UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **CYNTHIA BALLENGER, and CHRISTOPHER PRICE,** **Defendants.**	**Case No. 1:21-cr-00719 (JEB)**

REPLY IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND POST VERDICT RULE 33 MOTION FOR A NEW TRIAL

Comes now by and through undersigned counsel file this Reply in Support of Defendant's Motion for Judgement of Acquittal [ECF 108] and Post Verdict Rule 33 Motion for a New Trial [ECF 109] ("Defendants' Reply").[1] The Government's Opposition to Defendants' Motion for New Trial and Renewed Motion for Judgment of Acquittal ("Gov't Opp.")[ECF 112] fails to address or contest major portions of both of defendants' original memoranda. With respect to Def. Memo in Supp. Judgment of Acquittal, the Gov't Opp. does not appear to address or directly contest at least the following arguments:

- Analysis and case law concerning the general legal standard for motions under Federal Rule of Criminal Procedure 29. Def. Memo. in Supp. Judgment of Acquittal at 1.
- Analysis and case law supporting that rules of statutory construction limit any broad reading of ambiguous or uncertain statutory language. *Id.*

[1] These motions are accompanied by legal memorandum, filed as ECF Nos. 108-1 ("Memo in Supp. Judgment of Acquittal") and ECF No. 109-2. ("Memo in Supp. New Trial")

- Statement and argument that the parties did not agree on important elements of law and that Defendants' arguments from Defendants' Memorandum of Points and Authorities Stating Concerns with Certain Government Jury Instruction Requests and Support for Defense Jury Instruction Requests and Support for Defense Jury Instruction Requests [ECF 99-1] are relevant and preserved. *Id.* at 4-5.
- Analysis and argument that there is insufficient evidence to support the government maintained 18 U.S.C.§ 1752(c) restricted area through actual signs and barriers on the Capitol Grounds or the North, Northwest, or Part of the West Terrace that the Prices were on during the time the Prices were there. *Id.* at 7-11.
- Analysis and arguments related to the terms "disorderly or disruptive conduct" specifically by comparing terms like "entering or remaining" versus "disorderly or disruptive conduct" under 18 U.S.C.§1752 and 40 U.S.C.§ 5104(e); arguing "disruptive conduct" must be of a similar nature to "disorderly conduct"; and reviewing related rules of statutory construction and case law on statutory construction. *Id.* at 17-19.
- The arguments that federal regulations define "disorderly conduct" in a more limited manner. *Id* at 19.
- The summary of the Court's interpretation and findings related to the *actus reus* of disorderly and disruptive conduct and demonstrative conduct. *Id.* At 13 and 22.
- The statutory construction and argument that "in fact" under Count 2 requires cause in fact and, thus, the government's drop of water theory is insufficient in the instant case where the Prices were not even present with the proceedings were suspended. *Id.* at 28-31.

- The reference and use of *United States v. Matthew Martin* Case No. 1:21-cr-00394-TNM, Transcript [Martin ECF 41] which comes to different results on the law, including on Counts 2-4. *Id* at 25, 28.
- The arguments that the Court's approach to the term "demonstrate" is inconsistent with law including multiple provisions of the Constitution. *Id*. at 25.
- The analysis that the sign on the lone bike rack, that was not even obstructing a path or describing an area, appeared on video for only a fleeting 0.12 seconds and off to the side of the picture; no reasonable person would have observed it. *Id* at 26
- The analysis that neither pictures nor video of the Upper Northwest and West Terrace at the time do not show any tear gas, supporting that the Chris Price statement was kidding and not fact. Id at 37.
- The analysis and case law that *mens rea* must be about actual conduct. *Id*. at 38-39.
- The analysis that many people are observed having conversations with police in the Senate Wing Door Foyer under Gov meaning the alarm was not so loud as to prevent such conversations and that such conversations appear. *Id*. at 42-43; Exhibit 202(D).

I. The Gov't Opp. Fails to Show Sufficient Evidence to Support the Court's Finding that the Prices Entered or Remained in a Restricted Areas Defined Under 18 U.S.C. § 1752(c) For the Time and Areas the Prices Walked

To convict under 18 U.S.C. § 1752(a)(1) ("Count 1"), the Court must find under 18 U.S.C. § 1752(c) that there are postings, a cordoned off area or other restrictions at the time of the alleged violations of the Prices. The Gov't Opp. refers to Gov't Exhibit 501 which is meaningless for the purpose of the time and location of the Prices. Defendants have shown, by evidence, that the red perimeter in Exhibit 501 did not exist after 2:30 pm. Def. Memo in Supp. Judgment of Acquittal at 7-11; Defense Exhs 210, 215, 216, 401; Gov't Ex. 701. The statute

does not provide legal status to the ghost of a red perimeter. The Court's current assertion to the contrary should be reconsidered.

Similarly, the Defense proved that while there were bicycle racks and police forming a cordon to restrict entrance to the Upper North East Terrace for a time, the policemen left and the bicycle racks were set to the side by others before the arrival of the Prices. Def. Memo in Supp. Judgment of Acquittal at 7-11; Defense Exhs. 215, 216. Accordingly, the terrace was not legally a posted, cordoned off or otherwise restricted area after this time and the Court's reference to "being" on the Upper Terrace as criminal conduct is not supported by sufficient evidence or law.

The Gov't Opp. ignores and, thus, does not contest, the analysis and argument that there is insufficient evidence a protectee was on or was expected be on the West Grounds or the Upper Terrace North East, Upper North Terrace, or Upper Terrace West as required for restricted grounds under 18 U.S.C. § 1752(c). *Id.* at 11.

With respect to the open Senate Wing Door, the Court declares the whole Capitol building restricted without specific analysis of evidence regarding the open Senate Wing Door and specific facts attendant at the time. A building may be restricted, but an initial unrestricted area inside a door of a public building is the usual case in America. Frequently, security restrictions are applied and communicated after one enters a public building. Entering a public building does not mean one will be allowed to go further. That was the case here and the Prices committed no crime by following instructions when provided. The police were there in great number. The police formed cordons which did not include a small envelop of space in the foyer/small hallway. The police could have easily posted police outside the door in the instant case but failed to do so.

The Gov't Opp. government tries to argue a list of "other restrictions" to entering the door even though the police lines and operation permitted entry. In this case "other restriction" must identify the entire foyer inside of open Senate Wing Door as restricted at the time of the Prices entry. The government confuses "other restrictions" under 18 U.S.C. § 1752 (c) with potential indicators that could influence *mens rea* based on the specific path of defendants.

Random barriers not in the right location, and nowhere near the Senate Wing Door, cannot be "other restrictions" that restrict an open Senate Wing Door. Potential events like "flash bombs" where there is no evidence of occurrence at the time and location, are not "other restrictions" for purposes of the Senate Wing Door Foyer. Importantly, these alleged "other restrictions" cannot reasonably override the actual operation of the police cordon or cordons at that location. In the instant case, a cordon is how the police line-up and what they say. A police cordon indicates to anyone that one side of the police line is acceptable but crossing that line is not. That is the universal understanding of police lines in America. In the instant case, an alarm does not change the alignment of the police or their instructions or lack of instructions.

Defendants counter the much vaunted "deafening" statement of Lt Rossi by 1) specific analysis of the many conversations actually occurring during the time the Prices are in the foyer; [Def. Memo in Supp. Judgment of Acquittal at 42-42; Gov't Ex. 202(D)]; and 2) actual sound on video indicating people can hear ordinary conversation that is not shouted [Gov't Ex. 205, 207].

Indeed, by defendants' informal estimate and as shown in the Gov't Ex. 202 (D) about 100 people entered the open door during this time only to end up standing in line to exit. Contrast this to when a police officer simply went up to the open door and indicated to people not to come, at least by hand gestures. Defense Ex. 201. No one came in after this police officer

took that step. There is no evidence that the Prices would not have followed the instruction of the police officer and no evidence that they did not.

Note also the point made by the government that the *actus reus*, the act must be voluntary. Gov't Opp. footnote 3. The Prices got in line to exit after a very short time. The time it takes to exit was not voluntarily "remaining". The Prices were fulfilling the ordinary convention of civilized behavior by standing in line to exit and not trying to push their way out. "Disorderly or disruptive" conduct cannot include peacefully standing in line to exit. Thus, not only was that part of the foyer not restricted under 18 U.S.C. § 1752(c) at the time, even if the Prices gained further knowledge, the Prices acted properly in response and did not voluntarily remain. It was not feasible or reasonable to create a separate line to exit or turn on the spot and walk in the opposite direction, because that would involve pushing.

II. The Government Offers No Credible Legal Support and Insufficient Evidence for the Court's Transformation of Peacefully Walking and Standing in Line into Criminal Disorderly or Disruptive Conduct Under 18 U.S.C. § 1752(a)(2) (Count 2) and 18 U.S.C. § 5104(e)(2)(D)(Count 3)

The Gov't Opp. does not directly respond to Defendants' legal challenge, arguments of statutory construction, and application of Constitutional principles to the Court's open ended and basically unexplained "mob": construct. No response to the extensive analysis of comparison of specific statutory terms. No response the rules of construction flowing from avoiding Constitutional issues and observing the rule of lenity. The Court and the government spins mere presence into 4 charges violating rules of multiplicity as Defendants argued in their Memorandum in Support of Defendants' Motion to Dismiss. [ECF 54-1] at 37-38. Defendants further argue a multiplicity violation here based on using the same peaceful walk and standing in line to constitute 4 convictions. The Gov't Opp. fails to address any arguments made from pp 17-

23. The government response is some varying combination of "mere presence", "joined a mob", or "[t]hey were all raindrops in the storm." Trial Tr., March 21, 2023, at 137:18. This approach ignores and, effectively, concedes, without countering, for example, the importance of *Bittner v United States* 143 S. Ct. 713 (2023); *Connally v. General Construction Company,* 269 U.S. 385, 391, 46 S.Ct 126, 127, 70, L.Ed. 322 (1926) *Dowling v. United States*, 473 U.S. 207, 213 (1985). *Scales v. United States*, 367 U.S. 203, 81 S. Ct. 1469 (1961); and *Burrage v. United States*, 571 U.S. 204, 210-219 (2014).

The government recharacterizes the Court statement and prior governments arguments. In the recent flavor, the government argues that neither it nor the Court meant anything by "join the mob" or "be part of the mob" other than the construct that "mere presence" with other people poses a risk. The proceedings were stopped well before the Prices arrive so the risk of disruption must mean the same poses a risk of further delay. Even assuming arguendo that peaceful people who never disobeyed a police officer are a threat. That is only reason for police to ask the Prices to not to enter or to leave, not to charge people with "disorderly or disruptive" conduct or "demonstrative" conduct.

The Government supports this illegal analysis arguing, for example, that "mere presence" suffices for the *actus reus* requirement of disorderly or disruptive conduct. Gov't Opp. at 8. The government then downplays the Court's analysis concerning the relationship of the Prices to an alleged "mob". *Id.* at 9. In this flavor of argument, the construct of a mob does not appear to require any "joining" by defendants. It would be the job of the many police to instruct the Prices if there was a problem with entry. The police did restrict further access beyond a limited area—a practice consistent with most security measures in a public building.

The conduct of the defendants is the same, whether there were more people in the Capitol and regardless of what other people did elsewhere and at other times. The number of citizens in the District of Columbia always outnumbers police. At the Senate Wing Door, when the Prices entered, there were dozens and dozens of police in complete control and not challenged by any citizen there. The government's transformation arguments include the claim that peacefully walking and standing in line is "no longer peaceful". Gov't Opp. at 7. There is no precedent for distorting the English language on such critical matters. The Prices were peaceful.

The Gov't Opp. at 9, appears to contradict its prior position that joining a mob was the relevant legal element:

> Next, your Honor, Count 2, 1752(a)(2), the conduct here, the conduct element, is met because these defendants joined a mob. There were participants in the mob.… (emphasis added) Trial Tr., March 21, 2023, 135:10-12.

The Court says "the fact the mob clearly disrupted … and that they were part of this mob" *Id.* at 171:24 and 172:1. The Court notes and the government counsel agreed that " …. in other cases, where the individual himself or herself engaged in disorderly conduct yelling breaking things, blocking people, threating in some manner, then that would be according to you , disorderly and disruptive? Id. at 136:25 and 137: 1-4. Ms. Akers agreed. *Id*. at 137:5. The Court continued:

> But that here where the defendants, by your, I think, admission, didn't do anything in that category once in Capitol. That does not matter because by being a part of this mob, that is disruptive conduct? (Emphasis added). Id at 137:6-9.

Separately, the government also argues, presumably referring to the Prices going down Constitution avenue, before going to the West Café that there was a "joining" to a "mob" stating

"…you heard Ms. Ballenger testify she was following the group. She was joining the group, the mob. That's sufficient." Id. at 137: 21-22.

"Following the group" refers to the Prices walked down Constitution avenue and there are people from the rally—whom the Prices did not know and did not stay with. The Prices, instead, go to West Café and stay for about 44 minutes [Defense Ex. 300, Picture 1, Google walking record]. There is no evidence of the Prices following or coordinating with anyone in any legal sense.

The government now focuses on the impact of "mere presence" on January 6, 2021. Gov't Opp. at 6. The logic of "mere presence" may underlie why "entering or remaining" in a restricted area under 18 U.S.C. § 1752(a)(1) is a crime. 40 U.S.C. § 5104(e)(2)(C) also uses the terms "entering or remaining". Those terms are close to the equivalent of "mere presence". "Disorderly or disruptive conduct" under either 18 U.S.C. § 1752(a)(2) or 40 U.S.C. § 5104(e)(2)(C) must be more than mere presence. Also note, it is well settled that mere presence at the scene of a crime and awareness that a crime is being committed is insufficient to support a conviction for aiding and abetting. *United States v. Salamanca*, 990 F.2d 629, 638 (D.C. Cir.), *cert. denied*, 510 U.S. 928, 1145 S.Ct. 337, 126 L.Ed.2d 281 (1993). Here the government did not seek aiding and abetting charges but nonetheless argues "mere presence" in a situation where others committed crimes that did disrupt proceedings before the Prices arrived.

III. Neither the Court nor The Government Identify and Separate Legal Activities and Objectives from Illegal Activities and Objectives in The Court's *Mens Rea* Analysis

Cynthia Price was specifically informed of the objections of Senator Cruz—the legal process in the same message as the statement of a breach and possible court actions. The whole

message was modified with the statement "unverified" – a point the government and the Court refuses to acknowledge in their synthesis. Regardless, delaying certification by providing political support to objecting Republicans was the point of the rally generally. Hoping for court action is also consistent. Such political support is legal. What is illegal is trying to physically disrupt a proceeding. Here some people may have disrupted the proceedings through disorderly conduct or worse before the Prices arrived.

If the Prices really wanted to occupy the time of the police they could have done so merely by conversing or not moving in the exit line or any other manner of conduct, but the evidence shows that was not the case. If the Prices really wanted to demonstrate in the Capitol why did they not engage in demonstrative conduct, like saying anything at all? The whole premise that the Prices peacefully walked and then stood in line in front of dozens of police officers to take their time or delay something is shear speculation without basis.

"Joined" a mob appears to be all slogan and no actual elements of conduct that the government can explain. Neither the government nor the Court sufficiently explain 1) what element of conduct or actus reus was involved in the "joining", 2) what constitutes the group called a "mob", 3) who did the Prices specifically join; 4) whether the joining is defined by time and location; 5) how either relates to the statutory language of the charging statutes; and 6) what part of the conduct of the Prices was mob-like.

IV. The Government Offers No Credible Legal Support and Insufficient Evidence for the Court's Finding That No Outward Demonstrative Conduct in the Capitol Is Required Under 40 U.S.C. § 5104(e)(2)(G)

As stated by the Court: "…if they had been by themselves, would you agree, likely would not satisfy the demonstrate prong it seems like they were largely peacefully walking, standing,

texting or taking pictures?" Government counsel responded "…. it might be different under this particular statute if this weren't January 6 and the defendants didn't intentionally join a mob…147. Once again, the Prices did not engage demonstrative conduct inside the Capitol. There is no evidence that either Cynthia or Christopher said anything political to anyone there. Cynthia did not waive a flag but only held it by her side. This lack of demonstrative conduct was dispositive in *Matthew Martin* and the government fails to address that case.

The government focuses on defendants conduct outside of the Capitol building and tries to make their exercise of First Amendment rights an element to prove a crime. The government notes people "marched in concert to the Capitol with people who shared their political beliefs" and that from the "Ellipse to the Capitol Mrs. Prices held an "All Aboard the Trump Train" flag. Gov't Opp. at 12. There is no evidence that Defendants "marched in concert." Defendants walked and went to the West Wing Café where they stayed, talked to a couple and at lunch they had brought. Regardless, the exercise of a First Amendment right to gather, aggregate and/or express on Constitution Avenue is neither a crime nor an element of a crime. It is not constitutional to use such actions as an element for actions that did or did not occur in the Capitol.

Many people engage in demonstrations earlier in the day and enter the Capitol at some other time. Many people were political slogans on t-shirts and enter the Capitol Buildings. These things do not constitute a violation of 40 U.S.C. § 5104(e)(2)(G). Moreover, the Gov't Opp. at 11 conflicts with its own proposed jury instruction, let alone defendant's proposed jury instruction, both based on *Bynum v. U.S. Capitol Police Bd.,* 93 F. Supp. 2d 50, 53 (D.D.C. 2000). *Bynum* and any other instruction would not provide for the "silent and reproachful

presence" as a basis under 40 U.S.C. § 5104(e)(2)(G) under both the First and Fifth Amendments.

V. The Government Violated Defendants' Fourth Amendment Rights; Defendants Should Not Be Convicted Based on Evidence Flowing from This Substantial Violation

The government violated the Fourth Amendment in an egregious manner requiring at least a hearing on the matter which was requested earlier. The Prices deserve a trial that is not based on violation of the Fourth Amendment. The Prices have previously requested a hearing on the matter and do so now. The government's use of Facebook messages at trial is fully tainted. The Facebook messages served a very significant role in the instant trial. Placing government exhibits 308A, 309B, and 309A into the trial record obviously means the government searched and seized and used the full Facebook returns which, including private information that is not the legal subject of the search. The search warrant by its terms claims that such broad material would not be searched and seized. [ECF 81-3 Government procedures for warrant execution at 11]. The warrant states: "Law enforcement personnel will then seal any information from the PROVIDER that does not fall within the scope of Section II and will not further review the information absent an order of the Court. *Id.* Defendants argued in a motion to suppress that this whole process was defective and too vague in violation of Fourth Amendment rights. [ECF 82-2]. The legal issue is the, now obvious, failure of the government to have or maintain the two-step process and two category process claimed in the search warrant. This failure and the other issues articulated in the motion to suppress makes all information from the Facebook messenger service, and evidence derived from that information, the product of an illegal search and seizure. Defense counsel can renew the motion to suppress and, effectively, is doing so here, adding new facts that arose from trial. A remedy is available under Rule 33 and it should be used.

VI. The Government Excuses Its Misrepresentation of the Lin Wood Related Messages and Misunderstands *Brady* Obligations

The Defense had no reason to cull through 14, 637 pages of messenger returns (Gov't Ex. 308A) over messages that were not included in the focused Gov't Ex. 307. It would be one thing to use the such voluminous record to authenticate something that comes up as a surprise – which is what the Defense is now doing. The defense objected to this governments Lin Wood questions because the government was not providing context regarding the article. Cynthia effectively stated in the prior message and that message she would never approve of such statements—which is exculpatory content. It is bad enough that the government pulls this surprise. This should have been an exhibit not buried and separately presented to the defense, with an opportunity to search for related content. Or, under Brady, the government should have identified the related exculpatory content. *United States v. Hsia*, 24 F. Supp. 2d 14 (D.D.C. 1998). In *Hsia* the Court notes '[t]o the extent that the government knows of any documents or statements that constitute *Brady* material, it must identify that material to [the defendant], id at 29-30. In reaching that decision, Judge Friedman explained that "[t]he government cannot meet its *Brady* obligations by providing [the defendant] with access to 600,000 documents and then claiming that [the defendant] should have been able to find the exculpatory information in the haystack." *Id.* at 29. One also questions whether pointing to 14, 637 pages is fairly exchanging exhibits in the judicial process. Moreover, this was a line of attack against Cynthia Price that should not have been pursued.

VII. The Court Should Revisit the Court's Findings on Credibility

The government notes the Court cited seven different reasons to question Cynthia Prices credibility and only two related to the Lin Wood exchanges. To the extent the defense argues all

Facebook messenger service should be suppressed that that involves more of the seven and the amount of trial content, overall, would be substantially limited. Regardless, we here address some of the other Court claimed demerits.

The government started it's cross-examination by accusing Cynthia Price, over and over, of planning to use bear spray on people. Trial Tr., March 21, 2023, at 73-76. Cynthia never had bear spray and the Facebook message filled with emojies –the equivalent of joking. Cynthia was, possibly, flippant in reply to this badgering with the truthful statement there are bears at the National Zoo. Perhaps this is a decorum issue, but not a credibility point.

The picture taken of the external police line is in Gov't ex. 107s and Defense ex. 300 picture 14. Both government and defense sequences have the picture taken after the pictures inside the Senate Wing Door. Moreover, Gov't ex. 107l; Defense ex. 300, Picture 9, show how crowded the West Terrace was. Visibility over distances no doubt varied. The Court apparently finds, at the governments urging, that Cynthia Price saw the external police which was not near the door at all, before they went in. This is sheer speculation in the face of the evidence of significant crowds blocking view and the sequencing of the pictures. Moreover, the Price did not cross that external police cordon either—another example of why the location of police cordons matter.

The Defense now turns to the totally owned it/"we totaled owed it!!" statements. The exhibit shows 4 missing emojies for Cynthia following "We stormed the Capitol." The Defense objected because the statement is not a fair or accurate representation without the emojies. The Court itself fails to acknowledge the emojies in its own findings. This is not a spelling issue. Cynthia said she was kidding. The government tried to pull the statement out of the flawed

evidence with a new statement. The exhibit was in front of everyone. There is nothing to hide or misrepresent. It is not a credibility point. The statement has to be taken in context of the emojies or missing emojies. The government misrepresents when it fails to acknowledge this and tries to get Cynthia to say she was not kidding. There may or may not be a decorum point, but one does not misrepresent the words on an exhibit by pointing to them. The Defense objected to the exhibit in its entirety because it does not fairly and accurately represent her statements.

CONCLUSION

For the above reasons, the government's evidence is insufficient to sustain Defendants' convictions on Counts 1, 2, 3, or 4. Therefore, pursuant to Federal Rule of Criminal Procedure 29, Defendants respectfully submit that the Court should enter a judgment of acquittal on all counts. In the alternative to full acquittal, the Court should suppress all Facebook Messenger evidence and require a new trial under Rule 33.

Dated: May 17, 2023

Respectfully submitted,

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