UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-CR-00647**
	:	
BENJAMEN BURLEW,	:	
	:	
Defendant.	:	

UNITED STATES' MOTION IN LIMINE REGARDING
CROSS-EXAMINATION OF U.S. SECRET SERVICE WITNESS

The United States of America hereby submits the following motions in *limine* to preclude the following defense arguments and admission of evidence during trial in this case.

Burlew is charged in an 8-count indictment with civil disorder, assault on law enforcement, prohibited actions in a restricted area, and assault in the territorial jurisdiction. The majority of his activity is focused on two areas at the U.S. Capitol on January 6, 2021 – his assault on law enforcement on the Lower West Terrace between 1 and 2 p.m., and a subsequent assault on a member of the news media in an adjacent area between 2 and 3 p.m.

1. This Court Should Preclude the Defendant from Arguing in a Manner That Encourages Jury Nullification, Whether During Voir Dire or During Trial

The defendant should be prohibited from making arguments or attempting to introduce non-relevant evidence that encourages jury nullification. As the D.C. Circuit has made clear,

> A jury has no more "right" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.

United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983). Evidence that only serves to support a jury nullification argument or verdict has no relevance to guilt or innocence. *See United*

States v. Gorham, 523 F.2d 1088, 1097-98 (D.C. Cir. 1975); *see also United States v. Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998) ("No reversible error is committed when evidence, otherwise inadmissible under Rule 402 of the Federal Rules of Evidence, is excluded, even if the evidence might have encouraged the jury to disregard the law and to acquit the defendant").

The government has identified the following subject areas, which are not relevant to the issues under consideration by the jury and could serve as an improper invitation for the jury to nullify its fact-finding and conclusions under the law.

The defendant may claim that he has been unfairly singled out for prosecution because of his political views, and that—at the very least—his conduct does not merit felony charges. But a "selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). Regardless of whether alleged discrimination based on political views is a proper basis for challenging the indictment—which the defendant has not claimed to date—it has no place in a jury trial. *See United States v. King*, No. CR-08-002-E-BLW, 2009 WL 1045885, at *3 (D. Idaho Apr. 17, 2009) ("The Court will therefore exclude any evidence or argument as to selective prosecution at trial."); *United States v. Kott*, No. 3:07-CR-056 JWS, 2007 WL 2670028, at *1 (D. Alaska Sept. 10, 2007) (where defendant, in response to government's expressed concern that defendant might use challenged evidence to claim selective prosecution at trial, the defendant "abjured any effort to" to make such a claim, "[t]he court will enforce that promise").

The defendant may face significant prison time were he to be found guilty in this case. The government will request that the Court give a commonplace instruction that the jury should not concern itself with a possible sentence in the event of a conviction. *See United States v. Feuer*, 403

F. App'x 538, 540 (2d Cir. 2010) (unpublished). Defendant should not be permitted to arouse the jury's sympathy by introducing any evidence or attempting to argue about the possible sentence in this case. These circumstances have no bearing on the defendant's guilt and invite jury nullification. *See United States v. Bell*, 506 F.2d 207, 226 (D.C. Cir. 1974) ("evidence which has the effect of inspiring sympathy for the defendant or for the victim … is prejudicial and inadmissible when otherwise irrelevant") (internal citation omitted); *United States v. White*, 225 F. Supp. 514, 519 (D.D.C 1963) ("The proffered testimony (which was clearly designed solely to arouse sympathy for defendant) was thus properly excluded.").

2. This Court Should Preclude the Defendant From Arguing Self Defense or Defense of Others

The defendant has not raised a claim of self-defense, but if he does, such argument should be precluded. To establish a prima facie case of self-defense, the defendant must make an offer of proof of "(1) a reasonable belief that the use of force was necessary to defend himself or another against the immediate use of unlawful force and (2) the use of no more force than was reasonably necessary in the circumstances." *United States v. Biggs*, 441 F.3d 1069, 1071 (9th Cir. 2006). "If a defendant cannot proffer legally sufficient evidence of each element of an affirmative defense, then he is not entitled to present evidence in support of that defense at trial." *United States v. Cramer*, 532 Fed. App'x 789, 791 (9th Cir. 2013) (citing *United States v. Bailey*, 444 U.S. 394, 415 (1980)).

Here, the defendant will not be able to present any evidence of a reasonable belief that his actions were necessary to defend himself against the immediate use of unlawful force. The defendant's own actions, and his statements of intent, undermine any claim that he had a reasonable belief that he was engaged in an act of defending himself. Likewise, the defendant's persistent and unrelenting effort to push forward and inside the Capitol belies any claim that he was engaged in conduct that the defendant reasonably believed was *necessary* to protect himself against unlawful force.

Through his words and actions, the defendant made plain his intent. The Court should exclude any testimony and evidence purporting to assert a claim of self-defense.

3. This Court Should Preclude the Defendant from Calling Expert Witnesses

The government has provided discovery pursuant to its obligations, including Fed. R. Crim. P. 16. The government does not intend to call expert witnesses. The government has also made a request pursuant to Rule 16(b) but has not been provided with any reciprocal discovery or notice of experts. Given that trial is scheduled to begin in seven weeks, the government submits that the time for expert witness disclosures has passed, and the defendant should not be allowed to present testimony from any expert witnesses.

CONCLUSION

Motions in limine are "designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions." *Graves v. District of Columbia*, 850 F.Supp.2d 6, 10 (D.D.C. 2011) (quoting *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1070 (3d Cir. 1990)). The government presents these issues to the Court in an effort to prepare this case for an efficient trial. For the reasons set forth herein, the United States respectfully requests that this Court grant the government's motion in *limine* no. 1 through 3, as set forth herein.

Respectfully submitted,

FOR THE UNITED STATES

MATTHEW M. GRAVES
UNITED STATES ATTORNEY
D.C. Bar Number 481052

s/Jennifer Blackwell
Jennifer Leigh Blackwell
Assistant United States Attorney
D.C. Bar No. 481097
U.S. Attorney's Office for the District of Columbia
601 D Street, N.W.
Washington, D.C. 20530
Phone: (202) 803-1590
Email: jennifer.blackwell3@usdoj.gov

s/Anna Krasinski
Anna Krasinski
Assistant United States Attorney
601 D Street, N.W.
Washington, DC 20530
Phone: (202) 809-2058
Email: anna.krasinski@usdoj.gov