

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

UNITED STATES OF AMERICA

v.

No. 1:21-cr-118-RCL

**ERIC GAVELEK MUNCHEL and
LISA MARIE EISENHART,**

Defendants

**UNITED STATES' MOTION IN LIMINE TO PRECLUDE IMPROPER DEFENSE
ARGUMENTS AND EVIDENCE ABOUT LAW ENFORCEMENT**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby requests that the Court issue an order precluding the defendant from any of the following: (1) arguing any entrapment by estoppel defense related to law enforcement; (2) offering evidence or argument concerning any claim that by allegedly failing to act, law enforcement made the defendant's entry into the United States Capitol building or grounds or her conduct therein lawful; or (3) arguing or presenting evidence of alleged inaction by law enforcement unless the defendant specifically observed or was otherwise aware of such conduct.

1. This Court Should Preclude the Defendants from Arguing Entrapment by Estoppel

The defendants should be prohibited from making arguments or attempting to introduce evidence that law enforcement gave permission to the defendants to enter the U.S. Capitol. "To win an entrapment-by-estoppel claim, a defendant criminally prosecuted for an offense must prove (1) that a government agent actively misled him or her 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(s) actually relied on the agent's misleading pronouncement in committing the offense; and (4) that the defendants' 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. Chrestman*, 525 F. Supp. 3d 14, 31 (D.D.C. 2021) (emphasis added) (quoting *United States v. Cox*, 906 F.3d 1170, 1191 (10th Cir. 2018)).

In *Chrestman*, another judge of this Court rejected an entrapment by estoppel argument raised by a January 6th defendant charged with, *inter alia*, violations of 18 U.S.C. §§ 1512(c)(2), 1752(a)(1) and (b)(1)(A) and 1752(a)(2) and (b)(1)(A). Although *Chrestman* involved an argument that former President Trump gave the defendant permission to enter the Capitol building, the reasoning in *Chrestman* applies equally to an argument that a member of law enforcement gave permission to the defendants to enter the Capitol building. As another judge of this District reasoned in *Chrestman*, “*Cox* unambiguously forecloses the availability of the defense in cases where a government actor’s statements constitute ‘a waiver of law’ beyond his or her lawful authority.” *Chrestman*, 525 F. Supp. 3d at 32 (quoting *Cox v. Louisiana*, 379 U.S. 559, 569 (1965)).

Just as “no President may unilaterally abrogate criminal laws duly enacted by Congress as they apply to a subgroup of his most vehement supporters,” no member of law enforcement could use his authority to allow individuals to enter the Capitol building during a violent riot, and after “obvious police barricades, police lines, and police orders restricting entry at the Capitol” had already been put in place by the United States Capitol Police and the Secret Service. *Id.* at 32. Indeed, another judge of this Court ruled in another January 6, 2021, case that “the logic in *Chrestman* that a U.S. President cannot unilaterally abrogate statutory law applies with equal force to government actors in less powerful offices, such as law enforcement officers protecting the U.S. Capitol Building.” Memorandum and Order, *United States v. Williams*, No. 21-cr-377-BAH, at *2 (D.D.C. June 8, 2022).

Even if either or both defendants could establish that a member of law enforcement told him/her/them that it was lawful to enter the Capitol building or allowed her to do so, the defendants' reliance on any such statement would not be reasonable in light of the "obvious police barricades, police lines, and police orders restricting entry at the Capitol." *Chrestman*, 525 F. Supp. 3d at 32. Moreover, the defendants' actions and words belie any argument that they actually relied on any such statement by law enforcement when they made their decisions to unlawfully enter the Capitol building and grounds. On their approach to the U.S. Capitol building, which defendant Munchel recorded, the defendants observed and encountered law enforcement officers attempting to use police lines, chemical irritants, and "flashbang" munitions to stop people—like the defendants—from further penetrating the Capitol grounds. Despite these clear signs that their presence was unwelcome, the defendants were not deterred. Instead, they discussed the effectiveness of their masks against the police's tear gas. They urged other rioters forward. They discussed the likelihood that their actions could lead to federal prison sentences. They applauded other rioters for physically fighting with police officers. They climbed under scaffolding to access the stairs to the Upper West Terrace, where they entered the Capitol building through a doorway in which alarm sirens were audibly ringing. While inside the building, they commented on the likelihood that they would get arrested for their conduct. After they left the building, both defendants made statements to reporters in which they implicitly acknowledged that they had entered the building in contravention of the police and the law; in fact, they bragged about doing so.

It is clear from the defendants' statements that they knew their actions were not permitted or encouraged by police. Accordingly, both defendants should be prohibited from arguing that their conduct was lawful because law enforcement allegedly told either or both of them that it was.

2. This Court Should Preclude the Defendants from Arguing that Alleged Inaction by Law Enforcement Officers Made Their Conduct on January 6, 2021, Legal

In addition to prohibiting any defense arguments that law enforcement actively communicated to the defendants that entering the Capitol building or grounds was lawful, the Court should also bar the defendants from arguing that any failure to act by law enforcement rendered their conduct legal. The same reasoning that applied in *Chrestman* again applies here. That is, like the Chief Executive, a Metropolitan Police Officer or Capitol Police Officer cannot “unilaterally abrogate criminal laws duly enacted by Congress” through his or her purported inaction. *Chrestman*, 525 F. Supp. 3d at 33. An officer cannot shield an individual from liability for an illegal act by failing to enforce the law or ratify unlawful conduct by failing to prevent it. Indeed, another judge of this District expressly reached that conclusion in *Williams* a few months ago. *Williams*, No. 21-cr-377-BAH, at *3 (“Settled caselaw makes clear that law officer inaction—whatever the reason for the inaction—cannot sanction unlawful conduct.”). It should apply the same principle in this case. Accordingly, the defendants should be prohibited from arguing that their conduct was lawful because law enforcement officers allegedly failed to prevent it or censure it when it occurred.

3. This Court Should Preclude the Defendants from Arguing or Presenting Evidence of Alleged Inaction by Law Enforcement Officers Unless the Defendants Specifically Observed or Were Otherwise Aware of Such Conduct

The government acknowledges that the conduct of law enforcement officers may be relevant to the defendants’ states of mind on January 6, 2021. However, unless either defendant shows that, at the relevant time, he or she specifically observed or was otherwise aware of some alleged inaction by law enforcement, such evidence is irrelevant to either defendant’s intent. Federal Rule of Evidence 401 states that evidence is relevant if it “has any tendency to make a fact more or less probable ... and the fact is of consequence in determining the action.” Fed. R. Evid.

401. Here, if the defendants were not aware of law enforcement's alleged inaction at the time of their entry onto restricted grounds or into the Capitol building (or at the time they committed the other offenses charged in the Indictment), any alleged inaction would have no bearing on the defendants' states of mind and therefore would not meet the threshold for relevance. Again, another judge of this district adopted the same reasoning in granting an analogous motion *in limine* in another January 6th case. *See Williams*, No. 21-cr-377-BAH, at *3-4. The Court should reach the same conclusion in this case and should exclude testimony and evidence of any alleged inaction by the police as irrelevant, except to the extent either defendant shows that he or she specifically observed or was aware of the alleged inaction by the police when he or she committed the offenses charged in the Indictment.

CONCLUSION

For the reasons set forth herein, the United States respectfully requests that this Court preclude improper argument or evidence related to entrapment by estoppel, that law enforcement's alleged inaction rendered the defendants' actions lawful, and any evidence or argument relating to alleged inaction by law enforcement except to the extent that either defendant specifically observed or was otherwise aware of such conduct at the relevant time.

MATTHEW M. GRAVES
UNITED STATES ATTORNEY
D.C. Bar No. 481 052

/s/ Michael M. Gordon
MICHAEL M. GORDON
Assistant United States Attorney, Detailee
Florida State Bar No. 1026025
400 N. Tampa St., Suite 3200
Tampa, Florida 33602
michael.gordon3@usdoj.gov
Telephone: 813-274-6370

/s/ Rebekah Lederer

REBEKAH LEDERER

Assistant United States Attorney, Detailee

Pennsylvania State Bar No. 320922

601 D St., NW

Washington, D.C. 20001

rebekah.lederer@usdoj.gov

Telephone: 202-252-7012