IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 1:21-cr-00263-TSC
	)	
RUSSELL DEAN ALFORD	)	

MOTION IN LIMINE TO PRECLUDE GOVERNMENT ARGUMENTS FOR VICARIOUS CRIMINAL LIABILITY

The Defendant, Russell Dean Alford, moves in limine for an order barring the government from making any argument at trial that suggests the actus reus element of an offense may be satisfied, in whole or in part, by other persons' conduct. Such an argument would be contrary to the plain language of the statutes under which Mr. Alford is charged and would violate well-established principles of criminal liability. The government should not be permitted, in either its opening statement or its closing argument, to suggest that the jury may convict Mr. Alford based on vicarious liability for another person's conduct.

I. This motion could not reasonably have been filed by the deadline for motions in limine because the government first revealed its intention to argue vicarious responsibility in recent pleadings.

Before elaborating the grounds for this motion, Mr. Alford's counsel notes that the Court's deadline for motions in limine—August 3, 2022, *see* Doc. 48 at 1—has passed. But counsel asks the Court to accept the motion now, because it could not have been filed before the deadline. Only in the last two weeks has the government

made clear that it intends to argue that Mr. Alford may be convicted based, in whole or in part, on others' conduct:

- "[T]he nature of these crimes is collective action. It was the mob's collective action that disrupted Congress . . . ." Doc. 59 at 3 (filed Aug. 17, 2022).
- "[T]he mob's collective action disrupted Congress." *Id.*
- "[O]therwise 'peaceful' rioters, by lending their presence to the crowd, contributed to a mob that was disorderly and disruptive *collectively*." Doc. 70 at 9 (emphasis in original) (filed Aug. 24, 2022).

As the following sections explain, the government's theory of collective culpability is not the law, and Mr. Alford did not anticipate that the government would embrace a legally unsupported theory of the case. He asks the Court to allow this motion, notwithstanding the deadline, because this matter needs to be resolved before trial.

II. Mr. Alford is charged with offenses defined by reference to a defendant's personal conduct.

From the government's pleadings, Mr. Alford's counsel expects that the government will suggest the jury may consider other persons' conduct to find that the actus reus elements of Mr. Alford's charges are satisfied. For Counts Two through Four of the Information,[1] Doc. 8, those elements are

- "engag[ing] in disorderly or disruptive conduct" (Count Two), 18 U.S.C. § 1752(a)(2);
- "utter[ing] loud, threatening, or abusive language, or engag[ing] in disorderly or disruptive conduct" (Count Three), 40 U.S.C. § 5104(e)(2)(D); and

[1] Defense counsel does not expect the government to make this argument for the actus reus element of Count One, "enter[ing] or remain[ing] in any restricted building or grounds," 18 U.S.C. § 1752(a)(1).

- "parad[ing], demonstrat[ing], or picket[ing]" (Count Four), 40 U.S.C. § 5104(e)(2)(G).

Each of the offenses plainly focuses on a given defendant's conduct.

Section 5104(e)(2) is not to the contrary, despite the opening phrase, "An individual *or group of individuals* may not willfully and knowingly . . . ." (Emphasis added). Even if that phrase created ambiguity, the rule of lenity would dictate that it not be read to depart from the traditional principle that a person may only be criminally liable for his own conduct. *United States v. Cano-Flores*, 796 F.3d 83, 93–94 (D.C. Cir. 2015) ("[T]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." (quoting *United States v. Santos,* 553 U.S. 507, 514 (2008))). "In our jurisprudence guilt is personal," *Scales v. United States*, 367 U.S. 203, 224 (1961). "[H]olding one vicariously liable for the criminal acts of another may raise obvious due process objections," *United States v. Decker*, 543 F.2d 1102, 1103 (5th Cir. 1976), so courts do not read criminal statutes to impose accountability for others' conduct unless Congress has clearly expressed an intent to do so, *see id.*

Here, § 5104(e)(2) gives no reason to adopt such an anomalous interpretation. Instead, the most natural reading of the statute is that the reference to an "individual or group" simply reflects the kinds of acts described in § 5104(e)(2), which often may (but need not) involve multiple actors. The phrase cannot reasonably be read to suggest that a person would be guilty under § 5104(e)(2)(B) or (F), for example, if he did not himself "enter or remain in the gallery of either House of Congress," § 5104(e)(2)(B), or "engage in an act of physical violence," § 5104(e)(2)(F)—unless, as

the next section explains, the person conspired with or aided or abetted others, and was accountable for others' conduct on one of those bases.

III. Vicarious liability is exceptional in American criminal law and does not apply to ordinary criminal charges against individual defendants.

If members of a group conspire together or aid and abet one another, then principles of vicarious liability (conspiracy) or accomplice liability (aiding or abetting) can make a group member criminally liable for others' conduct. But the government has not charged a conspiracy, nor aiding or abetting. *See* Doc. 8. Liability for aiding or abetting requires "(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of the offense." *United States v. Raper*, 676 F.2d 841, 849 (D.C. Cir. 1982) (citing *United States v. Prince*, 529 F.2d 1108 (6th Cir. 1976); *United States v. Staten*, 581 F.2d 878, 886–87 (D.C. Cir. 1978); *United States v. Wiley*, 492 F.2d 547, 551 (D.C. Cir. 1973)).

The government's "collective action" theory doesn't appear to be that Mr. Alford actually aided or abetted another person who engaged in disorderly or disruptive conduct, or paraded, demonstrated, or picketed. It has not, for instance, incorporated 18 U.S.C. § 2 into the charges or requested an instruction on accomplice liability. *See generally* Docs. 8, 66. Instead, the government appears to argue for something more akin to vicarious liability, though it does not use those words.

The doctrine of vicarious liability allows a jury to convict a defendant without any proof that the defendant personally engaged in prohibited conduct. 2 Wayne R.

LaFave, *Substantive Criminal Law* § 13.4 (3d ed. Dec. 2021 Update) ("with vicarious liability . . . the need for a personal *actus reus* . . . is dispensed with, and there remains the need for whatever mental fault the law requires"). Vicarious liability is exceptionally convenient for prosecutors—and for that reason, it is exceptional. *Id.* ("in criminal law [vicarious responsibility] is a departure from the basic premise of criminal justice that crime requires personal fault"); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 751 (1989) (Brennan, J., dissenting) (noting that in criminal law, unlike civil law, "vicarious . . . liability would be extraordinary"). A version of it, so-called *Pinkerton*[2] liability, applies in conspiracy cases. *See United States v. Silvestri*, 409 F.3d 1311, 1335 (11th Cir. 2005) ("Each party to a continuing conspiracy may be vicariously liable for substantive criminal offenses committed by a co-conspirator during the course and in the furtherance of the conspiracy, *notwithstanding the party's non-participation in the offenses or lack of knowledge thereof.*" (emphasis added in *Silvestri*) (quoting *United States v. Mothersill,* 87 F.3d 1214, 1218 (11th Cir. 1996))).

But most often, vicarious liability applies to *corporate* defendants. *See* LaFave, *supra*, § 13.4 (under vicarious liability, "the defendant, generally one conducting a business, is made liable, though without personal fault, for the bad conduct of someone else, generally his employee"); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1118 (D.C. Cir. 2009) ("Corporations may be held liable for specific intent offenses based on the 'knowledge and intent' of their employees . . . [b]ecause a

[2] *Pinkerton v. United States*, 328 U.S. 640 (1946).

corporation only acts and wills by virtue of its employees . . . ."). It is not surprising, then, that the government does not expressly argue for vicarious liability in this case. But in practical terms, that is the import of its "collective action" arguments. The Court should bar the government from making such arguments at trial, as the next section explains.

IV. Allowing the government to suggest that Mr. Alford may be convicted based on others' conduct would invite the jury to misapply the law and render a verdict that does not reflect his personal culpability.

The government must prove beyond a reasonable doubt that *Mr. Alford personally* "engage[d] in disorderly or disruptive conduct" §§ 1752(a)(2), 5104(e)(2)(D), and "parade[d], demonstrate[d], or picket[ed]," § 5104(e)(2)(G). That is the clear requirement of the applicable statutes and a fundamental principle of criminal liability. The government's own proposed jury instructions reflect the same understanding. *See* Doc. 66 at 17–19 (stating that to convict, the jury must find that "*[t]he defendant* engaged in disorderly or disruptive conduct" and "*[t]he defendant* paraded, demonstrated, or picketed" (emphasis added)).

The government's arguments in its pleadings suggest otherwise, though. *See supra* p. 2. It should not be allowed to make, or even suggest, the same arguments at trial, because they could only confuse the issues by inviting the jury to misapply the law and convict without unanimously finding beyond a reasonable doubt that Mr. Alford's own conduct violated the law.

Mr. Alford has requested a jury instruction that explains the requirement of personal guilt and the general insufficiency of others' conduct, or mere presence, or

mere association to establish a defendant's culpability. Doc. 66 at 4. The government opposes the instruction. *See id.* at 3. But it accurately states the law and is not substantially covered by other proposed instructions. Moreover, it contains principles that are crucial to Mr. Alford's ability to defend against these charges. Under those circumstances, the instruction should be given. *See United States v. DeFries*, 129 F.3d 1293, 1309 (D.C. Cir. 1997). Just as important, the government should not be allowed to undercut the instruction by arguing that the jury can find actus reus elements satisfied by "collective action."

Accordingly, Mr. Alford asks the Court to enter an order barring the government from arguing or suggesting at trial that the jury may find any charged element to be satisfied by other individuals' conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, I electronically filed the foregoing via this Court's CM/ECF system, which will send notice of such filing to all counsel of record.

Respectfully submitted,

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