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)**

DEFENDANTS' OPPOSITION TO THE UNITED STATES' MOTION IN LIMINE TO LIMIT CROSS-EXAMINATION OF ANY SECRET SERVICE WITNESS

ARGUMENT

The Government asks the court to grant a motion in limine [ECF 51] which at least:

1) Limits the Prices' rights under the Sixth Amendment to confront a witness the Government plans to present; and
2) Assumes a that a hearing regarding admissibility of the witness testimony and any hearing concerning evidence that may or may not be needed to evaluate the instant motion should be in camera AND ex parte. Gov Motion at 5.

Allowing the Government to present a witness and then to limit cross-examination must be scrutinized with great deference toward satisfying the Fifth and Sixth Amendment. It is important to note that the Prices could also just call the same witness allowing direct examination. The operation of Federal Rule of Evidence (FRE) 611(b) should be considered in

that light. As discussed below, the case law cited by the Government is either inapposite or of limited guidance. The Government's motion is not straightforward and contains many improper or incomplete statements and requests. At this stage, the category exclusions that the Government seeks are not legally appropriate. The Prices further explain below a variety relevancy issues in the in the context of the instant case which affect the validity of the motion.

I. Legal Standard

A. The Full Right of Cross-Examination

The Sixth Amendment establishes an integrated bundle of rights that constitutes a larger right to an effective defense in our system of jurisprudence. *In re Oliver*, 333 U.S. 257, 272-73 (1948). These rights include the right to compulsory process, the right to reasonable notice of criminal charges, the right to be heard in court, the right to offer testimony, the right to counsel, and the right to examine adverse witnesses. *Id.* at 273. The Confrontation Clause of the Sixth Amendment enshrines this latter right, providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In crafting this provision, the founding generation drew on English common law traditions. *Crawford v. Washington*, 541 U.S. 36, 43 (2004). These traditions emphasized the importance of "live testimony in court subject to adversarial testing" as the surest path to truth. *Id,*

As stated in *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986):

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers* v. *Mississippi, supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington* v. *Texas*, 388 U.S. 14, 23 (1967); *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful

opportunity to present a complete defense." [*California* v. *Trombetta*, 467 U.S.479, 485 1984]; cf. *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment").

As stated in *Lindsey v. United States*, 133 F.2d 368, 77 U.S. App. D.C. 1 (D.C. Cir. 1942):

> ….the efficacy of cross-examination as a weapon for the discovery of truth been recognized in our system of law that cross-examination is held to be a right, not a mere privilege. It is often stated that the control of cross-examination is within the discretion of the trial judge, but it is only after a party has had an opportunity substantially to exercise the right of cross-examination that discretion becomes operative. *Id*. at 369.

The *Lindsey* Court further stated:

> ". . . *A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called,* and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary. [Citations Omitted] (emphasis in original) *Id* at 369.
>
> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. [Citations Omitted]. *It is the essence of a fair trial that reasonable latitude be given the cross-examiner,* even

> though he is unable to state to the court what facts a reasonable cross-examination might develop. (emphasis in original) *Id*. at 370.

"There are few subjects, perhaps, upon which [the Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas,* 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed. 923 (1965).

B. Motions in Limine

Evidence should not be excluded in limine unless it is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Tech., Inc*., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (citing *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) only for general proposition that courts use motions in limine to manage trials); *Bouchard v. American Home Products*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002). Evidentiary rulings, especially those addressing broad classes of evidence, should often be deferred until trial so that questions of foundation, relevancy and potential prejudice can be resolved in proper context. *Sperberg v. Goodyear Tire & Rubber* Co., 519 F.2d 708, 712 (6th Cir. 1975); see also Starling v. Union Pac. R.R., 203 F.R.D. 468, 482 (D. Kan. 2001) ("it is the better practice to wait until trial to rule on objections when admissibility substantially depends upon what facts may be developed there"). "Denial of a motion in limine does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Hawthorne Partners*, 813 F. Supp. at 1401.

C. Certain Relevant Federal Rules of Evidence

The Government cites to Federal Rules of Evidence (FRE) 401, 403 and 611 and the motion itself mixes the provisions in the analysis. It is important to review the operation of these rules. Under Rule 401 - Test for Relevant Evidence:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

FRE 401(b) does not depend on the subject matter of the witness testimony upon direct examination as set out as an issue under FRE 611(b). That testimony on direct examination may or may not provide an additional bridge to provide relevance. However, the "action" is the full case and all charges against the Prices.

The Fed. R. Evid. 401 Advisory Committee Notes makes some general additional observations:

- Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.
- The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action.
- The fact to which the evidence is directed need not be in dispute.
- Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding.

Under Rule 403 - Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

. Among the points in the Fed. R. Evid. 403 Advisory Committee Notes:

> Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy-A Conflict in Theory, 5 Van. L. Rev. 385, 392 (1952); McCormick §152, pp. 319-321.

Under FRE 611(b) Scope of Cross Examination:

> Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

Cross-examination under the first sentence of FRE 611(b) depends either on subject matter or witness's credibility. However, the second sentence of FRE 611(b) makes clear the court may allow inquiry into additional matters as if on direct examination. Such inquiry would still be subject to FRE 401 and 403 but relevant inquiry that does not violate FRE 403 is permissive. Further guidance for the court comes in FRE 611(a):

> The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth;(2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.

Similarly, FRE 102 states:

> These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

The rationale for full cross-examination is augmented by the proposition that the Prices can call the Secret Service witness separately as defense witness. Moreover, under FRE 607 "Any party, including the party that called the witness, may attack the witness's credibility."

The Fed. R. Evid. 611 Advisory Committee Notes make some relevant points. The Notes state that on the one hand some of the notes suggest a practice of limited may promote orderly presentation of the case. Citing Finch v. Weiner, 109 Conn. 616, 145 A. 31 (1929). The Notes go on with some other points to emphasize here:

> There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many court rooms, of continual bickering over the choice of the numerous variations of the 'scope of the direct' criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their

determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner.

II. The Government's Cases Are Either Inapposite or Provide Limited Guidance

The Government purports to contrast the robust and important nature of cross-examination by citing, among other cases, *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). While the *Van Arsdall* Court did say the right to cross-examination could be limited based on various factors, in *Van Arsdall* holding the Supreme Court found the lower court's ruling violated respondent's rights secured by the Confrontation clause. *Id* at 679. The *Van Arsdall* Court went on to discuss the harmless error doctrine which is not the question regarding the instant motion.

The Government also cites to *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). *Fensterer* involves an unusual argument and not any court-imposed limitation on cross-examination. The *Fensterer* court stated:

> ….the trial court did not limit the scope or nature of defense counsel's cross-examination in any way. But it does not follow that the right to cross-examine is denied by the State whenever the witness' lapse of memory impedes one method of discrediting him. *Id* at 19.

Specifically, the *Fensterer* court noted The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. Indeed, the *Fensterer* court relied on the fact of robust cross examination as a reason this was not a Confrontation Clause issue:

> In this case, defense counsel's cross-examination of Agent Robillard demonstrated to the jury that Robillard could not even recall the theory on which his opinion was based.

The *Fensterer* court states:

> To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. *Id* at 21-22.

The Government cites to *United States v. Balistrieri*, 779 F.2d 1191. *Balistrieri* involved specific portions of a specific document under seal. The *Balistrieri* court states:

> We have examined the full text of the telex and have concluded that unsealing and supplemental briefing are unnecessary. We agree with the district court that the highly sensitive nature of the hitherto undisclosed information contained in the telex justifies keeping it under seal. The undisclosed information concerns matters as to which Potkonjak did not testify on direct examination and which do not pertain to the charges in this case. Those matters are thus beyond the scope of cross-examination. Fed. R. Evid. 611(b). To the extent that the district court has discretion to permit inquiry into additional matters, we hold that the court did not abuse its discretion in refusing to allow cross-examination on the undisclosed portion of the telex. The motion to unseal is denied.

Balistrieri neither involve category exclusions as requested in the instant Motion in Limine nor a motion in limine at all. During cross examination, the government offered an agent's testimony and the previously disclosed portion of the telex. The court permitted counsel for DiSalvo and Balistreri to review the entire telex but would not permit counsel for DiSalvo to cross-examine the agent on the undisclosed portion. *Id*. at 1216.

The Government states that in *United States v. Cuoy Griffin*, No. 1:2-cr-00092, Dkt. 92 (D.D.C. March 18, 2022), the Court granted parallel motions regarding two subject matters noting that the defendant had not contested that "such cross-examination would be inappropriate and immaterial to the question of guilt, or the credibility of the Secret Service witness. *Id* at 4. Gov. Motion at 2. Unlike Mr. Griffin, the Prices do contest these particular limits on cross-examinations in the two subject matter categories. Moreover, the motion appears to contain much broader requests and arguments. It is also important to note for context, in the *Griffin* case, the Government sought a foreclosure for questioning the witnesses about:

> Information related to the location within the Capitol or its grounds to which the Vice President and his family or their motorcade, were taken once the right began on January 6, 2021. *Griffin* Motion in Limine ECF No. 72.

The *Griffin* court rejected this request and stated:

> So too here—to mount a meaningful defense Griffin must be allowed to test the veracity of the Government's contention that Vice President Pence was on the Capitol grounds during the relevant period. The Government's suggestion of an *ex-parte* submission is therefore a non-starter. *Griffin* Order ECF 92 at 5.

Below, the Prices discuss the relationship, and considerable overlap, between the rejected request and the requests not contested in *Griffin*. The Prices review the testimony of the Secret Service witness in Griffin. The application of confusing rules from the instant motion would be unhelpful to promoting the Federal Rules of Evidence and unhelpful for the core objectives of ascertaining the truth relevant to the criminal charges and the Prices.

III. The Government's Discussion of Relevancy Is Inconsistent with the Statutory Charges and the Necessary Essential Allegations of Fact

As discussed in the Prices' memorandum supporting the main motion to dismiss, (ECF 54-1) The Government must prove multiple elements under the four charges. Accordingly, exploration of facts potentially relevant to each element provides its own basis for cross-examination. There are clearly different views among the parties as to the meaning of each statutory elements. Those differences must either be resolved, or defendants must be allowed to pursue questions related to the multiple interpretations of the elements. Moreover, if the Government's theory of the case is either not clear or involves items that are not consistent with the statutory elements, defendants must be allowed to explore those areas in cross-examination as potentially relevant.

A. The Government Avoids Acknowledging Key Requirements for a Restricted Area

In the instant motion, the Government incorrectly states the statutory definition for a restricted area:

> Counts One and Two of the superseding information charge Defendants with violating 18 U.S.C. § 1752(a)(1) and (2), by knowingly entering or remaining in a restricted building or grounds without lawful authority. That statute defines "restricted buildings or grounds" to include any building or grounds temporarily visited by a person being protected by the Secret Service. 18 U.S.C. § 1752(c)(1)(B). Gov. Motion at 1.

A similar statement is made later in the argument of the motion:

> To prove violations of 18 U.S.C. § 1752(a)(1) and (2), the government intends to offer testimony to establish that the Capitol and its grounds were "restricted," for purposes of § 1752(a) because the protectees were present there and being protected by the Secret

> Service. See 18 U.S.C. § 1752(c)(1)(B) (defining restricted buildings and grounds). Gov. Motion at 4.

These are incomplete and, thus, inaccurate statements of the definition of restricted buildings or grounds. This incomplete and inaccurate statement makes the Government's analysis incorrect. The statute does not define restricted buildings or grounds as stated in the motion. Showing protectees were present at a location and were being protected is, in the instant case, a necessary but incomplete set of facts to establish that the Capitol and its grounds or any part of the Capitol or its grounds were "restricted" for purpose of § 1752(a). 18 U.S.C. § 1752(c)(1)(B) includes the following:

> (c) In this section—
>
> (1) the term "restricted buildings or grounds" means <u>any posted, cordoned off, or otherwise restricted area</u>—…
>
> (B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting. (emphasis added)

Protectees may be at a location with no restricted areas as defined under 18 U.S.C. § 1752(c). The presence of Vice President Pence without a correlating restricted area under 18 U.S.C. § 1752(c) has no legal meaning in the instant case. The Government seeks to have an alleged restricted area that is relevant to the Prices under 18 U.S.C. § 1752(c). Restricted areas must be "posted, cordoned off, or otherwise restricted."

The Prices have argued in their motion to dismiss [ECF 54-1] that the legal issue is what the postings, cordons or other restrictions were at the time and location of the Prices' alleged violation. The Prices are neither responsible for the ghost of the perimeter past nor the ghosts of barriers or signs that were not present in the path the Prices took. The Government not only

cannot discuss this point, the Government provides descriptions of the statutory standard that ignore or hide it. The Prices had no role in maintaining such a perimeter or the demarcation of a restricted area under 18 U.S.C. § 1752(c). The Prices had no role in removing any element of such perimeter or demarcation of a restricted area under 18 U.S.C. § 1752(c). The Prices are not responsible for those who violated a perimeter earlier in the day. The Prices are not responsible for those who removed elements of any alleged perimeter or restricted area. The Prices are not alleged to have seen the demarcations creating a perimeter as it may have existed at an earlier time.

The Prices have questions of a Secret Service witness and other potential Government witness related to every aspect of piece of this statutory language and with regards to aspects that flow from other statutory language in the charges. All of those questions are relevant and there is no evidence such questions are prejudicial. The fundamental accusation under 18 U.S.C. § 1752(a)(1) is that the Prices knowingly entered or remained in a restricted area as defined under 18 U.S.C. § 1752(c). At a minimum, any testimony regarding the establishment of a restricted area creates the subject-matter of the restricted area for purposes of FRE 611. As discussed below, the prior testimony of Secret Service witness in the *Griffin* case is much broader than that and illustrates the complex nature of potential questions.

In particular, issues concerning timing and location become important. What is relevant for a restricted area with respect to the Prices is what were the postings, cordons, or other demarcations at the time of their alleged violations. Police cordons were changing after 2pm and the changes reflect relevant information and reflect the legal definitions. The Prices do not know the Government theory of the case with respect to conduct that constitutes disorderly and disruptive conduct under 18 U.S.C.§1752(a)(2) or 40 U.S.C. § 1504(e)(2)(D). Anything that

disputes, questions, or explores the Government's theory of the case or lack of Government theory of the case respecting those terms is relevant. The Prices also do not know the Government theory of the case with respect to conduct that constitutes to parade, demonstrate, or picket. Anything that disputes, questions, or explores the Government's theory of the case, or lack of Government theory of the case, respecting those terms is relevant. Information on the prior practices of the Secret Services may be relevant to any of those questions. Questions regarding "protocols" would be relevant. Accordingly, addressing whether the Government is pursuing a January 6, 2021 specific set of definitions or definitions, operations, and practices that are the same across days and events is relevant for definition and impeachment. Such questions would be relevant to the Secret Service witnesses because the Secret Service is always relevant to the implementation of 18 U.S.C.§1751(a) and (c). The coordination with the Secret Service and other parties both on January 6, 2021 and as a matter of practice is relevant for the same reasons. In the instant case the operation of an alleged restricted area also includes the interactions between the Secret Service and the Capitol Hill police, how any such restricted areas were or had been enforced, the role of police communication and many other relevant items as further discussed below. As discussed here and below the requested category limitations may impede valid and relevant cross-examination.

B. The Government Motion Avoids Acknowledging a Key Element That Calls into Question the Action of Other Parties Including Those Who Were Actually Violent or Disorderly as Well as the Preparation and Response of the Secret Service and Other Enforcement Agencies

Another of the elements of 18 U.S.C.§1752(a)(2) is that alleged disorderly or disruptive conduct, **in fact**, impedes or disrupts the orderly conduct of Government business or official functions. ¶ 8 of the Affidavit of Special Agent Belcher [ECF 1, Attachment 1] indicates that the

actual certification proceedings were not underway when Defendants are alleged to be in the Capitol. The United States may be arguing that Defendants' walk into the right-side foyer at the Senate Wing door before turning to exit is, "in fact", the reason that the certification process was delayed until 8 pm. As a separate matter, the Prices did not engage in any disorderly or disruptive conduct and any conduct was not the source of impeding or disrupting any government business or official function. However, the actions, inactions, and negligence of other parties might be considered responsible for such delay.

Generally, the Prices cannot be found criminally liable for the conduct of other parties. There is no guilt by association permitted under the four Counts. Any such imputation would be prejudicial. There were several separate breaches in the Capitol, and some of those breaches involved individuals with firearms, bats, chemical sprays, and the use of flagpoles, fire extinguishers, and skateboards of weapons of opportunity. Any discussions or questions forming the stated rationale for the delay would address what "in fact" was the reason for any delay.

Any discussions or information as to why police did not tell people to leave, by voice or other means before certain periods in certain locations is relevant. Relevant evidence could include consideration by the Secret Service, Capitol Police, or others who decided the course of proper security measures and, how long to delay proceeding. These questions could involve prior protocols or relate to the nature of the Secret Service details. The questions may involve the location and fate of the Vice President or other protectees to the extent those issues affected the actions of the police. The case has been the topic of National media coverage, including with the Select House Committee. The Select Committee allowed heresay from Cassidy Hutchinson to describe alleged interactions and operational details between Secret Service and the Commander in Chief on January 6, 2021. *See* https://www.npr.org/2022/06/28/1108396692/jan-

6-committee-hearing-transcript . The failures of security have been the subject of Government Accountability Office Reports that the Capitol Police Need Clearer Emergency Procedures and a Comprehensive Security Risk Assessment Process. *See* https://www.gao.gov/products/gao-22-105001. The GAO put out a report stating Capitol Attack: Special Event Designations could have been requested for January 6, 2021, but not all DHS guidance is clear. *See* https://www.gao.gov/assets/gao-21-105255.pdf. The Secret Service has responded to a Freedom of Information Act request with numerous items. *See* https://www.justsecurity.org/wp-content/uploads/2021/07/January-6-Clearinghouse-US-Secret-Service-FOIA-CREW-June-29-2021-2.pdf . Among these items are the USSS White House Complex Civil Disturbance Plan. The United States Capitol Police Labor Committee issued a press release saying "This lack of planning led to the greatest breach…This is a failure of leadership at the very top" *See* https://www.justsecurity.org/wp-content/uploads/2021/08/January-6-Clearinghouse-USCP-Labor-Committee-Press-Release-Capitol-Events-Final-Jan-7-2021-Leadership-Failed.pdf. There is a timeline of intelligence failures and prior reports that were ignored that maybe "in fact" a reason for the delay in certification proceedings. *See* https://www.justsecurity.org/81806/january-6-intelligence-and-warning-timeline/. The Prices also note the Secret Service is the same agency planning protection for the rally on January 6th as for the certification proceedings.

The Government wants to argue that a peaceful 7-minute walk in and out of the Capitol is "in fact" the reason for a delay in certification proceedings after those proceedings were stopped. Perhaps the Government claims that the proceedings would have returned by 4 pm if not for the Prices peaceful walk.

In defense, the Prices may certainly argue that certain problems in planning and preparation and operation of the Secret Service and other enforcement officials in conjunction with the actions on January 6, 2021 were the reason. Questions could include why the actions and inactions of the Secret Service and the enforcement agencies are not, in part, responsible for both the initial stop of the certification proceedings and any further delay. These questions could include touching category areas including prior protocols and the "nature of" the Secret Service protections. The Prices could ask whether better coordination between the Secret Service at the rally earlier in the day and the Secret Service might have produced a better result.

C. The Government Statements Regarding Claimed National Security Rational Is Overly Broad

Here the Government attempts to claim some default presumption that does not exist as a a matter of law and fact:

> "However, the very nature of the Secret Service's role in protecting its protectees implicates sensitive information related to that agency's ability to protect high-ranking members of the Executive branch and, by extension, national security."

This is a broad overstatement which provides no guidance whatsoever. The "very nature" quote is parallel to the request in the motion concerning the "nature of the protective detail." According to the Government, everything about the case involving the Secret Service witness is allegedly implicated by the "very nature" of national security. As discussed below, in the Griffin case, the secret service witness provided a very broad range of testimony. Presumably, this argument is provided to support application of FRE 403 as a limitation. FRE 403 assumes relevance but could limit introduction of evidence based on various factors. The

weight of an FRE 403 argument must be gauged relative to its particular terms and relative to the other testimony presented in the case.

As discussed further below, the Government has already identified the timing and locations of Vice President Mike Pence as described and required in the *Griffin* case. This included the time it took to get to a location and the intermediate steps. The case has been the topic of National media coverage, including with the Select House Committee. As discussed above there are numerous federal evaluations and studies concerning the lapses and failures of actions by the Secret Service and enforcement officials. It is difficult to draw a line on between what has and will be in cases and upon review of the preparation and actions of that day, and what must remain secret. Moreover, such questions may simply involve issues under the protective order for discovery in the instant case.

IV. The Secret Service Witness Testimony in *Griffin* Involves A Broad Range of Relevant Testimony Including with Respect to Prior Protocols, Relationship to Enforcement Agencies, and Examples of How the Secret Service Operates Under 18 USC § 1752

In its motion the Government appears to claim a narrow subject matter for the Secret Service witness:

> To meet its burden of proof at trial, the government will call a witness from the United States Secret Service to testify that, at the time of the Capitol breach, Secret Service agents were on duty to protect then Vice President Mike Pence and his two immediate family members, all of whom were present at the Capitol. Gov. Mot. at 1

However, the Secret Service witness testimony in the *Griffin* case went well beyond this Government statement. The Court should not assume the subject-matter of such direct witness testimony from this Government description. The testimony in the *Griffin* case is more than

illustrative of the problems that would ensue from adoption the Government's proposed category restrictions on cross-examination.

In *Griffin*, the Government called Inspector Lanelle Hawa who stated she had over 23 years of experience with the United States Secret Service (USSS). (*Griffin* Transcript (Tr.) at 211). Inspector Hawa stated the USSS coordinates visits to the U.S. Capitol with any of their protectees. This duty includes coordination with the Capitol Police, Senate or House Sergeant at Arms that the USSS liason division facilitates access onto the Capitol complex, off the Capitol Complex complex and throughout the complex. *Id.* at 212. Inspector Hawa said she had coordinated visits for protectees "several" times. *Id*. at 213. Inspector Hawa testified about how she notified the U.S. Capitol including by an exhibit presented in the *Griffin* trial that showed a schedule which included the location of the Vice President's arrival by motorcade and anticipated movement of the vice president around the Capitol Complex. *Id.* at 214-215. Inspector Hawa claimed to know about a restricted area and discussed an exhibit allegedly showing a restricted perimeter. *Id*. at 215. Ms. Hawa claimed the perimeter covered the loading dock that she otherwise stated Vice President Pence had retreated to later in the day. *Id.* Inspector Hawa responded to questions about the reasons for the alleged perimeter. *Id.* at 216. Ms. Hawa spoke about trips to the ceremonial office of the Vice President in the Capitol on January 6, 2021. *Id.* at 217.

Inspector Hawa claimed the USSS was getting notifications about some security breaches on the west lawn and explained what she meant by "security breaches." *Id.* at 219. Ms. Hawa was asked by the Government about the actions the USSS took based on the information they were receiving. *Id.* She was also asked by the Government about what was happening with

respect to the certification of the Electoral College. *Id.* at 224. Ms. Hawa stated the certification was

> "….stopped for multiple reasons It was stopped because there was breaches on the House of Representatives side by individuals who had breached the House of Representatives, and then there was breaches happening also on the Senate side of the Capitol building. *Id.*

Inspector Hawa further stated that at approximately 2:00 the Capitol went into lockdown which means everything has to stop. *Id*. at 225.

On cross-examination Inspector Hawa was asked if she was familiar with the process by which the Secret Service sets restricted areas for the Vice President when he goes other places. *Id.* at 229. Ms. Hawa stated yes and that the processes can vary. *Id.* at 230. She stated the Secret Service had authority under 18.U.S.C. §1752 to set restricted areas. *Id.* Ms. Hawa further stated that the USSS works with its' counterparts and actions depend on where and what the site is. *Id.* at 230-231. Ms. Hawa was asked a hypothetical about a rally in Florida with respect to ta perimeter. *Id.* at 231. The Government objected on relevance and the objection was overruled. Inspector Hawa was asked about how Secret Service operated with respect to the rally on the Ellipse which featured President Trump earlier on January 6, 2021. *Id.* at 233. The Government objected and the court overruled the objection. *Id.* at 234. Ms. Hawa was shown a video and was asked if the Secret Service agents were deciding who could enter a particular area and she stated yes. *Id.* at 234. Ms. Hawa discussed whether and how the Secret Service makes decisions on who can come into a restricted area. *Id.* at 235. Inspector Hawa referred to prior experience for other events and stated:

> They determined where the perimeter was going to be based on a long-standing relationship that we have with the Capitol Police. It was known to us that that is where the perimeter typically is for events like this. *Id*. at 238.

Mr. Griffin's counsel referred Ms Hawa to an additional exhibit and the Mr. Griffin's counsel circled certain barriers. *Id*. at 239. Ms. Hawa had a discussion related to an area that she said "does not appear to be" a restricted. Id. But she said "I believe those statutes were—should have been surrounded by a bike rack." *Id.* Mr. Griffin's counsel pointed to another area and stated "I'm asking you, before protestors moved those barriers, was that the restricted area line. *Id*. at 240. Ms. Hawa said "It should have been" *Id.* Inspector Hawa was asked the hypothetical about when the Vice President visits some place outside of Washington D.C. and he needs a security perimeter, how does the Secret Service normally indicate where the perimeter is? *Id.* at 241. Inspector Hawa described means of designating a restricted area in those contexts. *Id.* Ms. Hawa was asked how people were normally made aware and she stated by notifications or by restricted signs. *Id.* Ms. Hawa stated someone could be told verbally that an area was a restricted area. *Id.* at 242. Inspector Hawa was asked what happens if there isn't a sign and there's no verbal warning. *Id*. Ms. Hawa stated, "…I guess they would eventually—they would come upon somebody, perhaps, that would be able to tell them that it's a restricted area." *Id.*

Inspector Hawa was asked about circumstances where a person walks into the area and they did not know that the President or the Vice President was in it. Ms Hawa stated:

> No. Typically, in my situations where I've encountered it, we typically will talk to the people before they get into the secure area… *Id* at 245.

Inspector Hawa was asked whether she would inform an individual who wants to come in that she was a Secret Service agent. *Id.* at 245. Ms. Hawa state "either Secret Service or law enforcement." *Id*. at 246.

On re-direct Ms. Hawa was asked about a long-standing relationship between Secret Service and Capitol Police. *Id.* at 256. Inspector Hawa stated that the Secret Service was "pretty familiar with what [the Capitol Police] protocols are when there's events at the Capitol and on the Capitol grounds." *Id.* Ms. Hawa stated there were "certain protocols that fall into place" when there is a head of state or protectee notification. *Id.* at 257. With respect to the alleged perimeter the Government stated "[t]his was something that you had done in conjunction with the Capitol police" and Ms. Hawa said yes. *Id.* Ms. Hawa further stated "[w]e were monitoring what was happening and occurring on the Capitol grounds that day." *Id.* at 258. The Government showed Inspector Hawa a video clips indicating a specific "bike rack indicating that people were not allowed to move past that area" *Id.* at 259. Ms. Hawa stated correct. *Id.*

> While not part of the examination of Ms. Hawa the Government stated in closing that: "[The law] allows for an area that is cordoned off, posted that this area is restricted in any way. And Case law has shown that that includes having law enforcement officers there, having signs that say that the areas is restricted, informing people that this area is restricted through overhead announcements, things of that nature." *Id.* at 278.

As one can readily see, the testimony of the Secret Service witness in the *Griffin* case covered extensive areas and issues. Ms. Hawa testified in various ways on 1) protocols for restricted areas, 2) how such areas are enforced and manned, 3) how the USSS coordinates with other enforcement officials, 4) what the initial alleged restricted area was, 5) reports the USSS was receiving on January 6, 2021, 6 concerning the alleged breaches including timing and locations,

6) legal authority and the relationship of the USSS and other enforcement agency to that legal authority, 7) the timing of an alleged lockdown, 8) the putative reasons for the stoppage of proceedings, 9) the role that police communication or lack of communication may play with respect to alleged restricted areas and other issues. The references in the testimony are both to January 6, 2021 and practices that have occurred in the past. The Government itself asked about "protocols" and typical coordination with the U.S. Capitol Police.

The Government is using broad words like "protocols" or "nature of Secret Service protective details" in their request to this court to restrict cross-examination. And those words are, as discussed below, from the narrowest construction of their request. These terms can mean many things the terms are insufficiently specific to form a basis for a motion in limine.

V. The Government's Motion is Not Straight Forward and Contains Many Improper or Incomplete Statements and Requests

The Prices note numerous claims, incomplete structures, conflicting statements, and in appropriate arguments in the Government's motion in limine. In order to provide a clear map for the court, the Prices first identify specific Government statements and, then, provide the Prices basic responses regarding each of these statements. The Prices have already discussed the gap between the Government's statement of subject-matter and what actually happened in *Griffin.* The additional issues below add to the problem.

A. Precluding Cross-Examination "Not Directly Related to Whether the Government Was Performing a Function" Is an Unreasonably Broad Request

The Government makes several different statements in the motion that need rebuttal, or at least clarification, by the Government. The first overly broad Government request is:

> Specifically, the government requests that such order preclude cross-examination that would elicit information that is not directly related to whether the Secret Service was performing the function of protecting protectees at the Capitol on January 6, 2021. Gov. Motion at 1.

The Prices strongly object to this statement and formulation of a request to the Court. Presumedly this is not the "request" and the enumerated sentences in the Gov. Mot. at 1 are the "requests," or part of the requests, and not this particular sentence. The motion contains many statements of requests, often inconsistent and with a wide range of potential scopes. With respect to this statement the phrase statement "whether" suggests the Prices may only inquire about a simple and unadorned fact that the Secret Service were performing a function. Once the Secret Service witness says yes and unless, the Prices wish to impeach, the Government argues any other cross-examination is not acceptable. Even the formulation that "would illicit information" is a very nebulous statement. Obviously, and as discussed elsewhere, the Prices have many relevant questions beyond whether the Secret Service were performing the function of protecting the protectee. This request fails the Fifth and Sixth Amendments and the Court should not accept it.

B. The Requested Category Exemption from Cross-Examination About Protectee Location Protocols When Emergencies Occur Is Overly Broad and May Create Unfair Limitations for Relevant Exploration During Cross Examination

The Government's motion makes a specific request to prohibit a category of cross-examination:

> Defendant should be specifically foreclosed from questioning the witnesses about the following:
>
> 1. Secret Service protocols related to the locations where protectees or their motorcades

are taken at the Capitol or other government buildings when emergencies occur; and…"

The problems with this specific request of the Court are multifold. First, the proposed language is very confusing in the context of the overlap with the request rejected in Griffin which was:

> Information related to the location within the Capitol or its grounds to which the Vice President and his family or their motorcade, were taken once the right began on January 6, 2021. *Griffin* Motion in Limine ECF No. 72.

The Prices observe that this overlap was the basis of many confusing objections during the Griffin trial. With respect to the first category the *Griffin* court described the core right of cross examination citing *Davis v Alaska* 415 U.S. 308, 315, 216 (1974). The Court further noted the Government's "evolving legal theory and factual assertions relating to Secret Service's protectees" Opinion at 7. The Court said the lack of clarity about the metes and bounds of the restricted area and the Vice President's movements on January 6th undermines the Governments argument. To be consistent with the Griffin case, effectively then one would need to carve out January 6th itself from the statement "Secret Service protocols related to locations."

Second, the term "protocols" is broad and there is a relationship between locations, protectees, emergencies, restricted areas, the operation of police, coordination with other entities, and reaction to information both before and during January 6. 2021. Those are actually all topics discussed by the Secret Service witness in *Griffin*. All of those issues and interactions may implicate "protocols." Neither the Prices, the Court, nor the Government can know what is meant by the term. Second, the location of protectees on January 6, 2021, including with respect to time frames are both relevant for certain reasons and potentially relevant for other reasons. It is hard to see how the Governments proposed language excludes these issues. In *Griffin* the Court

denied a motion in limine concerning restrictions that would limit information regarding the timing and location of Vice President Pence.

The Prices are not saying the category in the request is or is not a key issue area. However, the Prices do not want to get ensnared in a legal tripwire when the Prices have questions about what constitutes a restricted area after the physical demarcations are not present in places and the Prices were not there to see the removal. A category limitation may limit questioning because it touches an area. Such questions may relate to the presence or absence of or comparisons to "protocols" of the Secret Service or the "nature of" the protection strategies which are related to Secret Service details. As examples, the Prices have questions about the significance of police cordons that arose afterwards or the operation and statements (or lack of statements) from police. These questions may very will relate to prior operations.

Third, the term "emergencies" also needs explanation. Was the failure to maintain a perimeter of signs and bike racks an "emergency" or a failure to address a contingency by the Secret Service/and or Capitol Police? That failure all occurred before the Prices arrived on the scene. The Prices came after parts of Plan A failed. Those parts of Plan A were over, and the Congress had already stopped or recessed based on two fundamental things:(1) the actions of people other than the Prices and 2) the failure of a security operation that is the responsibility of federal and/or local agencies. Many view the situation in hindsight, or perhaps at the time, as a lack of planning, preparedness and clarity. The Prices are not the organizers of the events of January 6, 2021. They have every reason to believe organizers have the right permits and that enforcement agencies are coordinating with organizers. The Secret Service itself is responsible for protection both at the rally at the ellipse where President Trump was and at the Capitol where the Vice President was.

In response to the "emergency" different police were creating different cordons and the Prices never crossed a cordon or disobeyed a police officer. The question of how protocols operated may be very relevant including whether those protocols involved coordination with the Capitol Police and other police.

C. The Government's Requested Category Exemption from Cross-Examination About "The Nature of Secret Service Protective Details" Is Overly Broad and May Create Unfair Limitations for Relevant Exploration During Cross Examination

The Government seeks an additional category exemption which involves terms that may intersect with relevant lines of cross-examination:

> "Defendant should be specifically foreclosed from questioning the witnesses about the following:…
>
> 2. Details about the nature of Secret Service protective details, such as the number and type of agents the Secret Service assigns to protectees."

Again, the problem here is similar to the issue with "protocols." Secret Service details coordinate with other law enforcement officials including on January 6, 2021. Secret Service details operate with the tools of restricted areas when they apply. Secret Service agents themselves can be elements of a cordon under 18 U.S.C.§1752(c). Or Secret Service agents could provide information to other police who are elements of a cordon under 18 U.S.C.§1752(c). The nature of secret service protective details may be part of the reason for a delay in certification. The nature of secret details may be part of the evaluation of the failure to prepare for an anticipate the loss of a flimsy perimeter on January 6, 2021. The "nature of Secret Service protective details" is a broad and ambiguous statement in the context of the case. Moreover, it is clear in the *Griffin* case that on direct examination, the Secret Service protective witness gave a great deal of information about the "nature of Secret Service protective details." The Government cannot claim a category is off limits and then dwell in the category.

D. *The Government Statement that Cross-Examination of Secret Service Witnesses Should Be Limited to Whether the Capitol Was Restricted on January 6, 2021 Is Overly Broad and Creates Unfair Limitations for Relevant Exploration During Cross Examination*

Note the header on page 4 of the motion under argument II in which the Government declares another broad argument for restricting cross-examination. The formulation in this statement is a request or argument not made earlier in the motion or not made with the same framing. Differences in framing and ambiguous framings in the motion create confusion about the category restrictions the Government seeks. The Prices have already identified the problem with the term "whether." The Capitol may have been restricted at some point and the tangible elements of restrictions may have been there. The Prices have many questions, including with respect to times, locations, the roles of the statements or lack of statements by police officers. As explained above the direct examination of the Secret Service witness in the Griffin went to many other areas. The Prices arguments above apply to this issue as well. Moreover, the Secret Service roles are relevant to other legal issues as described below.

E. *The Government's Two Different Statements of Request for In Camera and Ex Parte Hearings Are Inappropriate*

The instant motion has two formulations of a request for in camera and *ex parte* hearings. The first concerns admissibility of evidence:

> If this court determines that a hearing is necessary to determine the admissibility of testimony by Secret Service witnesses, the government requests the hearing be conducted in camera and ex parte. As noted, in this case, disclosure of certain information could prove detrimental to the Secret Service's ability to protect high-level government officials and affect our national security. Gov. Motion at 5.

The Prices have not, so far, challenged the admissibility of anything. In the instant motion, the Government is seeking to limit cross-examination not admissibility. If something is challenged as not admissible, one would think keeping something out would not be a security issue. Is this now a request that if the Government challenges admissibility of cross-examination questions this is the same as challenging admissibility. Is this an abstract question based on questions that have not been asked regarding a topic that has not been previously brought up in the motion? Also note the conflict with the second request for an in camera and ex parte hearing. The Government now assumes questions the Government has not heard involve "admissibility" and on such basis requests a process that would be both *in camera* and *ex parte.* That is an extraordinary and justified request.

The second request is the last sentence of the Conclusion which states:

> If this Court determines an evidentiary hearing is necessary to rule on this motion, the government asks that the hearing be held in camera and ex parte. Gov. Motion at 6.

The request in the Conclusion is very different from Government request in the argument. The request in the Conclusion is contingent on whether the Court determines an evidentiary hearing is necessary to rule on this motion. The Prices understand the Court could determine an evidentiary hearing is necessary. However, just to review the bidding, the Prices have not asked for an evidentiary hearing, and the Government has not asked for an evidentiary hearing. Certainly, the Prices would not want an evidentiary hearing where the Prices are excluded. The Prices take it that is what the Government is asking here by asking for an *ex parte* hearing. Neither party has explained what evidence is involved, only the categories of limitation for cross-examination. This "conclusion" is contingency upon contingency based on questions not

asked yet and testimony not given yet. The Government carries the burden and a motion to limit cross-examination needs to be clean and clear.

F. The Motion is Too Unclear to Meet the Government's Burden

The Government motion concludes:

> For these reasons, the United States requests that this Court enter an order, as described above, limiting cross-examination of any witness with the Secret Service. Gov. Motion at 6.

The Prices note that nothing in the conclusion clarifies the many conflicting, incomplete and ambiguous request that the Government describes as "described above, limiting cross-examination of any witness with the Secret service." Indeed, the conclusion may suggest the Government may call multiple Secret Service witnesses covering different topics. The Government has the burden for this motion and the various requests and an unclear motion with confusing overlaps and which does not map to prior witness Secret Service testimony fails that burden. If the Court adopts any of the Government's request, such order should be specific. There is no clear proposed order in the instant case.

VI. Accepting the Motion in Limine Would Further Erode the Price's Fifth and Sixth Amendment Rights

The Prices have already argued in their memorandum of points and authorities in support of their motion to dismiss [ECF 54-1] that the Superseding Information (SI) fails the requirements of the Fifth and Sixth Amendments and Federal Rule of Criminal Procedure 7(c). The Prices have not been told by the Government what specific conduct either person engaged in that the Government argues constitutes disorderly and disruptive conduct under 18 U.S.C. § 1752(a) or 40 U.S.C. § 1504(e)(2)(D). The Prices have not been told by the Government what

specific conduct either person engaged in that the Government alleges constitutes to "parade, demonstrate, or picket." The Prices have not been informed about what postings, cordons or other restrictions as required under the terms of 18 U.S.C. § 1752(c) were provided to mark an alleged restricted area within the meaning of 18 U.S.C. § 1752 at the time of the Prices' alleged violations. Borrowing text from the Sixth Amendment, the Prices have not been "apprised of the nature and cause of the accusation." Without such essential allegations of fact, the SI cannot survive a Double Jeopardy analysis under the Fifth Amendment or generally address multiplicity or duplicity problems. Nor is it reasonable to expect a defense to address motions to limit cross-examination when the underlying case from the Government is either non-existent or lacks key reference elements. With such Fifth and Sixth Amendment problems as a basis it should not be proper to then limit cross-examination when the basic case is not known to the Prices

CONCLUSION

For the forgoing reasons, the Prices respectfully request the Court deny the Government's Motion in Limine to Limit Cross-Examination with respect to any Secret Service witness and any other related Government request in the instant motion.

Dated: August 24, 2022

Respectfully submitted,

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