (PLF), 2023 WL 6364648, at *6-7 (D.D.C. Sept. 29, 2023); *United States v. Bru*, No. 21-352 (JEB), 2023 WL 4174293, at *2 (D.D.C. June 26, 2023); *United States v. Eicher*, No. 22-38 (BAH), 2023 WL 3619417, at *4-8 (D.D.C. May 23, 2023) *United States v. Carpenter*, No. 21-305 (JEB), 2023 WL 1860978, at *3 (D.D.C. Feb. 9, 2023); *United States v. Sheppard*, No. 21-203 (JDB), 2022 WL 17978837, at *7-9 (D.D.C. Dec. 28, 2022); *United States v. Grider*, No. 21-0022 (CKK), 2022 WL 3030974, at *3 (D.D.C. Aug. 1, 2022). The Court should do the same here.

FACTUAL BACKGROUND

On January 6, 2021, Defendant Brian Bingham unlawfully entered the U.S. Capitol building and made his way to an area just outside the Speaker's Lobby, which leads directly to the House

Chamber. While there, Defendant took photographs and shouted at police officers guarding the entrance to the Speaker's Lobby, where another rioter had just been shot by law enforcement. Several minutes later, Defendant engaged officers in a physical altercation as those officers tried to clear the crowd out of the Capitol building. Despite verbal commands by officers to leave the building, Defendant confronted, grabbed, pushed, and struck a D.C. Metropolitan Police Department officer. As Defendant continued the altercation, several other officers came to assist and were eventually able to push Defendant out of a doorway. Later that same day, Defendant exchanged Facebook messages saying, "I got to manhandl[e] 5 cops and live to tell." For his conduct on January 6, Defendant is charged in a six-count indictment for violations of 18 U.S.C. § 231(a)(3), 18 U.S.C. § 111(a)(1), 18 U.S.C. § 1752(a)(1), 18 U.S.C. § 1752(a)(2), 40 U.S.C. § 5104(e)(2)(D), and 40 U.S.C. § 5104(e)(2)(G).

On October 25, 2023, pursuant to Federal Rule of Criminal Procedure 12.3, Defendant provided "notice that he may assert as a defense at trial that he was acting under actual or believed public authority at the time of the alleged offenses." ECF No. 57 at 1. Specifically, Defendant argues that "he believed he was directed and authorized to engage in the conduct set forth in the indictment by President Donald J. Trump and his various agents and representatives." *Id.* Defendant is presumably referring to the former President's speech at the Ellipse during the "Stop the Steal" rally on January 6. During that speech, the President falsely claimed the 2020 presidential election had been stolen and made several statements encouraging the rally-goers to march on the Capitol. *See Thompson v. Trump*, 590 F. Supp. 3d 46, 99-100 (D.D.C. 2022).

LEGAL STANDARD

"The public authority defense allows the defendant to seek exoneration based on the fact that he reasonably relied" on the "actual authority of a government official to engage him in a covert activity." *United States v. Fulcher*, 250 F.3d 244, 253-54 (4th Cir. 2001) (cleaned up). It "often arises

when defendants claim to have been working as government informants conducting drug deals or other clearly illicit conduct at the behest of their official handlers." *Eicher*, 2023 WL 3619417, at *2. "The public authority defense is narrowly defined." *United States v. Navarro*, No. 22-cr-200 (APM), 2023 WL 371968, at *15 (D.D.C. Jan. 19, 2023) (quoting *United States v. Alvarado*, 808 F.3d 474, 484 (11th Cir. 2015)). To that end, a defendant "will not be allowed to assert the defense, or to demand that the jury be instructed on it, unless he meets certain evidentiary prerequisites." *Id.*[1]

First, "a federal law enforcement officer must have actually authorized the defendant to commit the particular criminal act at issue, and the defendant must have reasonably relied on that authorization when engaging in that conduct." *Navarro*, 2023 WL 371968, at *15 (quoting *Alvarado*, 808 F.3d at 484). A defendant must show "that a government official affirmatively communicated to the defendant the official's approval of the conduct at issue," *Alvarado*, 808 F.3d at 485; *see also Sheppard*, 2022 WL 17978837 at *9 (describing as "undisputed" the element that a defendant must rely on a conclusion or statement of law by the relevant official").

Second, "the government official on whom the defendant purportedly relied must have actually had the authority to permit a cooperating individual to commit the criminal act in question." *Navarro*, 2023 WL 371968, at *15 (quoting *Alvarado*, 808 F.3d at 484). Indeed, "[t]he validity of this defense depends upon whether the government agent in fact had authority to empower the defendant to perform the acts in question. If the agent had no such power, then the defendant may not rest on the 'public authority.'" *United States v. Burrows*, 36 F.3d 875, 881-82 (9th Cir. 1994) (quoting *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994)).

[1] "[T]he D.C. Circuit has not articulated in a binding opinion either the elements of the [public authority defense (and its close cousin, entrapment by estoppel)] or the procedure by which a court should consider them." *Sheppard*, 2022 WL 17978837, at *7. However, for the reasons set forth herein, the Court need not determine the precise contours of the defense to find that the evidentiary basis for the defense is lacking here. *See id.* at *8.

The circuit courts that have considered this issue are unanimous in requiring actual—not apparent—authority. *See Fulcher*, 250 F.3d at 254 ("we adopt the unanimous view of our sister circuits that the defense of public authority requires reasonable reliance upon the actual authority of a government official"); *United States v. Sariles*, 645 F.3d 315, 318-19 (5th Cir. 2011) ("we hold that the public authority defense requires the defendant reasonably to rely on the actual, not apparent, authority"); *United States v. Pitt*, 193 F.3d 751, 758 (3d Cir. 1999), *abrogated on other grounds by Honeycutt v. United States*, 581 U.S. 443 (2017); *United States v. Holmquist*, 36 F.3d 154, 161 nn. 6-7 (1st Cir. 1994) (characterizing as "nonexistent" and "not a defense at all" the "'defense' of apparent public authority" based "on a mistaken but good-faith belief that one's conduct is authorized by the government"); *United States v. Duggan*, 743 F.2d 59, 84 (2d Cir. 1984) (declining to adopt view that "a defendant may be exonerated on the basis of his reliance on an authority that is only apparent and not real"); *cf. United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980) (noting in dicta that defendants' claim that CIA officer had conspired with them to murder an ambassador "would not have created a defense if appellants' participation in the crimes had been established," and therefore describing evidence of the officer's employment with the CIA as likely "immaterial").[2]

[2] By contrast, in *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) (per curiam), the court reversed the convictions of two defendants who participated in the burglary of Daniel Ellsberg's psychiatrist's office. The defendants claimed they did so at the behest of E. Howard Hunt, a long-time CIA agent who worked under the supervision of John Ehrlichman in the White House. *United States v. North*, 910 F.2d 843, 879 (D.C. Cir. 1990). The case featured fractured separate opinions from the three-judge panel. Judge Wilkey, half of the two-judge majority, wrote that a defendant's reasonable reliance on the "apparent authority" of a government official (Hunt) to authorize his conduct could make out a defense. *Id.* (quoting *Barker*, 546 F.2d at 949 (opinion of Wilkey, J.). But that portion of *Barker* was not the controlling rationale, and the panel majority in *North* subsequently rejected North's request for an instruction invoking his superiors' "apparent authorization of his action." *Id.* at 881. In any event, Judge Wilkey's application of reasonable reliance in *Barker*—where the defendants claimed that a government official and previous CIA supervisor authorized what they allegedly were told was a counter-espionage operation—has no analogue here.

ARGUMENT

Defendant's reliance on the affirmative defense of public authority is misplaced. The defense could not apply on these facts as a matter of law for several reasons. First, Defendant does not point to any statement or action by the former President implying that it was lawful to enter the restricted area around the Capitol. Second, no executive official had actual authority to ask Defendant to unlawfully enter the Capitol, obstruct police during a civil disorder, and assault a police officer. Third, the defense requires that Defendant's reliance be *reasonable*. Even if Defendant believed that former President Trump authorized him to engage in illegal conduct, it would have been objectively unreasonable to rely on such authority.

This Court should therefore preclude the defense in advance of trial. Courts have routinely rejected jury instructions or requests to put on evidence by defendants whose proffered evidence fails, as a matter of law, to meet the defense's requirements. *See, e.g.*, *United States v. Nichols*, 21 F.3d 1016, 1018 (10th Cir. 1994) (affirming denial of motion to appoint psychological expert to testify in support of entrapment-by-estoppel defense); *United States v. Weitzenhoff*, 35 F.3d 1275, 1290 (9th Cir. 1993) (upholding refusal to instruct jury on entrapment-by-estoppel defense); *United States v. Brebner*, 951 F.2d 1017, 1024-27 (9th Cir. 1991) (affirming exclusion of evidence purporting to raise the defense as a matter of law).

I. THE FORMER PRESIDENT DID NOT ADDRESS THE "LEGALITY" OF DEFENDANT'S ACTIONS.

The former President's statements did not in any way address the legality of Defendant's actions on January 6. The public authority defense is "available only when the official's statements or conduct state or clearly imply that the defendant's actions are lawful." *Carpenter*, 2023 WL 1860978, at *2 (quoting *Sheppard*, 2022 WL 17978837, at *9).

Here, Defendant does not point to any statement or action by the former President that would have rendered his actions lawful. As multiple Judges on this Court have held, the former President's

speech at the Ellipse "neither stated nor implied that entering the restricted area of the Capitol grounds and the Capitol building or impeding the certification of the electoral vote was lawful." *Sheppard*, 2022 WL 17978837, at *9; *see also Carpenter*, 2023 WL 1860978, at *3 ("Because the Court is persuaded that Trump's statements at the January 6 rally do not plainly state or imply that entering the Capitol or interfering with the electoral certification would be lawful, they cannot support an entrapment-by-estoppel or public-authority defense"); *Grider*, 2022 WL 3030974, at *3 ("Grider has identified no statement by former President Trump—or any other government official—assuring him that obstructive trespass on Capitol grounds was lawful"). The former President's words encouraged "those at the rally to march to the Capitol—nothing more—and do not address legality at all." *Sheppard*, 2022 WL 17978837, at *9. Because the former President's statements do not amount to an express or implied statement of legality, the public authority defense is not available.

II. THE FORMER PRESDIENT LACKED ACTUAL AUTHORITY TO ORDER DEFENDANT'S CRIMINAL CONDUCT.

The President lacks the actual authority to empower citizens to enter restricted Capitol grounds, impede police during a civil disorder, and assault police officers. The same goes for a President's agents and representatives. In rejecting an entrapment-by-estoppel defense for January 6 defendants, then-Chief Judge Beryl A. Howell recognized that:

> [A President] cannot, in keeping with his constitutional function and his responsibilities under Article II, lawfully permit actions that directly undermine the Constitution. Thus, a President cannot, within the confines of his constitutional authority, prevent the constitutionally mandated certification of the results of a Presidential Election or encourage others to do so on his behalf, nor can he direct an assault on the coequal Legislative branch of government. Were a President to attempt to condone such conduct, he would act *ultra vires* and thus without the force of his constitutional authority. . . . Put simply, even if former President Trump in fact [explicitly directed the rioters' actions,] his statements would not immunize defendants charged with offenses arising from the January 6 assault on the Capitol from criminal liability.

Chrestman, 525 F. Supp. 3d at 32-33.

The D.C. Circuit came to the same conclusion in *United States v. North*, 910 F.2d 843, 879 (D.C. Cir. 1990) (per curiam), *opinion withdrawn and superseded in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990). In the wake of the Iran-Contra scandal, Lieutenant Colonel Oliver North faced criminal prosecution for conduct that North said he had been directed to engage in by the National Security Advisor to President Reagan, allegedly with the President's acquiescence or approval. North was a high-ranking government official indisputably working on behalf of the Administration. His superior, the National Security Advisor, had not only condoned but engaged in similar misconduct; and his superior reported directly to the President. North subpoenaed the former President Ronald Reagan to be a witness at his trial. North also requested that the trial court use this jury instruction at his trial: "If you find that . . . North acted in good faith on a superior's apparent authorization of his action, and that his reliance was reasonable based on the facts as he perceived them, that is a complete defense . . . ." *North*, 910 F.2d at 879.

The D.C. Circuit flatly rejected North's claim that he could raise a good-faith defense based on the apparent or implied authorization by his superiors in the Executive Branch:

> North's suggested instruction, quoted above, goes so far as to conjure up the notion of a "Nuremberg" defense, a notion from which our criminal justice system, one based on individual accountability and responsibility, has historically recoiled. In the absence of clear and comprehensible Circuit authority that we must do so, we refuse to hold that following orders, without more, can transform an illegal act into a legal one.

Id. at 881. The D.C. Circuit similarly concluded that whether North "was following President Reagan's orders" was "immaterial" to whether North intended to "corruptly" obstruct Congress under 18 U.S.C. § 1505. *Id.* at 884. In doing so, the Court rejected North's "stunning" idea that he could "escape the criminal consequences of his otherwise unlawful acts merely by asserting that his reason for committing the acts was that he was 'following orders.'" *Id.* at 883-84.

Here, Defendant's claim of authorization is weaker than North's unsuccessful claim in virtually every respect. He has no connection to any of the individuals who he claims to have authorized his unlawful conduct. He is not a government official, let alone a government official engaged in high-level national security work in an administration. Instead, he is a member of the public who claims, without more, that "he was directed and authorized to engage in the conduct set forth in the indictment by President Donald J. Trump and his various agents and representatives." ECF No. 57 at 1. In any event, the President has no power to unilaterally "waive statutory law." *Chrestman*, 525 F. Supp. 3d at 33; *see Eicher*, 2023 WL 3619417, at *3 (explaining that the public authority defense is unavailable "where a government actor's statements constitute a 'waiver of law' beyond his or her lawful authority"). Because Defendant cannot show that the former President had actual authority to authorize his criminal conduct on January 6, the public authority defense is not available as a matter of law.

III. DEFENDANT'S RELIANCE WAS UNREASONABLE.

Even if one were to assume (counterfactually) that the former President's statements had specifically addressed Defendant's conduct, and even if the former President had the authority to instruct Defendant to break the law, which he did not, Defendant cannot demonstrate reasonable reliance. Any claim that Defendant sincerely believed he had been authorized to stop the certification of the 2020 presidential election or obstruct law enforcement in the process, would be objectively unreasonable.

"[A] defendant makes out a defense of public authority only when he has shown that his reliance on governmental authority was reasonable as well as sincere." *Burrows*, 36 F.3d at 882; *see Fulcher*, 250 F.3d at 254; *Sariles*, 645 F.3d at 318-19. This reasonableness requirement is necessary to ensure the "uniform enforcement of law"; otherwise, anyone could interpret a public official's actions or statements as authorizing them to engage in criminal conduct. *Burrows*, 36 F.3d at 882

(quoting *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970)). "[R]easonable reliance occurs" only "if 'a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries.'" *United States v. Lynch*, 903 F.3d 1061, 1077 (9th Cir. 2018) (quoting *United States v. Batterjee*, 361 F.3d 1210, 1216-17 (9th Cir. 2004); *United States v. Corso*, 20 F.3d 521, 528 (2d Cir. 1994) (adopting "sincerely desirous" standard).

Along with a mob of other rioters, Defendant took several unlawful steps, including entering the Capitol building, interfering with police trying to clear the building, and assaulting a police officer. Even if Defendant were able to show that he subjectively believed such conduct was lawful, that belief is, as a matter of law, objectively unreasonable. At a minimum, when Defendant grabbed and struck a police officer, any reasonable person in that circumstance would "[know] he was breaking the law" regardless of the former President's purported authority. *Corso*, 20 F.3d at 529. Defendant therefore cannot rely on the public authority defense. The Court should reject Defendant's attempt to deflect responsibility and accountability for his assaultive conduct.

IV. THE ENTRAPMENT-BY-ESTOPPEL DEFENSE IS ALSO UNAVAILABLE.

Because "[t]he difference between the entrapment by estoppel defense and the public authority defense is not great," in an abundance of caution, the Government submits that the entrapment-by-estoppel defense should be rejected as well. *Burrows*, 36 F.3d at 882; *see also United States v. Baker*, 438 F.3d 749, 753 (7th Cir. 2006) ("The elements that comprise the two defenses are quite similar.").

Courts have narrowly construed the entrapment-by-estoppel defense. The Supreme Court first adopted a due process defense to entrapment by public officials in *Raley v. Ohio*, 360 U.S. 423 (1959). In *Raley*, the Supreme Court set aside the convictions of three individuals who refused to answer the questions of the Ohio Un-American Activities Commission, in reliance on inaccurate representations by the Commission "that they had a right to rely on the privilege against self-incrimination" under

the Ohio Constitution. 360 U.S. at 425. The Court held that the convictions violated the Fourteenth Amendment's Due Process Clause because they involved "the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Id.* at 438.

A few years later, the Supreme Court revisited the subject in *Cox v. Louisiana*, 379 U.S. 559 (1965). *Cox* reversed the conviction of a protester who had led a group of 2,000 people in a civil rights march across the street from a courthouse and was later prosecuted for violating an anti-picketing statute prohibiting demonstrations "near" a courthouse. 379 U.S. at 560, 564-65. The statute did not define that term. *Id.* at 560. The protesters had been "affirmatively told" by "the highest police officials of the city, in the presence of the Sheriff and Mayor," that protesting across the street from the courthouse was lawful under that statute. *Id.* at 571. The Court determined that the statute's ambiguous term "near" necessarily "foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it," and thus found that the demonstrators "would justifiably tend to rely on [the police's] administrative interpretation of how 'near' the courthouse a particular demonstration might take place." *Id.* at 568-69. The Court concluded that the local officials' interpretation of "near" was a "limited administrative regulation of traffic" upon which the protesters reasonably relied. *Id.* at 569. But it also made clear that a defendant cannot reasonably rely on a law enforcement official's attempt to provide "a waiver of law," which the Court described as "beyond the power of the police." *Id.*

Distilling these cases, recent case law has limited the entrapment-by-estoppel defense to the narrow circumstances in which a defendant reasonably relies on a government agent's interpretation of a statute that, if accurate, would render the defendant's conduct non-criminal. "To win an entrapment-by-estoppel claim, a defendant criminally prosecuted for an offense must prove (1) that a government agent actively misled him about the state of the law defining the offense; (2) that the

government agent was responsible for interpreting, administering, or enforcing the law defining the offense; (3) that the defendant actually relied on the agent's misleading pronouncement in committing the offense; and (4) that the defendant's reliance was reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation." *United States v. Cox*, 906 F.3d 1170, 1191 (10th Cir. 2018); *see also Chrestman*, 525 F. Supp. 3d at 33 (adopting *Cox* test).

Here, Defendant does not satisfy any part of the entrapment-by-estoppel test. The former President (or any other government actor for that matter) never purported to interpret the scope of the criminal statutes Defendant is charged with violating. In other words, there is no evidence that the former President "affirmatively assure[d] the defendant that certain conduct [was] legal." *United States v. Howell*, 37 F.3d 1197, 1204 (7th Cir. 1994); *see also Chrestman*, 525 F. Supp. 3d at 32 (explaining that the defense in the January 6 context "would not be premised . . . on a defendant's confusion about the state of the law and a government official's clarifying, if inaccurate, representations. It would instead rely on the premise that a defendant, though aware that his intended conduct was illegal, acted under the belief President Trump had waived the entire corpus of criminal law as it applied to the mob").

CONCLUSION

For these reasons, the United States respectfully requests that the Court preclude Defendant's public authority defense.

Respectfully submitted,

MATTHEW M. GRAVES
UNITED STATES ATTORNEY
DC Bar No. 481052

By: */s/ Jake E. Struebing*
JAKE E. STRUEBING
Assistant United States Attorney
United States Attorney's Office

601 D Street, N.W.
Washington, DC 20530
D.C. Bar No. 1673297
(202) 252-6931
Jake.Struebing@usdoj.gov

CHRISTOPHER D. AMORE
Assistant United States Attorney
United States Attorney's Office
Capitol Siege Section Detailee
601 D Street, N.W.
Washington, DC 20530
N.Y. Bar No. 5032883
(973) 645-2757
Christopher.Amore@usdoj.gov

CERTIFICATE OF SERVICE

I certify that, on November 6, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification to all counsel of record.

By: */s/ Jake E. Struebing*

JAKE E. STRUEBING
Assistant United States Attorney
601 D Street, N.W.
Washington, DC 20530
D.C. Bar No. 1673297
(202) 252-6931
Jake.Struebing@usdoj.gov