UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-CR-536 (CKK)**
	:	
KAROL J. CHWIESIUK,	:	
AGNIESZKA CHWIESIUK,	:	
	:	
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 defendants Karol J. Chwiesiuk and Agnieszka Chwiesiuk 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 defendants' entry into the United States Capitol building or grounds or their conduct therein lawful; or (3) arguing or presenting evidence of alleged inaction by law enforcement unless the defendants specifically observed or were otherwise aware of such conduct. On April 24, 2023, the government conferred with defense counsel. Both Karol J. Chwiesiuk and Agnieszka Chwiesiuk are determining their position and will file a response to the docket.

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

This Court should prohibit the defendants from making arguments or attempting to introduce evidence that law enforcement gave the defendants permission to enter the U.S. Capitol on January 6, 2021. "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*, 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 ma-y 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, just last week, 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 the defendants could establish that a member of law enforcement told them that it was lawful to enter the Capitol building or allowed them 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 Chwiesiuks' actions belie any argument that they relied on any such statement by law enforcement when they decided to unlawfully enter the Capitol's restricted grounds and the Capitol itself. The Chwiesiuks advanced on the Capitol building via the northwest stairs, and once they reached the top, they made their way through a crowded plaza to the broken-out Senate Wing door. Immediately after entering the Capitol, the Chwiesiuks stopped to take selfies and photographs. United States Capitol Police surveillance video does not show them approaching or interacting with any law enforcement officer at any time while they are inside the U.S. Capitol.

In fact surveillance video shows the Chwiesiuks entering the Capitol at approx. 2:57 p.m. At approx. 2:58 p.m., Karol Chwiesiuk received a text message from an individual stating, "Wonder if I'll see you on tv". K. Chwiesiuk responded with a selfie showing him inside of Sen. Jeff Merkley's hideaway office. The individual asked, "Where's your maga hat?" to which K. Chwiesiuk responded, "We inside the capital lmfao". The individual then stated, "I know. Guns were drawn in the chamber once window was broken. Shithousery." K. Chwiesiuk then replied, "Yeah I was there". ECF No. 1-1, pp. 9-10. Accordingly, the Chwiesiuks should be prohibited from arguing that their conduct was lawful because law enforcement allegedly told them it was.

2. This Court Should Preclude the Defendant 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*. *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."). This Court should apply the same principle in this case. Accordingly, 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 Defendant from Arguing or Presenting Evidence of Alleged Action or Inaction by Law Enforcement Officers Unless the Defendants Specifically Observed or Were Otherwise Aware of Such Conduct

The government acknowledges that the conduct of certain police officers may be relevant to the certain defendants' state of mind on January 6, 2021. However, unless the Chwiesiuks can show that, at a relevant time, they specifically observed or were otherwise aware of some alleged action or inaction by law enforcement, such evidence is irrelevant to the defendants' intent. Fed. R. Evid. 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 he committed the other offenses charged in the Information), any alleged inaction would have no bearing on the defendants' state of mind and therefore would not meet the threshold for relevance. Another judge of this district adopted the same reasoning in granting an analogous motion *in limine* on February 17, 2023. *See United States v. Rhine*, Crim. No. 21-CR-687 (RC), 2023 U.S. Dist. LEXIS 27764, at *34-35 (D.D.C.). 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 the Chwiesiuks are able to show that they specifically observed or were aware of the alleged action or inaction by the police when they committed the offenses charged in the Information.

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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 the defendants specifically observed or were otherwise aware of such conduct at the relevant time.

Respectfully submitted,

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DATED: March 24, 2023 By: _____

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