IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Crim. No.21-cr-447-05(CJN)**
v.	:	
	:	
OLIVIA MICHELE POLLOCK	:	
	:	

(defendant)

RESPONSE TO THE GOVERNMENT'S MOTION IN LIMINE AT ECF #170

ARGUMENTS

Olivia Pollock, through undersigned counsel objects to each section of the Government's in limine motion at ECF#170. Defendants Steve Perkins and Joshua Christopher Doolin join the arguments she puts forth herein.

A. Entrapment by Estoppel and a Public Authorities Defense

Ms. Pollock joins the previously filed arguments by Joshua Christopher Doolin through his counsel on this issue in ECF # 134, as well as additional arguments which will be filed in a separate pleading by counsel for Mr. Doolin.

B. Any Inaction by Law Enforcement Officers Defense

Ms. Pollock joins any arguments put forth by the co-defendants on this issue as it relates to entrapment-by-estoppel.

Additionally, the ability to put forth arguments of the effect of "law enforcement inaction" should be permitted as it forms a relevant defense. Such

evidence goes to important elements of the charged offenses. The charges in this case allege the defendants were present on Capitol Grounds around 1:56 p.m. However, by 12:58 p.m. signs, and barriers were moved or dismantled. Hence, by the time the Government alleges Ms. Pollock arrived at the base of the West side lawn of the Capitol, there were no signs or barriers in place. Any "inaction" on the part of law enforcement is relevant to "intent" and "knowledge" on the part of Ms. Pollock. The charges she faces require a mens rea and hence intent and knowledge are relevant factors the fact finder should consider. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and … the fact is of consequence in determining the action." Fed. R. Evid. 401. Not being able to bring out "police inaction" during cross examination as well as to argue it in closing would vitiate Ms. Pollock's right to put on a defense at trial in violation of the Sixth Amendment.

C. First Amendment Rights of Free Speech and or Conduct is a Proper Defense

The Government asserts that Ms. Pollock should not be permitted to present a defense that the actions she took on the grounds of the Capitol in protest were protected by the First Amendment.[1] The First Amendment provides for "freedom of speech" and "right of the people peaceably to assemble, and to petition the

[1] In the Government's In Limine Motion they specifically highlight Ms. Pollock's interview on social media.

Government for a redress of grievances." Nonviolent protest on Capitol Grounds is protected by the First amendment.[2]

The Government acknowledges in their pleading that in an interview Ms. Pollock described her actions on January 6, as First Amendment expressive conduct on the steps of the Capitol. Words of discontent and words in support of a political candidate are "expressive conduct." Free and open political debate is a bedrock principle on which the United States was founded. See *New York Times Co., v. Sullivan*, 376 U.S. 254 (1964). "[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials." *Id*. at 270.

In *Jeanette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1973) (three-judge panel) *aff'd* 409 U.S. 972 (1972), the Court struck down a title 40 statute prohibiting parading/demonstrating on the Capital Grounds. The Court concluded that the Capitol Grounds are a public forum, hence the act of parading, demonstrating or moving in assemblages in the Grounds per se could not constitute a criminal offense. *Id*. 342 F. Supp. At 584. The Supreme Court summarily affirmed the ruling in *Lederman v. United States*. See *Lederman v. United States*, 291 F.3d 36, 41 (D.C. Cir. 2002) ("The Supreme Court summarily affirmed, making *Jeannette Rankin Brigade* binding precedent."); see also *Kroll v.*

[2] A proposed First Amendment jury instruction will be provided to the Court with all other proposed jury instructions. See *Matthews v. United States*, 485 U.S. 58, 63 (1988) ([a]s a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.").

United States Capitol Police, 590 F.Supp. 1282, 1289 (D.D.C. 1983) ("The United States Capitol is a unique situs for demonstration activity"), *rev'*d on other grounds, 270 U.S. App. D.C. 136, 847 F.2d 899 (D.C. Cir. 1988); *Farina v. United States*, 622 A.3d 50, 55 (D.C. 1993) (Rogers. J.) (describing the Capitol Grounds as "a quintessential public forum."); Cf. *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed. 2d 697 (1963) (characterizing demonstrations on the grounds of a state legislature to be "an exercise of these basic constitutional rights in their most pristine and classic form"); *Adderley v. Florida*, 385 U.S. 39, 41, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966) ("Traditionally, state capitol grounds are open to the public.").

The Government appears to concede that the Capitol Grounds are traditionally a public forum, but states that on January 6, the grounds were nevertheless "restricted" from public access. Assuming they were "restricted" the restrictions did not constitute a lawful "time, place and manner regulation[ ]." *Mahoney v. Doe*, 642 F.3d 1112, 1117 (D.C. 2011). Laws that "restrict expressive conduct in a traditional public forum" may only do so if "the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications." *Id.*, quoting *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). [3] Additionally, an absolute prohibition on a particular type of expression must be

[3] The cases the Government cites in their motion all recognized these factors and weighed them before determining whether First Amendment rights had been violated.
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narrowly drawn to accomplish a compelling government interest. See supra, e.g., *Grace* at 176, 103 S.Ct. 1702.

In *Lederman*, the D.C. Circuit declared facially unconstitutional a "regulation banning leafleting and other 'demonstration activit[ies]' on the sidewalk at the foot of the House and Senate steps on the East Front of the United States Capitol." 291 F.3d at 39 (alterations in original). There the Court found the law at issue failed the narrow-tailoring analysis. As found in *Lederman*, the "restrictions," around the Capitol on January 6, were similarly not narrowly tailored to protect governmental interests and the prosecution here asserts no compelling government interest. The "restricted" area on January 6 was no less restrictive than in *Lederman*. Rather, here the Government has stated that on January 6, the whole Capitol Grounds around the Capitol building were "restricted."

Additionally, the restrictions were not content-neutral. On January 6, 2021, it was understood that persons who were against the certification of the electoral college intended on coming to the Washington, D.C. area and specifically to the mall to hear former President Trump speak as well as other politicians with similar views who were to speak on the Capitol Grounds. Hence, it was known exactly who would be coming to the area and the restriction was aimed at that content.

Further, if the Government were to establish that the Defendant entered the grounds, and/or obstructed, influenced or disrupted Government business merely through protected speech, without any other harm, then the mens rea and actus rei of the charges would completely overlap with the intent to engage in protected

parading/demonstrating under *Jeanette Rankin Brigade* and *Lederman*. By definition, an as-applied First Amendment challenge specifically clarifies that a defendant cannot be convicted of the offense despite the fact that the Government has proven he has committed its elements, as the application of the criminal statute in those specific circumstances reaches expressive activity. E.g., *United States v. Caputo*, 201 F. Supp.3d 65, 71 (D.D.C. 2016) (citing *Edwards v. Dist. of Columbia*, 755 F.3d. 996, 1001 (D.C. Cir. 2014)). It is fact-dependent, hence it will depend upon what the Government proves at trial and whether the Defendant's activity went beyond the expressive activity protected in *Jeannette Rankin Brigade/Lederman*.

Depriving Ms. Pollock of a First Amendment defense would violate her "constitutional right to counsel and to a trial," as those rights "encompass a right to have [the defendant's] theory of the case argued vigorously to the fact finder." *United States v. De Loach*, 504 F.2s 185, 189 (D.C. Cir. 1974). See also *United States v. Hsia*, 176 F.3d 517, 525 (D.C. Cir 1999) (finding defendant's First Amendment claims as a "basis for a defense at trial" rather than support for a dismissal of the indictment).

D. Introduction of Evidence

The Government has concerns about the defense introducing evidence of selective prosecution. The defense does not intend to argue selective prosecution,

however, any otherwise admissible evidence should not be precluded from coming in.

Likewise Ms. Pollock does not intend through counsel to argue for a not guilty verdict based upon potential prison time. However, any such evidence, if otherwise relevant should not be precluded.

E. Self-Defense or Defense of Others are Viable Defenses

Ms. Pollock objects to the Government's motion to preclude her from arguing self-defense or defense of others. (See ECF 170, argument E). She provides the following argument as well as joins the previously filed arguments by Joshua Doolin through his counsel on this issue in ECF # 134.

Firstly there is no requirement that Ms. Pollock raise a claim of self-defense or defense of others prior to trial. Unlike an affirmative defense of public authority which requires pre-trial notice, the Federal Rules of Criminal Procedure require no such advance notice for self-defense or defense of others. At this juncture Ms. Pollock neither acknowledges nor denies her intent to advance a self-defense or defense of others claim. However, Ms. Pollock should not be precluded from presenting such defenses at trial. The Government has not presented any case law to suggest that self-defense or defense of others may not be presented to defend against a charge of 18 U.S.C. §111 or any of the other charges Ms. Pollock faces.

In fact, circuit courts have found that a defendant charged under 18 U.S.C. §111 may assert, as an affirmative defense, a theory of self-defense "which justifies

the use of a reasonable amount of force against an adversary when a person reasonably believes that he is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger." See *United States v. Middleton*, 690 F.2d 820, 826 (11th Cir. 1982). Similarly, the Ninth Circuit has permitted an affirmative defense of self-defense against a federal law enforcement official when a defendant has a reasonable belief that the use of force was necessary to defend against the immediate use of unlawful force and that the use of force was no more than was reasonably necessary in the circumstances. See *United States v. Urena*, 659 F.3d 903, 907 (9th Cir. 2011).

In *Nelson v. United States,* 580 A.2d 114, 117 (D.C. 1990), the District of Columbia Court of Appeals also found self-defense is permitted when a police officer uses excessive force in carrying out their official duties whether the charge is simple assault or assault on a police officer. In a charge of assault on a police officer, "[i]f the officer used excessive force and the defendant responded with force that was 'reasonably necessary under the circumstances' for self-protection, the defendant will have acted with 'justifiable and excusable cause' and the government will have failed to prove its case.'" *Id.*

Hence, self-defense and that of defense of others are viable offenses here and Ms. Pollock should not be precluded from presenting such defenses if the facts provide such a basis.[4]

[4] These arguments also apply to the other pending charges as well.

F. Good Conduct Character Evidence

The Sixth Amendment guarantees a defendant the right to present a defense by calling witnesses on his or her own behalf. See *Taylor v. Illinois,* 484 U.S. 400, 409, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); United States v. Wilson, 160 F.3d 732, 742 (D.C.Cir. 1998). Ms. Pollock may decide to present witnesses to testify about her good character pursuant to Fed.R.Evid. 404(a)(2), Rules 405 and 608. To preclude her from presenting character witnesses would violate her right to present a defense pursuant to the Sixth Amendment.

Ms. Pollock joins the response put forth by Mr. Doolin in ECF #134.

Respectfully submitted,

OFFICE OF ELITA C. AMATO

/s/

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CERTIFICATE OF SERVICE

I hereby certify that this Response in Opposition is filed electronically through the ECF filing system on this 27th day of January 2023, thereby, providing service electronically upon all parties in this case including Government counsel.

/s/

Elita C. Amato