UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-cr-134 (CJN)**
	:	
MARK SAHADY	:	
	:	
Defendant.	:	

MOTION IN LIMINE TO PRECLUDE ARGUMENTS AND EVIDENCE ABOUT ALLEGED LAW ENFORCEMENT INACTION

The government respectfully requests that the Court issue an order precluding the defendant, Mark Sahady, from engaging in any of the following at trial: (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 their conduct therein lawful; and (3) arguing or presenting evidence of alleged inaction by law enforcement officers unless the defendant specifically observed or was otherwise aware of such conduct.

This motion is necessary because of statements that the defendant made in an interview with The Gateway Pundit in March 2021. In this interview,[1] the defendant claims that the mob "was walking into the Capitol through unobstructed open doors" and that he "was approached by police who said that [he] would not be arrested or charged if [he left the building.]" For the reasons that follow, the Court should preclude the defendant from making these arguments or otherwise presenting this evidence at trial.

[1] Available at https://www.thegatewaypundit.com/2021/03/interview-veteran-facing-charges-capitol-protest-says-cops-told-wouldnt-arrested-left-lied/.

I. The Court Should Preclude the Defendant from Arguing Entrapment by Estoppel.

The defendant should be prohibited from making arguments or attempting to introduce evidence that law enforcement permitted the defendant to enter, and later leave, the U.S. Capitol without consequence. "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. 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*, Chief Judge Howell rejected an entrapment by estoppel argument raised by a Capitol riot defendant. 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 law enforcement permitted the defendant to enter the Capitol building. As reasoned in *Chrestman*, Supreme Court precedent "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, Chief Judge Howell recently elaborated in a different 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." *United States v. Oliveras*, No. 21-cr-738 (BAH), 2023 WL 196525, at *1 (D.D.C. Jan. 17, 2023).

Even if the defendant could establish that a member of law enforcement indicated that it was lawful to enter the Capitol building or allowed him to enter or depart without consequence, the defendant's reliance on any such statement or allowance 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. The Parliamentarian Door, through which the defendant gained entry, was breached after a rioter used a crowbar to smash the glass in the door.

Figure 1: Screenshot from Open-Source footage

As depicted in the still image above, no law enforcement officers were present at the exterior of the door at this time—only members of the mob. Moreover, a piercing alarm sounded as the mob, including the defendant, swarmed the doorway. Indeed, the first rioters to enter through the door were confronted by a group of officers inside the building, who attempted to prevent the mob from entering further.

Figure 2: Screenshot from USCP CCTV footage

After the door was broken open, the officers retreated down the hallway, presumably to regroup and to get reinforcements. Less than three minutes later, when the defendant entered through the Parliamentarian Door, there were still no law enforcement officers present in the immediate vicinity of the exterior or interior of the Parliamentarian Door and the surrounding area of the Northwest Courtyard.

Figure 3: Screenshot from Open-Source footage

These facts clearly contradict any argument by the defendant that he was allowed to enter or remain in the Capitol building.

To the extent the defendant attempts to introduce evidence of statements by law enforcement *after* the defendant had already unlawfully breached the Capitol building, such statements should also be precluded. For one, to make an estoppel argument, the defendant must show that he "actually *relied* on the" statement "*in committing the offense*[.]" *Chrestman*, 525 F. Supp. 3d at 31 (emphasis added). Therefore, to the extent the defendant contends that law enforcement's alleged assurances actually *prevented* him from continuing to engage in unlawful conduct after he already entered the building, those assurances are completely irrelevant to a cognizable defense since the charged offense had already been committed. Accordingly, any such evidence or argument should be excluded. *See United States v. Russell Dean Alford*, No. 21-CR-263 (TSC), Dkt. Entry 53 (granting the government's motion *in limine* to preclude evidence of entrapment by estoppel except if the government opens the door to such evidence); *United States v. Anthony Robert Williams*, No. 21-CR-377 (BAH), Dkt. Entry 87 (granting the government's

motion *in limine* to preclude evidence of entrapment by estoppel).

II. The Court Should Preclude the Defendant from Arguing that Alleged Inaction by Law Enforcement Officers Made His Conduct on January 6, 2021, Legal.

In addition to prohibiting any defense argument that law enforcement communicated to the defendant that entering the Capitol building or grounds was lawful, the Court should also bar the defendant from arguing that any failure to act by law enforcement rendered his conduct legal. The same reasoning that applied in *Chrestman* again applies here—just like the President, 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, "[s]ettled caselaw makes clear that law officer inaction—whatever the reason for the inaction—cannot sanction unlawful conduct." *Oliveras*, 2023 WL 196525, at *2. This Court should apply the same principle in this case. Accordingly, the defendant should be prohibited from arguing that his conduct was lawful because law enforcement officers allegedly failed to prevent it or censure it when it occurred.

III. The Court Should Preclude the Defendant from Arguing or Presenting Evidence of Alleged Inaction by Law Enforcement Officers Unless the Defendant Specifically Observed or Was Otherwise Aware of Such Conduct.

The government acknowledges that the conduct of law enforcement officers may be relevant to the defendant's state of mind on January 6, 2021. However, unless the defendant shows that, at a relevant time, he specifically observed or was otherwise aware of some alleged inaction by law enforcement, such evidence is not germane to the defendant's intent. 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 defendant was not

aware of law enforcement's alleged inaction at the time of his entry onto restricted grounds or into the Capitol building (or at the time he committed the other offenses charged in the Information), any alleged inaction would have no bearing on the defendant's state of mind and therefore would not meet the threshold for relevance. *See Oliveras*, 2023 WL 196525, at *2. Accordingly, the Court should exclude testimony and evidence of any alleged inaction by the police as irrelevant, except to the extent the defendant shows that he specifically observed or was aware of the alleged inaction by the police when he committed the offenses charged in the Superseding Information.

CONCLUSION

For the reasons set forth herein, the government respectfully requests that this Court preclude improper argument or evidence related to entrapment by estoppel, that law enforcement's alleged inaction rendered the defendant's actions lawful, any evidence or argument relating to alleged inaction by law enforcement except to the extent that the defendant specifically observed or was otherwise aware of such conduct at the relevant time, and any evidence or argument concerning alleged assurances from law enforcement officers regarding potential arrest or prosecution.

Respectfully submitted,

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