No. 24A-____

In the Supreme Court of the United States

CYNTHIA BALLENGER,

Applicant,

-v.-

UNITED STATES OF AMERICA,

Respondent

On Application from the United States Court of Appeals for the District of Columbia Circuit

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APPLICATION TO THE HONORABLE CHIEF JUSTICE JOHN ROBERTS FOR RELEASE AND BAIL PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Defendant-Applicantsare Cynthia Ballenger (Price). Respondent is the United States. The proceedings below is*United States of America v. Cynthia Ballenger*, 1:21-cr-00719-JDB-1 (D.D.C.)which is consolidated with *United States of America v. Christopher Price*, 1:21-cr-00719-JDB-2 (D.D.C) and, respectively, in the D.C. Circuit, 23-3198 (D.C. Cir.) and 23-3199 (D.C.). Cynthia Ballenger was charged and convicted after a bench trial on four misdemeanor counts based ontheir actions at the United States Capitol on January 6, 2021: enteringor remaining in a restricted grounds or building, in violation of 18U.S.C. § 1752(a)(1) (Count One); disorderly or disruptive conduct in arestricted building, in violation of 18 USC § 1752(a)(2) (Count Two); disorderlyor disruptive conduct in a Capitol Building, in violation of 40 U.S.C. §5104(e)(2)(D) (Count Three); and parading, demonstrating, or picketingin a Capitol Building, in violation of 40 USC § 5104(e)(2)(G) (Count Four).

On September 29, 2023, Cynthia Ballenger was sentenced to four (4) months of imprisonment followed by nine (9) months supervised release. Cynthia Ballenger (Price) has already paid the assessment for $570 each in restitution and assessed fees.

Cynthia Ballenger and her husband, Christopher Price (the Prices) filed a motion for release pending appeal in district court based on substantial questionson November 12, 2023 [1:21-cr-00719, Doc. 152]. The government provided no brief in opposition. The District Court, however,did not rule until February 29, 2024, at a status hearing, where the district court denied the Prices'motion. The district court did not provide a written opinion. The denial is reported by minute order of

February 29, 2024, which states the basis of the denial is that the Prices did not present a substantial question. Application Appendix at 19.

Following the district court denial, the Prices filed a consolidated Motion for Release Pending Appeal Based on Substantial Questions in the D.C. Circuit under Federal Rules of Appellate Procedure 9(b) on March 5, 2024.[Case #23-3198,Doc. #2043574] ("Ballenger/Price Motion for Release Pending Appeal in D.C. Circuit"). The government filed an Opposition to Appellants Motion for Release Pending Appeal on March 7, 2024.[Case #23-3198, Doc. # 2043900]("Gov't Opposition to Release Pending Appeal in D.C. Circuit") and the Prices filed a reply on March 14, 2024. [Case #23-3198, Doc #2044813]. One day later, on March 15, 2024, a three-judge panel of the D.C. Circuit, which included Circuit Judges Patricia A. Millet, Cornelia T.L. Pillard, and Robert L. Wilkins denied the Price's motion for release pending appeal.[Case #23-3198, Doc. # 2045033].("D.C. Circuit Opinion on Release Pending Appeal") Appendix to this applicationat 20. The opinion appears to only refer to Cynthia Ballenger in the discussion, but the motion was properly filed by Cynthia Ballenger and Christopher Price.

Cynthia Ballenger self-surrendered to the custody of the Bureau of Prisons, FCI Hazelton, on March 19, 2024, and is in custody at the Secure Female Facility there. By minute order on February 29, 2024[1:21-cr-00719, Doc. 167], the district court suspended the reporting date for Christopher Price. The district court seeks an update of information from health professionals by July 29, 2024. Chris had a

second round of radiation therapy in October and November of 2023 for prostate cancer that had moved to lymph nodes.

The Prices filed their consolidated appellate brief on February 7. 2024[Case # 23-3198, Doc, # 2039213]. ("Ballenger/Price App. Br. or Br."). The Prices also provided a two-volume appendix. ("A"). The government filed a responsive brief on April 15, 2024[Case # 23-3198, Doc. # 2049671]. ("Gov't Br.")and a supplemental appendix [Case # 23-3198, Doc. 2049684] The Prices filed the reply brief on May 6, 2024.[Case # 23-3198, Doc 2053107]. ("Reply Br.)

TO THE HONORABLE JOHN ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Cynthia Ballenger (Price) respectfully submits this Application to your Honor as Circuit Justice for United States Court of Appeals for the District of Columbia Circuit, pursuant to Supreme Court Rule 22 subd. 5 and 18 U.S.C. §§ 3141(b) and 3143(b) seeking release and bail pending each parties' respective appeal in the United States Circuit Court for the District of Columbia and the final disposition of any subsequent petition to the U.S. Supreme Court for a *writ of certiorari*.

JURISDICTION

The Court has jurisdiction to review this application under Supreme Court Rule 22 subdivision 5 and pursuant to 18 U.S.C. §§ 3141(b) and 3143(b).

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue are those statutes related to the charges and conviction of the Prices as described above and the relevant statutory language is included as an addendum to this application.

REASONS FOR GRANTING THE APPLICATION

The district court and D.C. Circuit should have granted the Price's motions for release pending appeal pursuant to 18 U.S.C. §§ 3141(b) and 3143(b) based on substantial questions. The district court provides no written opinion. The D.C. Circuit provides a short, written opinion which contains several perfunctory declarative sentences without support.

The basic conduct at issue isthe Price's entry through an open door after standing in line to enter and observing people entering and leaving in an orderly fashion. At least a dozen police officers were right there and cordoned-off going to the left/north and did tell the Prices not to enter. A peaceful, 1-minute walk to the right/south followed until police south of the entrance indicated that the Prices, or anyone else, go no further south. Thus, the Prices never crossed the police cordon north or south of the entrance. This was directly followed by 5 ½ minutes of the Prices peacefully standing in line to exit. The only other conduct is texting (Chris Price) and taking pictures (both).

The Prices properly argue that their walk complied with the police cordon right at the location. As a result, the small area the Prices walked in was not restricted. As an analogue, people walk into public buildings all the time and then, inside, face security measures or personnel that may restrict further movement into the building and may mean they should then exit. Citizens are dependent on the instructions of police on the scene, particularly if the situation is confusing.

The government argues that presence, in the Capitol entry foyer is "disruptive conduct" regardless of: 1) whether or not the area was restricted, 2) whether the Prices were in full compliance with a police cordon and never crossed such cordons, 3) whether any police or sign provided notice, 4)the*de minimis* time in the walk south, 5) whether the Prices failed to follow a police instruction, and 6) that no one was pushing or challenging police while the Prices were there.

Similarly, the government argues that the same conduct, even though the Prices said nothing to anyone political (or pretty much anything)andhad no act of organization with anyone there or anywhere.

On April 4, 2024, Russell Alford filed a Petition for Certiorari (Supreme Court # 23-7158) to review the decision in *United States v Alford* 89 F 4th 943 (D.C. 2024) and presents the question: "In §1752(a)(2)'s and §5104(e)(2)(D) prohibition against 'disorderly or disruptive' conduct, do 'disorderly' and 'disruptive' narrow the types of conduct criminalized, or do those adjectives refer only to conduct's effect under the circumstances so that even mere presence may violate the statute?" *Id*. On April 12, 2024, the government waived its right to file a response. However, on April 23, 2024 the Supreme Court directed the government torespond by May 23, 2024 which supports a substantial question on issues critical to the convictions of the Prices.

Below, the Prices argue there are substantial questionswhether the conduct of the Prices meets the requisite standards for Counts 1, 2, 3, and 4. The Prices further argue there are substantial questions whether the convictions on Counts 1, 2, 3 & 4 should be reversed based on two basic procedural errors. The first

substantial procedural question is whether the superseding information provided sufficient information to satisfy the Sixth Amendment regarding the nature of the legal case and provided sufficient essential facts as required under both the Sixth amendment and the rules of Federal Criminal Procedure. The second substantial procedural question is whether evidence relied upon in the case to convict was used in violation of the Fourth Amendment and whether this requires reversal or a new trial.

I. SUBSTANTIAL QUESTION AUTHORITY FOR RELEASE PENDING APPEAL

Release pending appeal is warranted where the judicial officer finds, "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under §§ 3142(b) or (c) of this title; and that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in. . . reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(A), (B)(i)-(iv).

A "substantial question" within the meaning of § 3143(b) is "'a close question or one that very well could be decided the other way.'" *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam) (quoting *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985)). This standard does not require that the Court find that Cynthia Ballenger's or Christopher Price's appeal establishes a likelihood of reversal before it may grant either a release pending appeal. *See Bayko*, 774 F.2d at 522-23.

Rather, the Court must "evaluate the difficulty of the question" on appeal, *United States v. Shoffner,* 791 F.2d 586, 589 (7th Cir. 1986), and grant release pending appeal if it determines that the question is a close one or one that "very well *could* be" decided in the defendant's favor.

The Prices argue something can be significantly less than probable but still "very well could" occur. This is particularly so where law is complex, novel, involves constitutional considerations, or involves several applicable rules of construction.

II. NEITHER THE GOVERNMENT NOR COURT HAS CONTESTED THAT THE PRICES SATISFY THE NO FLIGHT AND PUBLIC SAFETY REQUIREMENTS

The Prices have demonstrated by clear and convincing evidence that they will neither flee nor pose a danger to the community. Neither the government nor the district court nor the D.C. Circuit contest this. On April 11, 2024, defense counsel contacted their supervising officer, Pamela Nieva, at the United States Probation and Pretrial Office District of Maryland at Greenbelt, who indicated the Prices remained in compliance. The Prices have been under court supervision for over 2 and ½ years, since August 2021, and have remained in compliance. The presentence reports (PSRs) for Cynthia Ballenger and Christopher Price indicate a zero-level criminal record for purposes of the sentencing guidelines. [1:21-cr-00719, Cynthia Ballenger (Price) Doc. 123, Presentence Report ¶ 49] [1:21-cr-00719, Christopher Price Doc. 121, Presentence Report ¶ 53]. Chris has local medical treatment professionals he is seeing that are critical to his medical circumstance. As the

primary patient navigator and primary care giver, Cynthia wants to stay at home and care for her husband. Both have jobs in the community.

The Prices further submit by clear evidence the appeal is not for purposes of delay. Transcripts were timely ordered. The consolidated appellate brief was filed on February 7, 2024. As described below, the Prices arguments are more than in good faith.

III. SOME FRAMEWORK BACKGROUND REGARDING SUBSTANTIAL QUESTIONS FOR THIS APPLICATION

The Gov't Opposition to Release Pending Appeal in D.C. Circuittakes the position that the government need only prevail regarding Count 3 disruptive conduct and show there were no substantial questions that would reverse count 3. Cynthia Ballenger argues the government failure to challenge the other counts is a concession and the sheshould not need to address controversies that the government challenged in the D.C. Circuit. Out of caution, Cynthia Ballenger addressesCounts 1, 2, 3, and 4 below.Cynthia Ballenger identifies where an issue was addressed in D.C. Circuit Opinion on Release Pending Appealand where it was not addressed.

Relief is important even if saves only two months of prison for Cynthia. The issues presented here have been presented to the government several times and there should be no reason for a government response to this application to take a long time to produce.

IV. STANDARD OF REVIEW FOR QUESTIONS ON APPEAL IN D.C. CIRCUIT REGARDING COUNT 1, 2, 3 & 4 LEGAL INTERPRETATIONS AND SUFFICIENCY OF EVIDENCE

The D.C. Circuit reviews questions of statutory interpretation *de novo*. *See United States v. Hite*, 769 F.3d 1154, 1160 (D.C. Cir. 2014). The D.C. Circuit reviews insufficiency claims *de novo*, considering whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gaskins*, 690 F.3d 569, 576 (D.C. Cir. 2012).

V. CERTAN RULES OF STATUTORY INTERPRETATION AMPLIFY AND SUPPORT SUBSTANTIAL QUESTIONS BELOW

As stated in *Winters v. New York*, 333 U.S. 507(1948):

> The crime "must be defined with appropriate definiteness." [citations omitted] …There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. [Footnote omitted] The vagueness may be from uncertainty in regard to …the applicable tests to ascertain guilt. [Footnote omitted]*Id.* at 515-516.

"Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate." *Dowling v. United States*, 473 U.S. 207, 213 (1985). As stated in *Dowling*:

> Thus, the Court has stressed repeatedly that "`"when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."'" *Id* at 214. [Citations omitted].

United States v. Lanier, 520 U.S. 259, 267 (1997) states "…due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope" [citations omitted].

The government has not cited a single case prior to the January 6th cases where there is a conviction under §1752(a)(1) where the §1752(c) perimeter no longer materially exists. No case prior to the January 6th cases findthat peacefully walking or standing in line met the definition of disruptive conduct under either §1752(a)(2) or § 5104(e)(2)(D) or demonstrative conduct under § 5104(e)(2)(D).

The recent Supreme Court case *Bittner v United States* 143 S. Ct. 713 (2023) states:

> To the extent doubt persists at this point …. a venerable principle supplies a way to resolve it. Under the rule of lenity, this Court has long held, statutes imposing penalties are to be "construed strictly" against the government and in favor of individuals. (Citing *Commissioner v. Acker*, 361 U. S. 87, 91 (1959)) *Bittner* 143 S. Ct at 724.
>
> …. as Acker acknowledged, "[t]he law is settled that penal statutes are to be construed strictly," and an individual "is not to be subjected to a penalty unless the words of the statute plainly impose it." *Id.* [Citation omitted]

VI. ENTERING A FOYER IN FRONT OF NUMEROUS POLICE, WALKING FOR ABOUT 1 MINUTE, AND, THEN STANDING IN LINE TO EXIT FOR 5 AND ½ MINUTES IS THE PHYSICAL CONDUCT

On January 6, 2021, the Prices attended then President Trump's rally at the Ellipse. The approximate times of their walking are shown by exhibit. (A121, A125). After spending time at the Ellipse, the Priceswalked down Constitution Avenue toward the Capitol but detourednorth to go to the West Wing Café. The Prices

stayed for about 44minutes from about 1:49 pm to 2:33 pm at the café to rest and havesomething to eat. After the West Wing Café, the Prices walked downNew Jersey Avenue and crossed over Constitution Avenue onto theCapitol Grounds. They walked onto a pedestrian walkway and walked to the Upper Terrace on the West side of the Capitol.

The evidence shows the Prices walk through an open Senate Wing Door at about 3:22:44 pm.(*See* Brief Pictures at Br. at 17-20and Defense Exhibit 303 (A137)). At the time of entry there is no indication or evidence that any of the police officers inside, but near the door, tells the Prices not to enter. Inside the door, there is a police cordon, or line, preventing anyone from going north in the foyer. At less than one-minute walking south, the Prices encounter a police officer with the lettering A. Tax on hisshirt. (A138) Christopher Price takes a picture of officer A. Tax. The evidence shows that neither the Prices, nor anyone entering during their time in the foyer, go further south than officer A. Tax. After encountering officer A. Tax, the Prices spend the remaining approximately 5 ½ peacefully standing in line to exit the Senate Wing Door which they do at about 3:29 pm. (A139 and Application Video Disk 11-Def. 400 Senate Wing Door 1 w/ Circles (3.22-3.30 pm)).

The defense showed the closed-circuit video that captures the Prices walk in the small foyer to the primary government witness, Lt. Grossi. The defense stopped minute by minute and Lt. Grossi who was forced to admit **no one** was pushing or challenging any police officer while the Prices were in the foyer. (A238-241). Defense Counsel askedrelated questions of Special Agent Belcher at (A331):

Q: …it seems like the Prices walk in, get in line, and walk out.

Is there is something different that you found in your investigation?

A: No.

Q: And in your investigation, did you investigate anything outside of the Senate Wing Door. That is to say, in the area outside of it, were you able to talk to anyone or you, ask what the situation looked like there?

A: No.

After that they stood in line to exit, the Prices observed additional things such as some citizens chanting or someone climbing through a window, as examples.

VII. THERE IS A SUBSTANTIAL QUESTION WHETHER ENTERING OR REMAINING ON THE GROUNDS OR UPPER TERRACE CAN BE A BASIS FOR ANY COUNT BECAUSE THESE AREAS WERE NOT DEMARCATED AS RESTRICTED AT THE TIME OF THE PRICE'S WALK

Here the Prices briefly address a substantial question (listed as substantial question 1 in the motion before the D.C. Circuit:

> Whether the government proved beyond a reasonable doubt and by proper legal interpretation and sufficient evidence that there was a restricted area under 18 U.S.C.§1752 (c) on the Capitol Grounds and Upper Terrace at the time of the Prices walk and, if so, whether the Price entered such area knowing it was restricted.(Ballenger/Price Motion for Release Pending Appeal in D.C. Circuit on for Release Pending Appeal at 9-10)

The government effectively conceded this issue for purposes of the motion for release pending appeal in the D.C. Circuit and, consequently, the D.C. Circuit did not address this issue as a basis for rejecting the Prices motion.

A. Relevant Postings, Cordons or Other Restrictions Must Materially Exist at the Time of Encounter

The district court claimed the ghost of prior perimeter demarcations which had been moved or take down before the Prices walk still had legal impact to demarcate a restricted area by saying:

> Rioters' success in knocking down barriers and doors, however, does not strip an area of its restrictions. [A602]

Material existence of postings, cordons, or other restrictions at the time someone "enters or remains" is consistent with common-sense understanding of demarcation, which is a mechanism of notice which Congressional required under 1752(c). Restrictions under §1752(c) are often temporary and police lines formed in different locations later in the day. The *mens rea*test under§ 1752(a) based on theories of constructive notice that things were unusual at the scene does not displace the requirements of § 1752(c).

The government in its responsive brief in the appeal in the D.C. Circuit cites to *McCulloch v Maryland*, 17 U.S. 426 (1819) for the proposition "…[t]hus, only a government agency can reverse its own exercise of the authority to restrict an area."(Gov't Br. at 25). The Prices read *McCullough* as a case finding that an enactment of Congress is supreme over state law. *McCullough* is not a case relevant to statutory interpretation supporting the ghost of perimeter past as enforceable to convict.

Under §1752(c) the secret service must both designate AND there must be an actual, material system of demarcation at the time relevant for the alleged conduct.

For example, if the Secret Service assumed a hotel would set up a cordon in a location, but the hotel staff did not, this circumstance does not satisfy §1752(c). Government authority to designate and good faith intention to have the hotel provide a "cordoned-off" area is not sufficient. Surely, the government does not argue the ghost of demarcation from the morning of January 6, 2021, still exists to this day as operative, even if it was others that moved the demarcations and not the government.

If a person encounters and removes a §1752(c) element that materially exists, such conduct may be subject to conviction under §1752(a)(1) and §1752(a)(2) and, possibly, other laws.

B. The Government and District Court Interpretations of "Otherwise Restricted Area" Fails

While conceptually, there is flexibility for the government to provide for an otherwise restricted area through other means, the evidence does not support that the government designated and used other means. Captain Baboulis specifically defined the elements comprising the required demarcations of the alleged restricted area in testimony as interlocking bicycle racks, permanent fixtures, mesh fencing, thick white signs, and law enforcement officers. (A186).

The government itself says "[b]ut only the government can restrict an area for purposes of § 1752." (Gov't Br. at 25). Neither a court nor prosecutor has authority to add to the §1752(c) mechanisms of restriction beyond what the government itself

identified in the trial. As shown in the initial brief, the items referred to by the court did not demarcate an area anyway. (Br. at 36-44).

Also §1752(c) is an objective requirement that does not vary by person. §1752(c) is not a *mens rea* test. The question of whether an area is restricted for purposes of 18 U.S.C.§1752(c) cannot vary based on the different paths or observations of different people in different locations. For example, evidence concerning alleged flashbangs or loud booms heard while the Prices were at West Wing Café – a fundamentally different time and location-- did not demarcate an otherwise restricted area from unrestricted area.

VIII. THERE IS A SUBSTANTIAL QUESTION WHETHER CYNTHIA BALLENGER ILLEGALLY ENTERED A RESTRICTED AREA IN THE SMALL FOYER, INCLUDING BECAUSE THE PRICES NEVER CROSSED THE POLICE CORDON ON THE SCENE

The Prices argued as substantial question (listed as substantial question 2 in the motion before the D.C. Circuit) the following:

> Whether the government proved beyond a reasonable doubt by proper legal interpretation and sufficient evidence the small area of the foyer that the Prices walked between the police cordon north of the door and the police not permitting people to go further south in the hallway was a restricted area under § 1752 (c), and, if so, did the Prices have the requisite knowledge this was a restricted area as set out in 18 U.S.C.§1752(a)(1). (Ballenger/Price Motion for Release Pending Appeal in D.C. Circuit at 11.)

Here the government, and D.C. Circuit with respect to the motion for release pending appeal, did not challenge that this is a substantial question for Count 1 (entering a restricted area) but claimed this substantial question was not relevant to

a "disruptive conduct" finding under Count 3. As discussed below the Cynthia Ballenger disagree.

In the Ballenger case, at least one salient security mechanism existed at the time of their walk— police cordons. The Prices complied with the actual police cordons they encountered. Police cordons are consistent with the statutory term "cordoned off" and was at least stated in the list provided by Captain Baboulis as §1752 (c) elements for the red perimeter diagram which included interlocked bicycle racks, permanent fixtures, snow fencing, and law enforcement officers to demarcate the restricted area. (A186).

With respect to the location and operation of the police cordon, the government's argument is primarily the same failed argument about the ghost of the past perimeter stating:

> But that was not the officers' initial defensive position, and like illegally removing barriers, wrongfully forcing a retreat by police officers does not magically render the ceded ground unrestricted. Gov't Br. at 30.

The Prices did not encounter any initial position or any retreat.

The definition of how a police cordon restricts an area in *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005) is fully consistent with the Ballenger interpretation.*Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 118 (D.C. Cir. 1977) states that under the police line regulation:

> "….a citizen must not cross a police line without authority and he must obey any police order…. If the location of the line is clearly indicated and if adequate notice is given….its application will not trap innocent persons." *Cullinane* at 118.

This is a traditional understanding of a police line and interaction with police in analogous circumstances. The Prices fully complied with and are innocent persons. The government response brief in the main case states:

> But the constitutionality of a requirement not to cross police lines does not conversely suggest that it is unconstitutional, or otherwise impermissible, to restrict an area in front of police lines. (Gov't Br. at 30).

Again, the government looks to authority when that is not the issue. The statutory terms in §1752(c) and the Constitution demand a specific set of mechanisms for the purpose of fair notice if the government chooses to enforce. Neither the prosecutor nor the court has the authority to change that. Moreover, a police cordon has a traditional meaning that specifies the location of what is restricted. Walking in front of a police cordon is not a walk into a restricted area.

IX. THERE IS A SUBSTANTIAL QUESTION WHETHER CYNTHIA BALLENGER COMMITTED "DISRUPTIVE CONDUCT" UNDER §1752(a)(2) OR §5104(e)(2)(D)

The Prices raised as substantial question 3 in the motion before the D.C. Circuit:

> Whether the government proved beyond a reasonable doubt by proper legal interpretation and sufficient evidence the Prices engaged in the *actus reus* of disruptive conduct under 18 U.S.C. § 1752(a)(2) and 40 U.S.C. §5104 (e)(2)(D), and, if so, did the Prices have the requisite *mens rea* for such *actus reus*.(Ballenger/Price Motion for Release Pending Appeal in D.C. Circuit at 13).

A. The *Alford* Findings Do Not Foreclose Cynthia Ballenger's Argument in the Instant Case

The government notes panels in the D.C. Circuit must follow the legal findings in *Alford United States v. Alford*, 89 F.4th 943 (D.C. Cir. 2024), citing *New York-New York, LLC v. NLRB*, 676 F. 3d 193, 194-195 (D.C. Cir. 2012)("We are of course bound by our prior panel decision[.]"). (Gov't Br. at 34). The Prices have several framework responses to the government brief on this point and *Alford*.

First, the fundamental statutory interpretations in *Alford*, before review of the specific evidence in *Alford*, do not preclude Price arguments in the instant case. Second, the evidence in *Alford* of conduct and context is different in critical ways. Third, *Alford* ruled on the legal arguments made by Russell Alford not other arguments made by the Prices and these additional arguments remain in scope for consideration by the D.C. Circuit panel. In addition, such arguments are in scope for an *en banc* proceeding or Petition to the Supreme Court. Fourth, the D.C. Circuit must address the legal reasoning of the district court in the bench trial, as applied to the evidence in the instant case, not the potential alternate findings a jury or another court could potentially arrive at in another fact pattern.

B. The *Alford* Statutory Interpretation, Before Consideration of The Potential Support for Jury Convictions, Can Be Consistent with the Price's Argument

First, *Alford* states "[u]nlike disorderly conduct, "disruptive conduct" is not a term of art and has only its plain meaning." Second, *Alford* provides certain dictionary definitions of "disruptive". Id at 950-951. Third, *Alford* states:

> Whether particular conduct is disruptive is also a context-sensitive inquiry. The Supreme Court has observed that whether conduct "disrupts or is about to disrupt normal school activities" should be made "on an individualized basis, given the particular fact situation." [citing *Grayned v City of Rockford*, 408 U.S. 104, 119 (1972)] *Id.*

The individualized evidence and specific context in the Price case does not support "disruptive conduct" under the dictionary definitions as provided in *Alford*. The Prices further observes a few points that are not in conflict with the above findings in *Alford*. First, a reviewing court must insist that "disruptive" is the adjective linked explicitly to the noun "conduct" as the ascertainable standard of guilt. The Prices cannot be convicted of disorderly "context". Second, and related, the issue is the individual conduct of each defendant, even if in context. Third, the "context" must be reflected in evidence presented in the Ballenger/Price trial and not evidence from another trial.

C. Russel Alford Did Not Contest on Appeal That His Walk Was in A Restricted Area and the *Alford* Finding Is Based, In Part, on "Unauthorized Presence"

The gravamen in *Alford* is that peaceful conduct can nonetheless be disorderly or disruptive conduct based on unauthorized presence and other factors. The D.C.

Circuit emphasizes "…he made a deliberate choice… to enter the Capitol when he was plainly not permitted to do so." (emphasis added). *Id.* at 953. *Alford* notes:

> ….He climbed the steps as other rioters knocked on the doors to attract the attention of rioters already inside the building, who then threw open one of the double doors that make up the Upper House Door. *Id.* at 947.

Alford also states:

> …Police arrived within about ten minutes and began physically and verbally directing the crowd back out through the upper House door…. *Id.*

The Prices continue to state actual police instruction to the Prices could be an important element but is missing in the instant case.

D. "Disruptive Conduct" Must Be More Than "Entering or Remaining" Based on the Context of the Other Provisions in 18 USC § 1752(a) and 40 USC § 5104(e)(2)

Cynthia Ballenger argues that "disruptive conduct" must be more than "entering or remaining" based on the text and context of the other provisions in 18 U.S.C. § 1752(a) and 40 U.S.C. § 5104(e)(2). *Alford* does not review the specific argument here. As an example, 40 U.S.C. §5104(e)(2)(A)-(C) use the terms "enter or remain" in specific settings in the Capitol Buildings. The foyer is not one of those settings. A good illustration and comparison is 40 U.S.C. §5104(e)(2)(C) which includes the language:

> …..with the intent to disrupt the orderly conduct of official business, enter or remain in a room in any of the Capitol Building set aside or designated for the use of…

Similarly, § 1752(a)(1) uses the terms "enter or remain" but § 1752 (a)(2) uses "disorderly or disruptive conduct" as a different crime.

Note how §5104(e)(2)(C) and § 5104(e)(2)(D) and share the issue of whether certain conduct disrupts the orderly conduct of business. Effectively, the government claims "disruptive conduct" covers "entering or remaining" even where such entering or remaining is not in circumstance specifically described by Congress in §§5104(e)(2)(A)-(C).

Congress was very specific and detailed in terms. "Disruptive conduct" is a different term from "enter or remain" and Congress chose its words carefully. *SeeCity of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337-38 (1994) ("Our interpretation is confirmed by comparing [the disputed statute] with another statutory exemption in [the same act]. . . . [T]his [other] provision shows that Congress knew how to draft a waste stream exemption . . . when it wanted to." (internal quotation marks omitted)). "[W]here Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). "We refrain from concluding that the differing language in two subsections has the same meaning in each." *Id.*

Here Congress has provided "entering or remaining" is a crime within certain limitations. The district court evades those limits to apply "entering or remaining" as a crime through entirely different language.

The government has produced no case where standing or walking, outside of an area specified in §1752(c) or § 5104(e)(2)(A)-(C), has been held to be a violation

under §1752(a)(2) or § 5104(e)(2)(D) prior to the January 6th cases. *Bursey* and *United States v Jabr*, 4 F.4th 97 (D.C. Cir. 2021)are pure trespassing cases under §1752(a)(1). Trespassing can always be viewed as a security threat but that does not make trespassing disruptive conduct under these provisions.

The government notes "[t]he statutes thus each have distinct elements". (Gov't Br. at 41) This supports that "enter or remain" is distinct from "disruptive conduct" —Cynthia Ballenger's point.

Further baffling is the government's citation to *United States v. Wheeler*, 753 F.3d 200, 209 (D.C. Cir. 2014) (quoting *United States v. Mahdi*, 598 F.3d 883, 888 (D.C. Cir. 2010)). (Gov't Br. at 40-41). *Wheeler* and *Mahdi* are challenges under the Double Jeopardy Clause and look to see if each provision requires proof of a fact which the other does not. Here, the Prices are arguing "disruptive conduct" requires proof of different facts.

E. Peacefully Standing in Line to Exit is No Crime

Cynthia Ballenger argues that standing in line to exit following information from police at the location of A. Tax is no crime under any provision. (Br. at 50-51). Properly, the government does not state that the Prices should have engaged in the disorderly conduct of pushing their way out and not standing in line. (Gov't Br. at 42). The government states that Price's offense was complete when they entered the Capitol making the specific issue immaterial. *Id.*

Cynthia Ballenger has explained how the point is material and reiterates here. Generally, judicial proceedings should proceed from an organized analysis based on orderly interpretation and a clear statement of the offense conduct. First, the issue winnows down the alleged offense conduct. Second, Cynthia Ballenger's two-steps of first entering and walking south and then standing in line to exit organizes the issue of notice. The information Cynthia Ballenger had entering the Senate Wing Door is different than what she learned inside. The Prices got in line to exit immediately after notice from police near A. Tax. Third, the issue undercuts the overly simplistic claim that each minute of presence is a minute of offense conduct. Fourth, the issue goes to any impact test whether as part of the definition of "disruptive conduct" as the government claims or as part of the clause in §1752(a)(2), "such conduct, in fact, impedes or disrupts". (Br. at 67-74 and section herein immediately below). Fifth, the issue goes to the Price's argument flowing from *Burrage v. United States*, 571 U.S. 204 (2014) stated below concerning de minimis impacts. The de minimis argument would be relevant either under "disruptive conduct" or the "in fact" clause.

F. Assuming a Substantial Question about the Foyer and Police Cordon,Then Such Substantial Question Is Also a Substantial Question Whether There Is "Disruptive Conduct" Under §1752(a)(2) and §5104(e)(2)(D) In the Instant Case

The Gov't Opposition to Release Pending Appeal in D.C. Circuitat page 10, falsely states "Nor do appellants make any effort to connect these

arguments to 5104(e)(2)(D)." In fact, the substantial question 3 section of the Prices motion cross-references the exact point:

> First, as discussed above, the Prices did not enter illegally. If there is a substantial question regarding whether the Prices [were in] compliance with a cordon, that same question addresses [the] basis for the district courts charge of disruptive conduct—that the Prices entered illegally with others. Thus, a substantial question regarding the operation of the cordon at the door is one that can result in reversals for Counts 1, 2, 3 and 4. (Ballenger/Price Motion for Release Pending Appeal in D.C. Circuit at 14).

The Prices specifically stated that the result would eliminate entering the Senate Wing Door as a basis for Count 1, Count 2, Count 3, and Count 4. *Id.* at 11. The Prices also presented a table that stated Count 2 could be addressed by multiple substantial question, including substantial question 2.

Here Cynthia Ballenger addresses two statements from the D.C. Circuit regarding whether the substantial question regarding illegal entry is also a substantial question for disruptive conduct.

The D.C. Circuit ruling states, in error:

> First, whether the area entered was "restricted" for purposes of 18 U.S.C. 1752 (c) does not present a substantial question as to her conviction under 5104(e)(2)(D) that the area was restricted for purposes of 1752(c). (D.C. Circuit Opinion on Release Pending Appeal, Appendix 4 to this Application, at 1)

Compare this question then to the D.C. Circuit one sentence dismissal of the Cynthia Ballenger's argument:

> Second, Ballenger has not raised a substantial question as to whether she engaged in disruptive conduct, because there was sufficient evidence to prove that her "unauthorized presence in the Capitol as part of an unruly mob contributed to the disruption of the Congress's electoral certification and jeopardized public safety." See United States v. Alford, 89 F.4th 943, 946 (D.C. Cir. 2024).*Id.*at 2-3.

There is no finding by the district court in the instant case that there is separate "restriction" of that same area for purposes of § 5104(e)(2)(D) as opposed to § 1752(c) or that the operation of a police cordon means something different under § 1752(c) than for any purpose under § 5104(e)(2)(D). There is also no statement of other conduct beyond alleged illegal entry.

Consider what the D.C. Circuit is saying. Even if the Prices did not walk in a restricted area and are found to have been in full compliance with the police cordon, mere presence in the unrestricted area is "disruptive conduct." This position is firmly at odds with the statute and mechanisms of fair notice.

G. Certain Other January 6th Cases at the District Court Level Do Not Support Findings of Disruptive Conduct in the Instant Case

In *United States v Griffin* Case No. 21-CR-092 [*Griffin*Doc 106](April 8, 2022) Transcript at 336 the court states:

> In any event, and more fundamentally, nothing showed the defendant engaged in any disorderly conduct above and beyond entering a restricted area. That alone cannot show a violation of 1752(a)(2).

In *U.S. v Matthew Martin* Case No. 1:21-cr-00394-TNM (April 2022) the transcript *Matthew Martin* [Martin Doc. 41] at 270 states:

> The government also alleges that his conduct was disruptive in that it had stopped the congressional proceedings. I find that the proceedings had been halted well before he entered the Capitol building and that they did not resume until long after he had left… looking at his actions and the time at which they occurred, I find that the government has not proven beyond a reasonable doubt that he disrupted congressional proceedings

H. The Role of An Appellate Court is To Review the Specific Findings of the District Court

The district court in Ballenger made specific findings including that the district court only found "disruptive conduct" and not disorderly conduct.

In the Court's Rule 29 opinion court states:

> …. their disruptive conduct consisted of their "being part of th[e] mob" that stormed the Capitol, even if theiroutward contribution to that mob consisted of little more than "walk[ing] in" with its members. (A606)

The government stated the same argument is the basis for Count 3 stating:

> And the government generally agreed that if this conduct hadtaken place in a vacuum, it might well not be disruptive. But thefact that the mob clearly disrupted, did, in fact, impede anddisrupt the orderly conduct of government and that they were partof this mob that did so….. (A506-507). (emphasis added)

Note, in the district court statement, it is the "mob" that "disrupted"and no actual finding that the Prices "engage" in"disruptive conduct" but that they were "part of this mob".

For Count 3, the lower court, in part states:

> … Similarly, I find that they did engage in disruptive conduct forthe reasons I set forth in Count 2…And again, they would not beguilty if they had acted by themselves. (A507)… So the fact that they were--- that they formed part of a groupthat by entering the building….*Id.*

I. Several Building Blocks in *Alford* Are Novel and Not Well Founded

*Alford*claims "passive" conduct or "presence" can be an ingredient in a different rule or category unrelated to lawful orders. Alford looks to dispersal laws which require a dispersal order and reasonable opportunity to comply. The rule from these cases cannot be severed. A cut and paste formulation, severing peaceful conduct from fair notice requirements from a police order has never been utilized before to glean statutory intent in such situations.

In support of the circumstances sensitive approach, the *Alford* appellate opinion also misstates the relevance of the Supreme Court decision in*Garner v. Louisiana*, 368 U.S. 157 (1961)as supporting a rule of statutory interpretation:

> And the Supreme Court has taken the same approach, focusing its interpretation of a state's breach-of-the-peace provision on the defendants' conduct "in the circumstances of these cases." *See*Garner at 174.

In Section I of the opinion, the *Garner* Court states it is "bound by the State's interpretation". *Id.* at 166. In Section II of the opinion, and not Section I, the Supreme Court reviews evidence and uses the term "circumstances" in connection with the review of evidence. *Id.*at 172 and 174. *Garner* does not use "circumstances of these cases" to support a different statutory interpretation and it is error to state or imply such an argument.

X. THE STATUTORY TEXT AND RELEVANT SUPREME COURT CASE LAW SUPPORT A SUBSTANTIAL QUESTION THAT "SUCH CONDUCT" OF THE PRICES DID NOT IN FACT IMPEDE OR DISRUPT THE CONDUCT OF A PROCEEDING

The Prices raised as Substantial Question 4:

> Whether the district court improperly ignored the statutory language and the de minis statement and causation analysis in *Burrage v. United States*, 571

U.S. 204 (2014) and failed to require evidence tying the impact of any alleged disruptive conduct of the Prices in entering and walking south for 1-minute to the disruption of a proceeding or the delay of a proceeding until much later in the day.Ballenger/Price Motion for Release Pending Appeal in D.C. Circuit at 17.

In the government response to the Price's motion for release in the D.C. Circuit, the government did not address count 2 and did not address the issue regarding the "in fact" clause in Count 2. Accordingly, the D.C. Circuit chose not to address the Price's argument. Cynthia Ballenger maintains that if Count 2 is reversed there should be a review of sentencing since Count 2 represented the highest sentencing guideline level amount.

A. Limiting Future Scheduling Is a Thin and Speculative Argument Under Count 2 And Not Clearly Supported by The Text

The text of 18 U.S.C. § 1752(a)(2) states, in part, that … "such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions". The government states 1752(a) prohibits disruption of suspended or future proceedings in addition to active proceedings. (Gov't Br. at 55-57). Cynthia Ballenger argues the time to measure whether "in fact, impede or disrupt" occurs for legal purposes is during the "conduct" of the proceeding. As stated in the opening brief "conduct" of business means something under way. (Br. at 68).

The first certification proceedings were stopped or suspended before the Prices arrived on the grounds. The stipulations say by 2:15 pm. (A111). In the instant case, the security situation limited possibilities of when to schedule the start of next session.

The Senate and House began the evening sessions at approximately 8:06 and 9:02 pm respectively. (A112). No evidence was presented that the conduct of those evening sessions was impeded or disrupted once those proceedings started.

B. The Statute Does Not Refer To "Contribute To" And the Construct Is Inconsistent with The Statute

The government brief argues the language and text support a reading that the "in fact" clause means disruptive conduct "contributes to the disruption of government business." (Gov't Br. at 49). The government suggests the addition of the words "contributes to" relying on an analysis of *Maslenjak v. United States*, 582 U.S. 335 (2017)which is also a case the district court cites. The government brief further dismisses the Prices discussion of *Burrage*, stating that case "is not a proper guide to the meaning of § 1752(a)(2) because it interpreted different language in a different context." (Gov't Br. at 53).

"Such conduct" is a reference to the individual disorderly or disruptive conduct of each defendant and the instant case is brought against individuals. (Br. at 67) As a connected point, Cynthia Ballenger is charged as an individual and not with alleged relationship to the conduct of others. (Br. at 54-56). The government provides no response to these specific arguments. "Such conduct" is without reference to any other conduct of any other person or any other reason. "Such conduct" must "in fact, impede or disrupt" the orderly "conduct" of Government business or official functions. Nothing in the statutory language uses the terms "contribute to". Context may be relevant, but nothing in the statute suggests that

the defendant's conduct may be aggregated with the conduct of other people as the reason something occurs for the purpose of the in-fact clause.

The government brief did not counter the Prices critique of using *Maslenjak* as a basis to argue for a lower causal standard. *Maslenjak* adds a modest causation standard as a narrowing construction in favor of defendants when there was, arguably, only a thin textual reed to do so. *Maslenjak* offers no support for constructs that are unfriendly to criminal defendants, that broaden the universe of criminal liability, or to provide courts discretion to broaden the universe of criminal liability. Nothing in *Masjenlak* suggests or concerns the "contributes to" argument that the government advocates.

Burrage is a long treatise on causation standards and causation issues in criminal law. The government tries to distinguish analysis in *Burrage* finding but-for causation that the *Burrage* court notes has been applied under the terms "results from, "because of," based on or "by reason of." As discussed below, the government cannot distinguish these terms and *Burrage* did not restrict its analysis to those phrases. and discusses criminal causation standards and how to interpret them.

The language of the "in fact" clause is a causation or impact test. The language is different from §5104(e)(2)(D) which does not have the "in fact" clause. The statement of cause is the individual's disruptive conduct. That cause must, in fact, impede or disrupt a proceeding. This can be stated in similar ways using the words the government tries to distinguish. As an example, the disruption "results from" the disruptive conduct of the defendant. The proceeding was, in fact, impeded

or disrupted "because of" or "based on" or "by reason of" the disruptive conduct of the defendants. These are all, basically, the same legal tests. *Burrage* also has a discussion of the Model Penal code which states the "traditional understanding" that states the but-for standard is a common standard of cause. (Br. at 72-73). *Burrage* at 211.

The strong case is the *Burrage* but-for analysis and standard applies. Beyond a but-for standard, *Burrage* states this point about *de minimis* action and causation:

> ….By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a non-essential contributing role in producing the event. *Burrage* at 212.

The statement is not made with reference to specific language but "the common understanding of cause." *Id*. at 211. The government response brief does not address this de minimis argument. Assuming only this simple point, without getting to but-for causation, the conviction of the Prices on Count 2 must be reversed. Obviously, any hybrid standard above *de minimis* would also result in reversal.

Reviewing the government's claims, disruptive conduct is "mere presence" no matter how short, whether just the entry foyer and a short part of a hall, or whether in complete compliance with police right there. "Mere presence" of any individual by January 6, 2021, "in fact, impedes or disrupts' the certification proceeding which restarts at 8:06 and 9:02. The government claims this finding requires no independent evidence tying the individual conduct to the delayed start. Instead, the government relies on cookie cutter statements.

Evidence in the trial does not connect the alleged disruptive conduct of the Prices to the length of time that security threat remained or the delay in the start of the evening sessions.

XI. THERE IS A SUBSTANTIAL QUESTION WHETHER THE DISTRICT COURT LEGAL INTERPRETATION OF THE ACTUS REUS FOR 40 U.S.C. § 5104(e)(2)(G) ARE IN ERROR AND WHETHER THERE IS SUFFICIENT EVIDENCE TO CONVICT

As a statutory limitation, the district court fails to find Cynthia Ballenger engaged in demonstrative conduct inside the Capitol. Cynthia Ballenger says and does nothing that could constitute demonstrative expression. The district court further fails to apply and satisfy the Constitutional limitation from *Bynum v. U.S. Capitol Police Bd.,* 93 F. Supp. 2d 50 (D.D.C. 2000), in that there is no demonstrative conduct which is also disruptive conduct.

A categorical prohibition on all expressive activity within Capitol buildings would likely not pass constitutional muster even under the relaxed standard applicable to a nonpublic forum. *United States v Nassif*, No. 23-3069 (D.C. Circuit, April 9, 2024) Slip Opinion at 18.

Nassif states the prohibition on "demonstrat[ing]" reaches people gathering or individually drawing attention to themselves inside the Capitol building to express support for or disapproval of an identified action or view point." *Id.* at18-19. The Prices did nothing to draw attention to themselves inside the Capitol building. No evidence is presented that anyone noticed the Prices. No witness testified they even saw the Prices, let alone noticed they were drawing attention to themselves.

*Nassif*states:

> The district court was right, then, to read section 5104(e)(2)(G) to encompass only "organized conduct advocating a viewpoint," not "off-handed expressive conduct or remarks." [Citing Nassif, 628 F. Supp. 3d at 183 n.9.] *Id*. at 19.

Not only was Cynthia Ballenger not expressing anything or drawing attention to herself in the Capitol, neither were was she involved in "organized" expressive conduct by herself or with anyone in the Capitol. Cynthia Ballenger walked south for a minute and then stood in line to exit. The government refers to Cynthia Ballenger carrying a flag down by her side. She did not lift it or waive it and it was not at a level that anyone there would observe.

In *U.S. v Matthew Martin* Case No. 1:21-cr-00394-TNM (April 2022) the transcript *Matthew Martin* [Martin ECF 41] at 271 states:

> Count 4 is parading, demonstrating, or picketing in a Capitol building. While there is little guidance on the exact meaning of these terms, I do not think the defendant's actions while in the Capitol building are consistent with any of them. He spent almost his entire time in the Capitol building videoing the surroundings and what others were doing. He did not shout, he did not waive his flag, he did not confront officers, he did not engage in violence.

XII. THERE IS A SUBSTANTIAL QUESTION WHETHER THE SUPERSEDING INFORMATION MEETS THE REQUIRED STATUTORY AND CONSTITUTIONAL STANDARDS

Substantial question 7 in theBallenger/Price Motion for Release Pending Appeal in D.C. Circuit at 22-23 is whether the superseding information for each defendant fails to provide allegations of essential fact and fails to provide the nature of the case in violation of Federal Rule of Criminal Procedure 7(c) and 12(b) and the Fifth and Sixth Amendment.

The government argues it has fully presented the necessary elements and that "joining a mob" was not a necessary element 76-77. The government further cites *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) and claims the day of January 6, 2021, and the location of the Capitol and its grounds is enough specification to satisfy the statutory and Constitutional requirements, including to adequately prepare a defense. Those bits of information do not "…. Inform the accused of the specific offence, coming under the general description, with which he is charged. *Hamling v. United States*, 418 U.S. 87, 117-119 (1974). The Supreme Court has noted:

> "It is an elementary principle of criminal pleading, that where the definition of an offence …. `includes *generic* terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — it must descend to particulars.'" *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). (emphasis added).

See also *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980); *United States v. Nance, 533 F.2d 699, 701 (D.C. Cir. 1976).*

The initial brief also cites *Hunter v. District of Columbia*, 47 App. D.C. 406 (D.C. Cir. 1918) where there was no averment of fact "to inform defendants of the nature of the acts which [were] relied upon by the prosecution as constituting alleged obstruction of the sidewalk, or that would enable defendants to make an intelligent defense, much less to advise the court of the sufficiency of the charge in law to support a conviction." *Id.* at 410. The government brief did not distinguish or even address the case and neither did the district court.

Disorderly or disruptive conduct is particularly not ascertainable under the novel and previously unstated "joined the mob" theory of the district court. Cynthia Ballenger had no reason to evaluate or address the constructs of a "joining" or "the mob" as legal elements or transformative "context". Those points were first made in closing statements and the district court made clear that the Prices conduct would have not been disruptive conduct except for the construct of a "joining" of a group or "mob". The district court's reading novel and does not exist in cases prior to January 6th.

In the Rule 29 memorandum, the Prices noted:

> ….Among the problems is that no one could reasonably understand what the court means is the legal standard. How is the court defining a mob? Is a mob a group of people who peacefully walk, stand in line, text, take pictures and obey police officers? ….Is the mob just the people who were in the foyer at the same time the Prices were? Or is the mob anyone in the Capitol at any time or location on January 6, 2021? Is the Court lumping in the Prices with people who disobeyed police orders, engaged in vandalism, broke things, hurt people, or more? Is the court claiming impacts earlier in the day from the Prices presence later in the day based on the notion there was a mob earlier? ….(A531)

In preparation for trial, Cynthia Ballenger properly focused on her individual conduct of the Prices and not these additional constructs of "joining the mob". Whether "joined the mob" is described as an additional element or transformative context, the district court explicitly relies on those aspects.

The government brief does not respond to these issues and, instead relies on the "circumstance-sensitive" analysis in *Alford*. The defense must inherently be part of the judicial process. The defense has every right to understand in order to counter, refute, test, present witnesses and confront issues concerning what

"circumstance", elements, context, critical feature, relationship with others or element of notice that the court will make relevant to transforming the defendant's conduct into a crime. No essential facts or descriptions were provided in the superseding information concerning any of this.

Nor did the superseding information provide essential facts related to mechanism satisfying the "otherwise restricted" clause under §1752(c) to designate a restricted area or provide the essential fact of what the Prices did that constitutes demonstrating in the Capitol.

There is no credible argument that "otherwise restricted area" is not a generic term. Everything in Appellants opening brief from the statement of facts to the interpretations listed in the brief from page 36-44 is devoted to the government and district court's theory of "otherwise restricted area".

XV. THERE IS A SUBSTANTIAL QUESTION WHETHER FOURTH AMENDMENT FAILURES SHOULD RESULT IN A REVERSAL OR REMAND FOR ALL COUNTS

Substantial question 8 in the D.C. Circuit Motion is:

> Whether the Prices convictions on Counts 1-4 should be vacated since evidence garnered or derived from an illegal search warrant and search warrant operation for Facebook was important to conviction and to ensure future conduct does not fail Fourth Amendment Protections. Ballenger/Price Motion for Release Pending Appeal in D.C. Circuit at 23-24.

A. The Search Warrant Operation Isa Sham and the Government Violated the Terms of the Search Warrant

Section II of Appendix B of the Search Warrant is titled "information to be seized by the government" and includes a two-step process to separate information to be "seized" from the full data dump from Facebook. Section III states in part:

> The United States government will conduct a search of the information produced by the PROVIDER and determine which information is within the scope of the information to be seized specified in Section II. That information that is within the scope of Section II may be copied and retained by the United 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. Such sealed information may include retaining a digital copy of all information received pursual to the warrant to be used for authentication at trial, as needed.[1:21-cr-00719, Doc. 81-3 at 11]

The government and the Cynthia Ballenger identifies the same two-step process in the search warrant but draw different conclusions of the meaning of the Search Warrant and the meaning of the actions of the FBI and prosecution. The separation structure in the Search Warrant is not a technicality but the core steps necessary to avoid a Fourth Amendment violation. First, without properly implementing the filtering and sealing components, the Search Warrant would be a general warrant. Second, an operation in fundamental violation of this construct is a search outside of a warrant. Obviously, the government did not run the separation and sealing required in the search warrant since the government prosecution included the full Facebook data dumps (unfiltered) as exhibits in a public trial. This included a 14, 637 exhibit of Facebook messenger information on Cynthia Ballenger. The Gov't Opposition to Release Pending Appeal in the D.C. Circuitat 20 states:

> The government was unable to complete scoping prior to trial, but the warrant contained no time limit for completion.

Apparently, the government cannot show it determined what are the "seized" messages under the search warrant even to this day. According to the government,

the terms "will not further review absent an order from the Court" apply when the prosecutor, in his or her discretion, decides the scoping exercise is finished. How did the government introduce a 14,637, page Facebook messenger data dump as an exhibit in a public trial, if the government did not "seize" the information?

The search warrant operation failed the Fourth Amendment regardless of what happened at trial. Between the FBI and the prosecution there was no separation and sealing step as required. The government's argument that there was no time limit just amplifies the lack of credible process. What is the point of the structure if the prosecution controls when it will be implemented and can pick from any pile, through the proceedings, and can publicly disclose everything?

B. All Facebook Information Introduced at Trial Was Beyond the Stated Scope of the Stored Communication Act Which the FBI Affidavit Claims Was the Source of Authority

The FBI also stated the authorizing language under the Stored Communication Act was the basis of the search warrant and failed to identify to the Magistrate scope limitations. If the authority is 18 U.S.C. § 2703(a) that authority is restricted to looking back 180 days from obtaining the warrant. That prohibition in the statute means none of the Facebook information at trial should have been included—a point addressed in the motion to suppress. The Prices had argued that 18 U.S.C. § 2703(b) did not apply because 18 U.S.C. § 2703(b)(2) limits the full paragraph.

The district court offered no written opinion on these issues. The Ballenger/Price Motion for Release Pending Appeal in the D.C. Circuittries to

rebut the argument pointing 18 U.S.C. § 2703(b). (Gov't Br. at 87). 18 U.S.C. §2703(b)(1) starts by saying the provision is only applicable by paragraph (2) of this subsection. 18 U.S.C. § 2703(b)(2) requires that there be a "subscriber" or "customer" of such "remote computing" service which means "the provision to the public of computer storage or processing services by means of an electronic communication system." *See* 18 U.S.C. § 2711(2). In the memorandum supporting the motion to dismiss, the Prices elaborate on the requirements of this paragraph (b)(2) and why the paragraph does not apply:

> To the Prices understanding, Facebook removed access to these accounts for the Prices sometime in August or, possibly, early September 2021…..The Prices have not been subscribers or customers of Facebook at all in the sense that they have never paid any fees. The Prices have not been subscribers or customers of Facebook for these accounts in the sense that Facebook removed access in August or early September 2021. 18 U.S.C §2703(b)(2) uses language in the present tense for applicability. On November 7, 2022, while Facebook may have held certain wires or electronic communications from the former messenger account, Facebook was not holding them for the Prices as subscribers or customers ….. (A64).

The FBI provided no evidence in the Search Warrant Affidavit that 18 U.S.C. § 2703(b) applies and the government has pointed to no evidence here. None of the evidence presented at trial would have been in scope of the Search Warrant authority claimed by the FBI.

C. The Good Faith Exception Does Not Apply

*I*n *United States v. Leon* 468 U.S. 897, 925 (1984), the Supreme Court set out an exception to the exclusionary rule for a search conducted in good faith reliance upon an objectively reasonable search warrant. As stated in *Leon* regarding the exclusionary rule:

> The rule …operates as a "judicially created remedy to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[citation omitted]. *Id.* at 906.

The conduct of the government is not in good faith. The government seeks to extend the *Leon* good faith exception beyond where *Leon* or other Supreme Court case law applies. In the instant case:

1) the government did not fulfill the filtering, separation, and sealing requirements of the search warrant prior to trial in violation of the terms of the search warrant. (Br. at 91-93).
2) The prosecutor introduced the full data dumps of Facebook messenger information in a public trial in violation of the search warrant, (Id. at 93)
3) the FBI and prosecution failed to identify to the defense what information fell into the filtered scope of Section II of the warrant,
4) the prosecution used the tactic of separately searching and selecting from the 14, 637-page data dump a message which had not been identified as filtered for scope under the Search Warrant (Id. at 97, 99).
5) the prosecution mischaracterizes the message from the data dump and fails to identify the exculpatory message before. (Id.)

These points above are not indicia of good faith and are actions and approaches that must be deterred. The extension of the *Leon* good faith exception

is appropriate under these circumstances. The burden is on the government to assert the good faith exclusion.

The government continues to besmirch Cynthia Ballenger by trying to claim the introduction of the 14, 637 data dump was not a violation of the Search Warrant and the government only logically applied information from the data dump. Gov't Br. at 67 footnote 22. Here, the government questions Cynthia's clear statements that she disagreed with the statement of Lin Wood. Br. at 99. (A118.)

Cynthia had already stated that Mike Pence was involved with the proceeding. A415. The government now offers the post hoc rational. However, it remains clear that the purpose of the questioning and evidence was to suggest animus for Cynthia, not knowledge of a certification process.

D. The Full Exclusionary Rule Applies

It is well settled that evidence seized during an unlawful search cannot constitute proof against the victim of the search. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). This "exclusionary rule" extends to both direct and indirect products of such unlawful searches. As previously stated by the D.C. Circuit in*United States v. Weaver*, 808 F.3d 26, 33 (D.C. Cir. 2015):

> Where it applies, the exclusionary rule prohibits the government from introducing in its case in chief evidence obtained in violation of the Fourth Amendment. [Citations omitted]. Evidentiary exclusion "compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard" the Fourth Amendment's commands. [Citation omitted]

If the good faith exception does not apply, the full exclusionary rule applies to the full set of Facebook returns including very substantial evidence relied upon at trial which the government and district court used particularly in the district courts inappropriate *mens rea* analyses.

E. Application of the Full Exclusionary Rule Would Be a Substantial Blow to the Government Case at Trial and Not Harmless Beyond a Reasonable Doubt

Cynthia Ballenger agrees with the government that the use of unconstitutionally obtained evidence at trial is not reversible if it was harmless beyond a reasonable doubt. *See*, *e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 53 (1970). The government relies on a district court statement to suggest Facebook evidence was not significant at trial. (Gov't Br. at 90 and A617)

The district court, D.C. Circuit, and government continue to ignore the argument that every bit of evidence from the Facebook Search warrant is not constitutionally obtained evidence.

The district court erroneously stated the only issue was a single reference to material at trial. The district court statement was specifically to the use of government exhibits 308A, 308B, and 309A to the extent something beyond government exhibits 306, 307 and government video exhibits 300, 301, and 302 were introduced. (A616).

The specific issue the district court cites is from page 3933 of 14, 637 from Government Exhibit 308(B) where the government claimed, or strongly implied,

Cynthia Ballenger was in agreement with certain statements of Lin Wood, when the remainder of that page shows she opposed those statements. (*See* A118).

The critical distinction is whether the introduction and exhibits 306, 307, and government video exhibits 300, 301, and 302 were the products of a defective search warrant process. The trial itself relied heavily on these exhibits. References to Facebook evidence is at least in the Appendices to the brief. (A266 -271, A290-293, A310-317, A322, A324, A327-329, A340-344, A357, A402-403, A408-411, A415-420, A424-428, A432-A434, A447, A448-449, and A457-458). The government includes these exhibits in the government's Supplemental Appendix which includes Government Exhibit 307 at SA 222 (referred to on page 5 with four references) and Government Exhibits 300 (referred to page 6 in two references, page 7 in two references, page 8 in 1 reference, page 62 one reference.), 301 (referred to on page 6 with 2 references, page 7 with two reference, page 8 with one reference, page 26 with one reference, page 62 with one reference, page 65 with two references, and 302 (page 8 one reference, page 9 continued reference, page 29 one reference). (referred to in Index of Government's Supplemental Appendix as on CD.) These items are referred to in the government's brief on pages 5 (four references), 6 (two references), 7 (two references), 8 (one reference)

If there is a substantial question regarding whether the full set of evidence from the Facebook Search warrant should be included there is no credible

argument that such inclusion is harmless error beyond a reasonable doubt in this case.

CONCLUSION

For the foregoing reasons, Cynthia Ballenger (Price) respectfully requests that your Honor grant herapplication for release under the previously terms of bond imposed by the district court and stay hersentence pending the disposition of her appeal to the D.C. Circuit and the disposition of *certiorari* in this Court should a writ be sought.

Date: May 15, 2024

Respectfully submitted,

/s/ Nandan Kenkeremath

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ADDENDUM
STATUTES AND REGULATIONS INVOLVED

18 U.S.C. § 1752, in relevant part, provides:

(a) Whoever—

(1) knowingly enters or remains in any restricted building or grounds without lawful authority to do so;

(2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions;

. . . or attempts or conspires to do so, shall be punished . . . .

(c) In this section—

(1) the term "restricted buildings or grounds" means any posted, cordoned off, or otherwise restricted area—

(A) of the White House or its grounds, or the Vice President's official residence or its grounds;

(B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or

(C) of a building or grounds so restricted in conjunction with an event designated as a special event of national significance; and

(2) the term "other person protected by the Secret Service" means any person whom the United States

Secret Service is authorized to protect under section 3056 of this title or by Presidential memorandum, when such person has not declined such protection.

40 U.S.C. § 5104(2)(2)(D), (G).

(2) Violent entry and disorderly conduct.—An individual or group of individuals may not willfully and knowingly— * * *

(D) utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress; [or]

* * *

(G) parade, demonstrate, or picket in any of the Capitol Buildings.