SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – MISDEMEANOR BRANCH

UNITED STATES OF AMERICA	**Case Nos.:** **2021 CMD 000187** **2021 CMD 000185**
v.	**Honorable Judith A. Smith**
EARL GLOSSER and **DAVID FITZGERALD**	**Status:** **September 13, 2021**
Defendants.	

UNITED STATES' REPLY IN SUPPORT OF
ITS MOTION FOR PROTECTIVE ORDER GOVERNING DISCOVERY

The Capitol Attack is the largest prosecution the United States has ever undertaken. Ultimately, to comply with its discovery and disclosure obligations, the government intends to make voluminous materials available in all pending cases arising out of the events of January 6, 2021, including these cases. Given the volume of material that is likely to be made accessible to the defendants, the proposed order ensures that this information, where appropriate, will be adequately protected. To streamline the production of discovery and to ensure that any disputes can be resolved efficiently, the government has sought the entry of a uniform protective order in all its prosecutions, whether in the Superior or District Courts. The government has established good cause for its proposed protective order, and Defendants Glosser and Fitzgerald identify no compelling reason why different orders should be entered in their cases.

On June 23, 2021, the government filed a letter respecting a proposed consent protective order governing discovery in each of these twenty-four co-defendant matters, and it sent a courtesy copy to counsel by email. The next day, the government sent a copy of its proposed consent protective order to counsel by email. The government stated that if it did not hear from counsel by June 29, 2021, it would move for entry of the protective order. Counsel for seven defendants

(Bergeson, Grames, Knowles, K. Malimon, Y. Malimon, Mendez, and Murphy) responded and consented. Counsel for one defendant (Parker) responded and explicitly refused to consent. Counsel for the remaining sixteen defendants did not respond.

On July 20, 2021, the government filed its Motion for Protective Order Governing Discovery in the cases of the seventeen defendants who did not consent to the motion. The next day, counsel for Defendant Glosser responded by email that he would be filing a response. He did not specify any objections to the protective order nor propose any constructive modifications. On August 1, 2021, Defendant Glosser filed a "Response and Opposition" to the Motion. On August 4, 2021, Defendant Fitzgerald sought leave to join and adopt Defendant Glosser's Response and Opposition. As of this filing, no other defendant has opposed or otherwise responded to the Motion. The government now files this Reply in support of its Motion.

Defendants Glosser and Fitzgerald do not dispute that the investigation and prosecution of those implicated in the Capitol Attack will likely be one of the largest in American history, both in terms of the number of defendants prosecuted and the nature and volume of the evidence. Defendants do not dispute the scope of the charges that are under investigation or the voluminous amounts of information and evidence relating to both charged and uncharged individuals which may be discoverable pursuant to Rule 16, the provisions of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and its progeny, *Giglio v. United States*, 405 U.S. 150, 153–54 (1972), and the Jencks Act, 18 U.S.C. § 3500. Nor do Defendants dispute the possibility that some of these evidentiary materials may contain sensitive information. (Examples of the types of information that the government may designate Sensitive or Highly Sensitive are identified in Paragraph 1 of the proposed order.) Finally, Defendants do not claim that any aspect of the proposed order would be particularly onerous or unworkable.

Much of Defendants' Opposition suggests that certain categories of information potentially covered by the protective order either do not exist or will not be relevant to them given their characterization of their alleged criminal conduct on January 6, 2021. Even if these assertions were correct, it is difficult to see how the entry of the protective order would prejudice them, given that the protective order has effect only if the government (i) produces the information and (ii) gives the produced information a sensitivity designation (i.e., "Sensitive" or "Highly Sensitive"). Most of Defendants' arguments seem not to involve a genuine dispute over the protective order's terms but are rather aimed at minimizing their criminal conduct. *See, e.g.*, Opp. at 4 ("The Government seeks to treat Mr. Glosser as if he were involved in the Capitol Attack when the Gerstein merely alleges that he failed to vacate a parking lot."). But these cases are inextricably part of the Capitol Attack and will require the government to produce voluminous evidence that may contain sensitive information. Given the volume of material that is likely to be made accessible to Defendants, the proposed order ensures that this information, where appropriate, will be adequately protected.

As pertains to Paragraph 1.i. of the protective order, Defendant Glosser challenges the inclusion of "Materials designated as 'security information' pursuant to 2 U.S.C. § 1979." He objects to use of the word "sensitive" in 2 U.S.C. § 1979, arguing that it is "not even clear what the word 'Sensitive' would mean in this context' and that it is 'also so broad that it would or conceivably could cover absolutely anything turned over in discovery.'" Opp. at 4. This argument is misplaced. As set forth in 2 U.S.C. § 1979, Congress has empowered the Capitol Police Board by statute to protect certain sensitive information related to the security of the United States Capitol. The government is not able to modify that statute. The government could not use this statute, as Defendant suggests, to "cover absolutely anything turned over in discovery."

To be clear, the proposed order does not automatically render the listed categories of information subject to protection. While Paragraph 1 of the proposed order includes an illustrative list of items that could be subject to a sensitivity designation, it does not designate any particular category of items as Sensitive or Highly Sensitive. The same paragraph makes clear that the government will "make every effort to provide discovery in a manner that will allow for most discovery to be produced without such designations."[1] Paragraph 11 makes clear that the order does not apply to, *inter alia*, materials that are or later become part of the public court record, or that are derived directly from or pertain solely to the defendant.

To the extent Defendants may be concerned with the government's designation of material as "Sensitive" or "Highly Sensitive," given their concern about the use of the word "sensitive" in 2 U.S.C. § 1979, Paragraph 8 requires the government to make "a good faith effort to resolve any dispute about a sensitivity designation before requesting the Court's intervention," and to agree to redaction whenever redaction will resolve the basis for which the designation was applied. Paragraph 9 of the proposed order makes clear that Defendants retain the right to seek modification of the proposed order and to challenge any particular designation before this Court. It also states explicitly that the burden of justifying any designation remains with the government.

The government has established the requisite good cause for the proposed protective order. The proposed order is designed to ensure the defense has liberal access to discovery while protecting sensitive materials from unwarranted disclosure.

CONCLUSION

For the foregoing reasons, the government respectfully requests the Court issue a protective

[1] Though not mentioned by Defendants, the government has already produced initial discovery in this matter, all without any sensitivity designation.

order governing the production of discovery in these matters as the government has demonstrated good cause.

Respectfully submitted,

CHANNING D. PHILLIPS
Acting United States Attorney

JOHN B. TIMMER
Deputy Chief, Major Crimes Section
Assistant United States Attorney

ANDY WANG
KATHLEEN W. GIBBONS
Assistant United States Attorneys

By: */s/ Paul V. Courtney*
Paul V. Courtney (DC Bar No. 1034252)
Assistant United States Attorney
United States Attorney's Office
for the District of Columbia
555 Fourth Street, N.W.
Washington, DC 20530
Phone: (202) 252-1719
Email: paul.courtney@usdoj.gov