UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 1:21-cr-719 (JEB)**
	:	
CYNTHIA BALLENGER, and CHRISTOPHER PRICE,	:	
	:	
Defendants.	:	

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

The government respectfully requests that the Court issue an order precluding defendants Cynthia Ballenger and Christopher Price 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 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 defendants specifically observed or was otherwise aware of such conduct.

I. Factual Background and Procedural History

At 2:13 p.m. on January 6, 2021, rioters breached the United States Capitol Building by climbing through broken windows and kicking in the locked Senate Wing Door. *See* Gov't Ex. 1 at 0:09. By the time the defendants entered the Capitol an hour later, United States Capitol Police officers formed a line to prevent the situation from becoming worse. *See* Gov't Ex. 2 at 0:00.

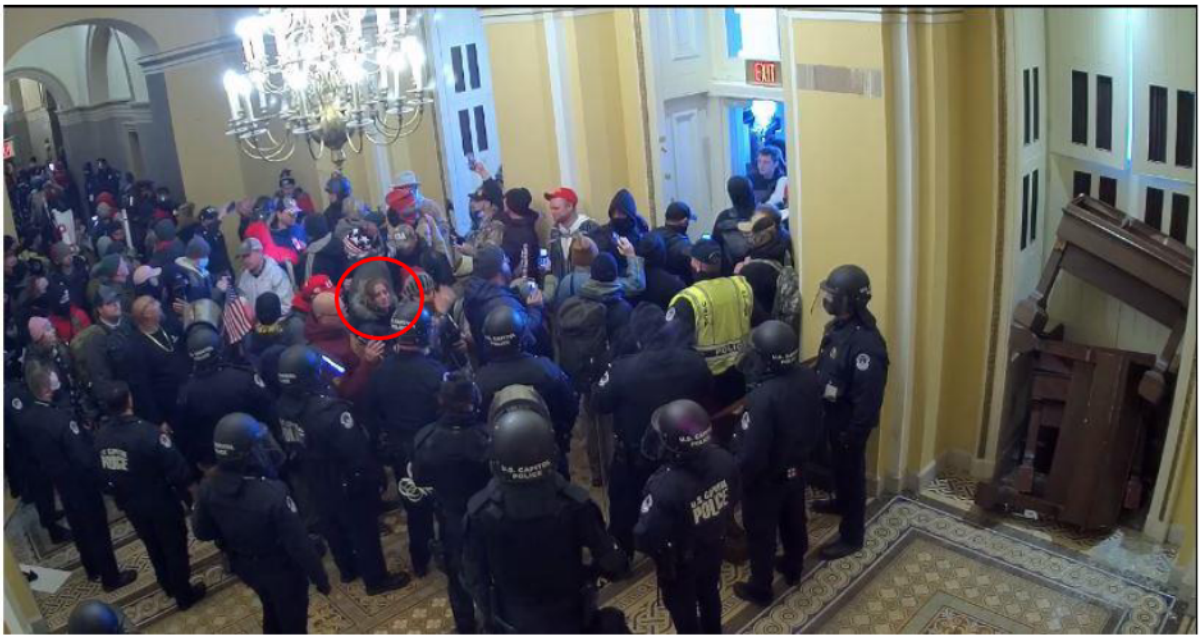
Rioters kick in Senate Wing Door

As the defendants entered this bellicose area, the alarm system blared. *See* Gov't Ex. 4.

Defendant Cynthia Ballenger passes broken door on her left

Almost immediately after the breach, officers tried to get rioters to leave. Some of the rioters climbed out of the broken windows moments before the defendants entered the Capitol. *See* Gov't Ex. 3 at 0:32.

The officers at the Senate Wing Door were not wearing their regular uniforms. Rather, they were nearly all wearing riot helmets and other tactical gear, which the defendants could plainly see. The officers also used damaged furniture as a makeshift blockade to prevent as many rioters from entering the Capitol as possible. These officers did not want the defendants in this area on January 6, 2021.



Defendant Cynthia Ballenger looks towards officers in riot gear

On March 8, 2022, the defendants were charged by superseding information for violating (1) 18 U.S.C. § 1752(a)(1) (Entering and Remaining in a Restricted Building or Grounds), (2) 18 U.S.C. § 1752(a)(2) (Disorderly and Disruptive Conduct in a Restricted Building or Grounds), (3) 40 U.S.C. § 5104(e)(2)(D) (Disorderly Conduct in a Capitol Building, and (4) 40 U.S.C. § 5104(e)(2)(G) (Parading, Demonstrating, and Picketing in a Capitol Building).

On October 23, 2022, the defendants filed a motion to compel discovery. ECF 69. This motion sought, among other things, discovery related to law enforcement's "failures to plan for and prevent" the events of January 6 and whether rioters were "allowed" into the U.S. Capitol. *Id.* at 18–9. This Court denied most of the relief sought in the motion, including the above two portions, in a Minute Order issued on November 7, 2022. As with the government's related motion in limine regarding other causes on January 6, the government similarly believes the defendants may probe witnesses with speculative questions at trial.

II. This Court Should Preclude Defendants from Arguing Entrapment by Estoppel

Defendants should be prohibited from making arguments or attempting to introduce evidence that law enforcement gave them permission to enter the U.S. Capitol. *See* "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) (*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 January 6th defendant charged with, *inter alia*, violations of 18 U.S.C. §§ 1752(a)(1)and (2), and 40 U.S.C. §§ 5104(e)(2)(D) and (G). The entrapment by estoppel argument was slightly different in *Chrestman*. There, the defendant argued that former President Trump gave him permission to

enter the Capitol building. Even so, the Court's analysis of the entrapment by estoppel defense applies equally here to an argument that a member of law enforcement gave permission to the defendants to enter the Capitol building. As the court noted, 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. Chief Judge Howell later concluded 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." Memorandum and Order, *United States v. Williams*, No. 21-cr-377-BAH, ECF No. 87, *2 (D.D.C. June 8, 2022).

Even if 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, their 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, defendants' actions belie any argument that they actually relied on any such statement by law enforcement when they made a decision to unlawfully enter the Capitol building through a broken door open alongside

rioters climbing out through a broken window, in the face of a line of Capitol Police officers, and they made statements in text messages like, "we stormed the capital." Therefore, the defendants should be precluded from presenting any evidence or arguing in support of the entrapment by estoppel theory. Further, the court should not instruct the jury as to this defense.

III. This Court Should Preclude Defendants From Arguing That Alleged Inaction By Law Enforcement Officers Made Their Conduct On January 6, 2021, Legal

In addition to prohibiting any defense argument that law enforcement actively communicated to defendants that entering the Capitol building or grounds was lawful, the Court should also bar defendants from arguing that any failure to act by law enforcement rendered their conduct legal. The same reasoning that applied in *Chrestman* applies here. That is, 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. *See 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.") (citing *Cox v. Louisiana*, 379 U.S. 559, 569-70 (1965); *Garcia v. Does*, 779 F.3d 84, 95 (2d Cir. 2015) (en banc); *United States v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1168-69 (10th Cir. 1999)). Under the same reasoning, 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.

IV. This Court Should Preclude Defendants From Arguing Or Presenting Evidence Of Alleged Permissiveness By Law Enforcement Officers Unless They

Specifically Observed Or Was Otherwise Aware Of Such Conduct

The conduct of law enforcement officers may be relevant to defendants' states of mind on January 6, 2021. However, unless defendants show that, at the relevant time, they specifically observed or was otherwise aware of some alleged permissiveness by law enforcement, such evidence is irrelevant to defendants' 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 defendants were not aware of law enforcement's alleged permissiveness at the time of their entry onto restricted grounds or into the Capitol building, any alleged permissiveness would have no bearing on the defendants' states of mind and therefore would not meet the threshold for relevance. *See Williams*, No. 21-cr-377-BAH, at *3-4. The Court should therefore exclude testimony and evidence of any alleged permissiveness by the police as irrelevant, except to the extent the defendant shows that they specifically observed or were aware of the alleged permissiveness by the police when they committed the offenses charged in the 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, and any evidence or argument relating to alleged permissiveness by law enforcement except to the extent that the defendant specifically observed or was otherwise aware of such conduct at the relevant time.

Respectfully submitted,

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