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P R O C E E D I N G S

THE COURTROOM DEPUTY: Your Honor, we're on the record in Criminal Matter 21-175, United States of America v. Defendant 1, Ethan Nordean; Defendant 2, Joseph R. Biggs; Defendant 3, Zachary Rehl; Defendant 5, Enrique Tarrío; and Defendant 6, Dominic Pezzola.

Present for the government are Jason McCullough, Erik Kenerson, Conor Mulroe, and Nadia Moore.

Present for Defendant 1 is Nicholas Smith. Present for Defendant 2 are John Hull and Norman Pattis. Present for Defendant 3 is Carmen Hernandez. Present for Defendant 5 is Nayib Hassan. Present for Defendant 6 is Steven Metcalf.

Also present is Defendant 1, Mr. Nordean; Defendant 2, Mr. Biggs; Defendant 3, Mr. Rehl; Defendant 6, Mr. Pezzola; and appearing by video is Defendant 5, Mr. Tarrío.

THE COURT: All right. Good morning, everyone.

Let me set out what I think is a reasonable way forward here in terms of what we can accomplish today and see if anyone -- see if -- what the parties think of this.

First, I have a couple of housekeeping matters I thought we would discuss. So let me just roll through them really quickly. The first is -- we talked about it the other day. I mentioned the idea of not sitting the week between Christmas and New Year's, which would be the 27th through the 30th. If we did that, we would probably reclaim the 23rd, which I had

1 sort of reserved as a little bit of a break before Christmas,
2 but do the parties want to be heard on that? Let me put it
3 this way: Does any party object to us moving to that schedule?

4 All right. Seeing no objection, that's what we will do
5 to try to preserve more of our jury pool. We'll reclaim the
6 23rd, which -- where we thought we would not sit, and then we
7 will -- and then we will not sit on the 27th to the 30th. Now,
8 we may -- you know, as we get closer to that time, we may all
9 find that it would be advantageous on one of those days to have
10 a procedure -- have a proceeding by video that we might --
11 we'll talk about it as we get closer to then.

12 I understand people won't be in the jurisdiction. Many
13 of you won't be, and certainly we can accommodate that, but I'd
14 leave open the possibility that we might want to -- there might
15 be some legal issues we can knock out at -- on one of those
16 days, if the parties agree to it.

17 Mr. Pattis?

18 MR. PATTIS: Would you reconsider for the 23rd, for
19 those of us who travel from some distance? I mean, if not, I
20 understand that this is certainly a windfall. I didn't
21 expect -- the 23rd is a difficult date, given the plans we
22 previously made, and I can adjust, but if you reconsider, I
23 promise to behave during trial.

24 THE COURT: Let's leave open the possibility, maybe,
25 of in the morning and breaking -- breaking at lunch.

1 MR. PATTIS: Thanks, Judge.

2 THE COURT: All right.

3 MS. HERNANDEZ: Your Honor, I think probably the --
4 I'm local, and I'm not traveling out of -- family is coming in,
5 but ordinarily -- that's the Friday before the Christmas
6 holidays.

7 THE COURT: I understand. So I think -- what I would
8 do is let's leave open -- I'll say right now, it will be a half
9 day. Whether that will be matters before the jury or matters
10 for us to discuss, we can -- we can talk about what makes sense
11 as it gets closer, but it will be a half day.

12 All right. So that's number one.

13 Number two, the other thing that I noticed -- again,
14 we're going to talk about the questionnaire in a moment. The
15 other thing I noticed in putting together that questionnaire,
16 there is that one question where we lay out, well, here's who
17 is going to be masked and here's who won't be. My thought --
18 and it sort of actually dovetails with the matter we just
19 discussed; that is, the break.

20 I had -- as you-all saw from the draft questionnaire we
21 provided, I had thought we would proceed as we are today, as
22 far as the lawyers go, that is. No masks -- or at least
23 optional. Obviously, masks optional. The jurors might --
24 because we are forcing them to be here and because they are
25 sitting in -- they'll be sitting in such proximity -- would be

1 to have them -- what I typically do -- actually, just to ask --
2 just to put this on the record for you-all -- is ask them to
3 fill out on a slip of paper whether they're vaccinate- -- once
4 we select them -- I'm talking about the actual jury, whether
5 they're vaccinated. And if so, are they comfortable sitting
6 with their fellow jurors with no -- with no mask on.

7 If all the jurors -- and anonymously they'll write down
8 yes or no, yes or no. I get 14 slips back. If I get yeses
9 from everybody, I say, okay, at least when you're -- at least
10 when you're deliberating back there and on breaks, if you want
11 to take them off, you're all in agreement, you're comfortable
12 with that, fine. If not, one person says no, you keep them on.

13 The issue is because this will be, you know, more than a
14 week or two worth of trial, number one; and, two, because we
15 are going to have this break where a lot of folks will travel,
16 see family, whether I should require counsel -- when not
17 questioning a witness -- to wear a mask on the theory that it
18 will lessen the likelihood if someone happens to get sick that
19 it won't get everyone sick and the whole trial won't be
20 derailed.

21 So I don't know whether folks feel strongly about that
22 one way or the other, but I thought I would take your
23 temperature about whether if I impose that rule -- that is, for
24 counsel anyway. If -- if the defendants want -- it seems to me
25 if the defendants want to remain unmasked when the jury is

1 here, I think that's probably their prerogative. But what is
2 counsel's view whether I should sort of mandate everyone wear a
3 mask prophylactically just to make sure that, you know, again,
4 if somebody gets sick, we don't take out half of -- half of the
5 lawyers here. Anyone want to be heard on that?

6 MR. PATTIS: Yes. I oppose masks, Judge. I mean,
7 especially in a case where the government may make masks an
8 issue as part of their evidence. But the view is if one of the
9 lawyers fall ill, we're going to have to stop the trial in any
10 case, and I don't particularly care to sit here six or seven
11 weeks --

12 THE COURT: I don't know -- did you say if one lawyer
13 fell ill, we'll have to stop the case?

14 MR. PATTIS: Well, I mean, if one of Mr. Biggs'
15 lawyers falls ill, he may make a claim that he has under
16 *United States v. Gonzalez-Lopez* the right to counsel of choice,
17 and because of an illness, the tri- -- you know, yada, yada,
18 yada. You can imagine the argument. And the Court may
19 conclude that he -- that the trial should go forward with one
20 and that will be an issue. But I have a strong objection to
21 wearing a mask for six or seven weeks.

22 THE COURT: You're arguing that he has the right -- I
23 mean, isn't -- isn't the import of your argument that I should
24 actually impose the -- I mean, if it's going to be a problem
25 for the trial, isn't that a stronger argument for me to impose

1 the mask requirement?

2 MR. PATTIS: It's not at all obvious to me that the
3 Court has inherent supervisory power over public health of
4 trial participants, and, you know, I don't mean to be difficult
5 about it, but I have no interest in masking up for that length
6 of time.

7 THE COURT: All right. I will weigh that.

8 Anyone else want to be heard on this point, for or
9 against?

10 MS. HERNANDEZ: I personally prefer no masks. I just
11 sat through a five-week trial. It's a pain in the neck. In
12 that case, Judge Boasberg's ruling was whoever -- if your
13 witness was on the stand, either you were cross-examining or
14 direct, you didn't have to wear a mask at all during, even
15 though you weren't at that moment asking the questions.

16 THE COURT: Right. You want to be able to just stand
17 up and object and all the rest. Right.

18 MS. HERNANDEZ: And all the rest -- I found it
19 cumbersome -- it's -- it's not comfortable.

20 THE COURT: Right.

21 MS. HERNANDEZ: But -- so personally prefer -- I
22 understand depends -- in that case, in particular -- and that
23 was a month -- two months ago -- the judge gave the jurors the
24 option. He said if it was unanimous, they wouldn't have to.

25 THE COURT: Right.

1 MS. HERNANDEZ: And in that case, they voted to wear
2 masks.

3 THE COURT: Yeah. I have never had -- in the three
4 or four times I've done it since the pandemic, I've come close
5 to unanimity, but most of the time at least one person --

6 (Indiscernible simultaneous cross-talk.)

7 MS. HERNANDEZ: So I guess if the jury wants masks,
8 then it's difficult for the -- counsel to walk around without
9 masks. But if you're asking for my preference, I prefer not to
10 wear a mask.

11 THE COURT: All right.

12 MR. HASSAN: Judge, just real quick. Different
13 jurisdiction. Southern District of Florida doesn't require a
14 mask whatsoever. It's completely optional. So I just ask that
15 the Court make it optional, Judge, for all parties.

16 THE COURT: It's definitely my preference to make it
17 optional, as you see here today and as you saw yesterday. I,
18 in general, agree with that approach. I think the only
19 question is whether -- when we're talking about a six-week
20 trial, whether some additional precaution is necessary to make
21 sure the trial proceeds expeditiously. You can understand
22 that, but I hear your point.

23 MR. HASSAN: Judge, wearing a mask with a beard is a
24 little too much.

25 THE COURT: I got it. I got it.

1 MR. HULL: Dan Hull -- excuse me. Dan Hull.

2 Your Honor, I prefer no masks as well. That said -- and
3 you may be thinking about this -- or going to bring it up
4 later. What -- there was a discussion in the pretrial for
5 Oath Keepers about what happens if one of counsel gets COVID or
6 something like that and, you know, some of us don't get -- get
7 it at all. It seems like -- and some of us do. What's -- is
8 there a protocol for that when it happens?

9 THE COURT: I don't think there's a protocol. In
10 that case, I believe they worked -- they may have lost a day or
11 two, but then they kind of worked around it and figured out how
12 to restructure -- I don't know whether that was the
13 government's case or the defense case at that point. I think
14 it was the government's case. And they may have restructured
15 the witnesses. And -- and counsel worked around it in terms of
16 who was going to be -- who was handling the witness in terms of
17 cross and -- so they lost a few days, but that's, I think --
18 that was the --

19 MR. HULL: It was one of the defendants, not counsel.
20 Was it --

21 THE COURT: It was actually a defendant, as I recall.
22 All I know is through media reports. I believe a defendant
23 came down with it.

24 MR. HULL: I'm raising it. I thought you would
25 probably mention it.

1 THE COURT: There's no protocol, I don't believe.
2 We'll work around -- whoever the party is, if it happens, we'll
3 figure out how to work around it.

4 MR. HULL: Thanks, Your Honor.

5 THE COURT: All right.

6 MR. MCCULLOUGH: You know, for government,
7 Your Honor -- Jason McCullough for the United States.

8 Your Honor is weighing all the considerations, and we
9 also have an interest, just like the defendants, in just making
10 sure that we get through the trial. We're happy to take
11 Your Honor's guidance on this.

12 THE COURT: All right. I'll just -- I'll take that
13 as it is.

14 All right. So with those housekeeping matters out of
15 the way, here is how I thought we would proceed. I want to
16 talk about the questionnaire because that's something we
17 definitely have to finalize; then move to the government's
18 motion *in limine*, which I think -- I presume we're going to
19 spend the bulk of the time on. I'll hear from the parties on
20 that.

21 Mr. Pezzola, I said I -- I'm -- I think -- Mr. Metcalf,
22 because he wasn't here the other day, I said I would hear
23 argument on his sort of supplement to the motion to dismiss.
24 So I will hear that.

25 Then my thought is -- frankly, the only other thing

1 would be to hear from Mr. Rehl on his motion to sever, and I'm
2 happy -- again, it's a Friday, and I know I'm trying to be
3 respectful of everyone's time. Then I'm happy to release
4 everyone else and just have Ms. Hernandez here and talk about
5 the motion to sever.

6 I think on some of the other more ordinar- -- but if
7 folks want to stay for that, that's fine with me.

8 We do have -- you know, ordinarily, in a pretrial
9 conference, I'd talk about things like the jury instructions,
10 but seems we're -- you know, for a couple of reasons, I think
11 putting that discussion off probably makes sense, not the least
12 of which I owe you a ruling in the motion to dismiss.

13 Number two, I know in the Oath Keepers trial, I think
14 either yesterday or today, they're instructing the jury there.
15 So we may all benefit from looking to see what those
16 instructions were. I mean, obviously, that's going to be -- I
17 know the -- what those instructions are will be hotly
18 contested. We'll have plenty of time to contest it in the
19 future.

20 That's my thought, but what -- I'll hear from anyone if
21 they want to add to that agenda.

22 MS. HERNANDEZ: Your Honor, just a housekeeping
23 matter. This is about housing for the trial.

24 Mr. Rehl and Mr. Nordean are at Northern Neck. I am
25 told that they were awakened at 2:00 in the morning in order to

1 get here in time, and then the other day when they were both
2 here the whole day, they didn't get back until 9:00 p.m.
3 That's an impossible schedule.

4 THE COURT: All right. I'll renew -- I'll renew my
5 discussions with the marshals.

6 Anything from any- -- anyone else want to put anything
7 else on our agenda here today?

8 All right. Hearing no one.

9 Is there -- you-all got a copy of the questionnaire.
10 Does anyone want to be heard on any aspect of the
11 questionnaire? Before we talk about the substance of it, let
12 me just say, this is my understanding of, roughly, how they
13 proceeded using this style questionnaire in the Oath Keepers
14 case anyway.

15 We will administer it -- as I mentioned to you-all, we
16 have the jurors -- the pool coming in on the 5th. We will
17 administer it to the panel. We will turn around and get the
18 completed questionnaires to counsel, I anticipate, that same
19 day. And I anticipate then having a session with counsel -- I
20 don't see any reason we can't do it by video -- let's say, the
21 morning of the 7th.

22 And the idea would be if all parties agree -- or if any
23 party wants to make the argument that we should excuse a juror
24 from coming in completely, we could talk about who -- who
25 amongst the pool falls into that category, whether because they

1 say I can't make it because of hardship, because of -- or some
2 other reason they wouldn't be a qualified juror. If we all
3 agree, then I can get that information to the jury office and
4 they can tell that potential juror you don't even need to show
5 up on the 12th. So it will be -- or maybe, actually, what
6 would happen is the person would come and serve on a different
7 jury.

8 So that's -- that is how I see the process working, and
9 then, obviously, when we show up for *voir dire*, you'll have
10 them and you'll have all that information as a jumping-off
11 point for individual *voir dire*.

12 So on the substance of the questionnaire, I will -- I'll
13 hear whoever would like to be heard.

14 MR. HASSAN: Judge, Nayib Hassan on behalf of
15 Mr. Tarrío, Judge.

16 Judge, many of the questions that we drafted in regards
17 to the jury questionnaire that were proposed by the defense,
18 many of those questions were open-ended questions. And I see
19 the Court basically curtailed some of those questions and made
20 them very narrowly scoped in regards to yes-or-no questions.

21 The reasons that we asked for very broad answers on
22 certain questions, it gives a broad perspective. It gives us a
23 better light as far as what these individuals -- like, let's
24 say, for instance -- and if I look at the Court's
25 questionnaire, Question 24, where you talk about organizational

1 affiliations and activities, and -- then it only talks about
2 five years' attended rallies, but doesn't follow up with what
3 rallies or what those were. Doesn't give us an insight as far
4 as whatever may be. And it's our perspective that the more
5 information, the better. That -- that basically gives all the
6 parties the best opportunity to know the jurors as much as
7 possible.

8 And you go on and you go forth, Judge. I mean, if we
9 continue on -- when we talk about firearms -- and I know that
10 question is going to come up regarding our motion *in limine*,
11 regarding Black Lives Matter --

12 THE COURT: Right. Obviously, this is all contingent
13 on those questions about --

14 (Indiscernible simultaneous cross-talk.)

15 MR. HASSAN: Correct, Judge. And if I see the
16 Court's questionnaire, those -- those questions are more
17 elicited on the back end of the questionnaire. Like, let's say
18 Question 53, Question 54, and it's simply like -- it simply
19 provides for a yes-or-no answer. The reason for being more
20 elaborative as far as that information, it gives us more
21 insight as far as what the -- what the potential jurors will be
22 thinking as far as what their insight is, as far as what
23 their -- their thoughts are.

24 I mean, that's what basically jury duty -- jury
25 selection is all about, finding out who is in -- who is

1 actually sitting on the jury.

2 THE COURT: Sure.

3 MR. HASSAN: If we simply go on a yes-or-no
4 questionnaire -- Judge, when we're creating this, we had --
5 first, we pulled up the questionnaire that was used in the
6 Oath Keepers case, of course. Then we had other drafts that
7 were created, but also we pulled drafts from other cases that
8 had very complex issues. For instance, the *Tsarnaev* case in
9 Boston, Judge. And if we pull out that questionnaire itself,
10 there's no yes-or-no questions. It was literally more a
11 narrative -- that provided a narrative. The basis and the
12 reasons for that were it gave more insight as far as what the
13 jurors were thinking.

14 I think it will place all the parties in a better
15 position, including the Court, to know exactly what the jurors
16 are thinking, especially in light of some of the questions.
17 That's why we provided for open-ended questions, and that's why
18 we would object as far as not providing those open-ended
19 questions on the jury questionnaire.

20 When it comes down to it -- I mean, when we go yes-or-no
21 questions, we expect jurors to do the correct thing. We expect
22 jurors to look at the questions and answer questions
23 adequately. But let's be honest. You're talking about a
24 hundred or so questions. There comes a time period that some
25 jurors may just want to go no, no, no, no, no, and then we're

1 not going to get a correct insight.

2 So by breaking up the mindset and making these
3 open-ended questions at a certain phase of the case -- let's
4 say firearms, for instance, let's say Black Lives Matter, let's
5 say rallies, let's say different things that -- for the defense
6 we're really concerned about. It opens up and creates -- makes
7 them think a little bit more before they move on to the next
8 question. So that's why we're asking for the breakdown a
9 little bit and allow the jurors to answer questions, not only
10 in a yes-or-no answer, but go on and pretty much list.

11 Look, if they attended a rally, we don't know what rally
12 they attended. It could fall for the defendant; it could fall
13 for the government. And the fact that they attended a rally
14 may not impact one way or another whether they can be fair and
15 impartial for the trial.

16 THE COURT: So --

17 MR. HASSAN: It gives better insight, Judge.

18 THE COURT: Right. Look, and I'm trying to balance.
19 I appreciate that even apart from the issue of prejudice, it
20 is -- both sides want as much information as possible. I've
21 been in your shoes. You want -- you want all the information
22 you can have of these people because you want -- you want to
23 use it to your client's advantage. There's nothing wrong with
24 that, obviously, but --

25 So I'll take what you're saying under advisement about

1 the open-ended questions. I think I have to balance getting
2 them through -- getting them -- giving them -- you know,
3 letting them -- making it easy for them to fill out and getting
4 it quickly back to you all. And -- and the other thing I'll
5 say is -- but I'm going to think about what you said, but I'll
6 just say this: For example, on the questions about, let's say,
7 we do have -- they are close ended, but if you look at 49 and
8 50; right? Have you seen -- "Have you read, seen, or heard
9 anything about the 'Proud Boys'?" Yes/no. Someone checks yes.

10 I'm going to follow up with them; right? I mean, it's
11 not -- that's -- that's not the end of the story; right? And
12 even if they check -- in the next one, anything that would
13 affect your ability -- even if they checked that no, it strikes
14 me -- we're going to ask the question, well, what have you
15 heard. And if we're all looking at the person and we think,
16 well, okay, you know, they -- they may -- well, if there's some
17 reason to think that we need to probe further, I can do that.

18 So I -- just because these are close-ended questions
19 doesn't mean that in the individual *voir dire* part of our
20 procedure I won't be pushing further and asking open-ended
21 questions.

22 MR. HASSAN: And I appreciate that, Judge. One
23 concern that I do have, Judge, is that the Court raised, as far
24 as making it easy for -- making it easy for the jurors to get
25 through the questionnaire. For many of these defendants,

1 including my client, Judge, this may be the biggest trial of
2 their life, Judge. So the fact the Court is trying to make it
3 easy for the jurors shouldn't really play a part as far as --
4 as far as this, Judge. I think -- I think we do need to break
5 it down a little bit, and that's why the open-ended questions
6 play a part in that because it causes them to think a little
7 bit.

8 Let's say you do answer no. They're just going through
9 the questions. You're going through a long list of a line of
10 questions here, and you've already -- you just covered the
11 knowledge as far as the prosecutors on this case, the knowledge
12 of the attorneys, the knowledge of the defendants. So you're
13 working your way through this questionnaire, and pretty much
14 you're like, okay, no, no, no, no. I mean, how do we phase it
15 in at that point in time?

16 So that's why a cause in the breakdown of
17 communication -- as far as a yes-or-no questionnaire works, and
18 that's why in cases like the *Tsarnaev* case, as well as the
19 Oklahoma City bombing case, those cases had breakdowns. They
20 had breakdowns. Not only did they -- some of them had a
21 yes-or-no questionnaire, but they had more of a narrative to
22 give a better insight as far as the parties, as far as who the
23 jury is.

24 This -- this can cut both ways. This can cut towards
25 the government; it can cut towards the defense. Because

1 they're answering yes, yes, yes, yes, yes, then we're going to
2 be sitting here all day asking every single juror certain
3 questions. By breaking it down, you're causing them to think a
4 little bit, Judge.

5 THE COURT: All right.

6 MR. HASSAN: And that's our position.

7 THE COURT: All right. All right. I'll think about
8 that. I'll think about that, and I'll -- before we finalize
9 it, we'll get it to all of you just so you have it, but I'll
10 think about the point you're making.

11 MR. HASSAN: Judge, as far as certain questions that
12 were made during the Court's proposed questionnaire, I imagine
13 those have an impact regarding how the Court will rule on the
14 motion to -- a motion *in limine*.

15 THE COURT: No. They don't suggest the -- no. I put
16 them in just assuming for the moment, I guess, that all that
17 evidence will be in. I did this before I even heard argument
18 yesterday. So it doesn't suggest a ruling at all on those
19 questions.

20 MR. HASSAN: So as far as --

21 THE COURT: Obviously, I would not include those
22 questions that have to do with that type of evidence if I was
23 going to rule it out.

24 MR. HASSAN: Do we -- as far as when the -- when the
25 Court does rule in regards to the motion *in limine*, will we

1 then have an opportunity to revise the jury questionnaire at
2 that point in time and present it to the Court, or will the
3 Court just simply remove the questions that were in the jury
4 questionnaire and go from there?

5 THE COURT: So we're going to be -- I think
6 inevitably, one way or the other, I'm going to have to get
7 back -- we're going to have to -- and it may just be the
8 lawyers -- is -- we'll be scheduling something in the next few
9 weeks where I can give you more guidance on the outcome of
10 these motions.

11 My thought is there's only a few questionnaire --
12 questions that have to do with this sort of -- these issues
13 that might -- that I could exclude. So I think we'll be in
14 contact, whether it's online or in person, and you'll have a
15 ruling from me on that -- those contours; but either way,
16 before the 5th, what I will -- what we will do is email you the
17 final version of this so you can see. But I think it's just a
18 question of -- what is it? -- maybe two or three or four
19 questions that either -- that this might hinge on, and,
20 obviously, if I rule that evidence out, we would pull those
21 questions out.

22 MR. HASSAN: And will the Court give an opportunity
23 again to counsel to -- and I'm simply asking for
24 clarification -- at a later time, Judge, because some of those
25 questions, directly, are some of the open-ended questions

1 that -- that the defense asked for; maybe the firearms -- the
2 firearm question regarding the magazines that were taken from
3 Mr. Tarrio, or Black Lives Matter issues.

4 THE COURT: Why don't we do this: I'll hear you
5 again -- on it again. I'm going to have to rule more
6 definitively as much as I can on some of these motions before
7 trial and -- before the 5th. So at that point, I'll hear you
8 on how they affect the questionnaire.

9 MR. HASSAN: Thank you, Judge.

10 THE COURT: Okay. Does the government want to be --
11 oh, Ms. Hernandez.

12 MS. HERNANDEZ: So, Your Honor, in support of
13 Mr. Nayib's argument, as the Court knows, we filed motions for
14 change of venue at which the Court has, I think, denied without
15 prejudice.

16 THE COURT: Uh-huh.

17 MS. HERNANDEZ: But, you know, the change of venue
18 issue is really a jury -- a fair jury issue. So to the extent
19 that we can -- the more information we can get, the more -- the
20 more that issue gets resolved, I think. And I -- and that --
21 on that score, I would point to the Court that, I guess, the
22 most recent -- I know there have been cases in this district,
23 including the Oath Keepers case. And I think two things are
24 the result of that, is -- as more of those cases get tried,
25 the -- the news reports about the events of January 6th or

1 about those trials also gets out in the community. So that
2 adds another level of potential prejudice -- or potential undue
3 prejudice, as the Court pointed out yesterday.

4 And, particularly, I think --

5 THE COURT: This would be -- because it's publicity,
6 this is all undue. There's -- there's nothing -- there's no
7 proffer of prejudice in terms of this.

8 MS. HERNANDEZ: Right. And I think the Oath Keepers
9 case is a big deal because that is a seditious conspiracy case,
10 and we're the second seditious conspiracy case. So I think we
11 have to really be wary of that -- or aware of that. So the
12 more information we can get, the better, and I think we get
13 more information with open-ended questions.

14 And along -- along with that issue, the Supreme Court
15 this term -- this past term, you know, decided the *Tsarnaev*
16 case, which is the case that arose out of the Boston marathon
17 bombing, and the jury -- you know, the First Circuit had
18 reversed, I believe, on jury selection issues, and I think the
19 Supreme Court upheld the -- or affirmed the convictions, in
20 part, because the jury selection process in that case, as I
21 recall, had taken, like, three weeks, and it was a very
22 extensive inquiry of the jurors.

23 So that combination of factors, again, I would -- I
24 think from the defense's point of view, that's why we want the
25 open-ended questions. If you're not going to give us the

1 open-ended questions, we'll take the change of venue motion.

2 THE COURT: No. I understand. No. I'm going to
3 think about the point you made, and maybe -- there may be some
4 places where the open-ended questions are appropriate. So
5 I'll -- it's a fair -- it's a fair point.

6 MS. HERNANDEZ: And I think Mr. -- I think this has
7 already been made, but if the point wasn't made, I do think
8 some of these issues may be sensitive to jurors. So it's -- it
9 can mask -- by being able to say yes or no, you can mask your
10 true feelings. Whereas, if you have to put down a few words in
11 an open-ended, we might get a more honest -- so that's another
12 reason.

13 THE COURT: And I realize this is -- you know,
14 obviously, by virtue of us doing a questionnaire, this is an
15 unusual case. Of course, when we do general *voir dire* in the
16 general case, it's -- it's a yes-or-no question to start too,
17 and then from there, you can -- you delve in -- more in a yes
18 or no. Oh, if yes, then let's talk about -- or no or
19 whatever the -- if you have something to say, okay, now let's
20 talk about what that thing is that you want to bring to our
21 attention.

22 So in some ways it's not any different than the -- I
23 mean, I get your point, but the open/closed issue is not any
24 different from the normal process that, you know, again, we
25 have to -- I will have to push forward past whatever they say.

1 And that's why I think it's important -- I mean, you could
2 imagine a world in which there's only a question, have you
3 seen -- just to take the Proud Boys example. Have you read,
4 seen, or heard anything about the Proud Boys that would affect
5 your ability to be a fair and impartial juror? No. Well,
6 then, okay, that's just sort of beginning at the --

7 MS. HERNANDEZ: Where have you been the last
8 two years then?

9 THE COURT: Well, I mean, you know, they -- that
10 could mean a lot of different things, but we do have a separate
11 question for anything about them at all.

12 If somebody checks yes, which I assume many -- some -- I
13 think a surprising number of jurors on some of those questions
14 will say no, and they really won't know, but -- you know,
15 anything about Antifa, but anybody who checks yes, like --
16 okay. Well, what did you learn, and what is -- blah, blah,
17 blah, blah. So -- but I take your point. I'm going to think
18 about the point you're making.

19 MS. HERNANDEZ: So the other thing is -- or two
20 points, I think. You know, part of the benefit of -- or part
21 of the reasoning for a jury questionnaire is the time-saving
22 that it will generate because we'll -- and I've been in one
23 case where we did a questionnaire, a drug case a long time ago
24 in front of Judge Leon, and it was -- it was hugely time-saving
25 in terms of the jury. I mean, it took -- it took time from the

1 defense counsel and the Court because you come in and you get
2 to review the things. But by the time we got to the jury, we
3 had a much better -- fewer questions, which I think is more
4 time-consuming in terms of having jurors here and having that
5 give and take.

6 THE COURT: But you made that point originally, and I
7 think it's the right one, but I don't know how that cuts in
8 terms of the open-ended questions, though, Ms. Hernandez, only
9 because I'm going to ask that question regard- -- right? Like,
10 if somebody checks yes, I know something about a topic,
11 regardless of whether there's then an open-ended question,
12 well, what do you know, and they write down whatever they write
13 down, I'm going to be asking that follow-up question regardless
14 of what they write down; right? Like -- we have to.

15 So that's why I'm not sure how much of a time-saver it
16 really is, because I'm going to -- again, if somebody checks,
17 yeah, I know something about the Proud Boys, even if they
18 checked the other box, I mean, we're going to have to find out
19 what that is.

20 So I don't know, but I hear you.

21 MS. HERNANDEZ: So the note I was given is to remind
22 me and you and the Court that this is not a normal case.

23 THE COURT: It's not. By definition, we're -- we
24 have a questionnaire, and that -- that's not -- I understand.
25 I'm only pointing out conceptually that starting with open --

1 starting with mostly close-ended questions, it is common in
2 terms of the starting point, but it's only the starting point,
3 but -- it's only the starting point. But, in any event, I hear
4 your argument.

5 MS. HERNANDEZ: Thank you, Your Honor.

6 THE COURT: I don't think Ms. Hernandez is done,
7 Mr. Hull.

8 MR. HULL: That's probably true.

9 THE COURT: All right. But she is.

10 MS. HERNANDEZ: Thank you, Your Honor.

11 THE COURT: All right. Mr. Hull, if you'd -- please.

12 MR. HULL: Your Honor, we spent a lot of time on
13 the -- on the questionnaire in view of the fact that this is a
14 different community, and we're trying to make that point in the
15 motion for change of venue, and the law is what it is on that,
16 and it's tough. So I think we all thought this has to be
17 particularly, you know, well done, understandable -- I mean,
18 something that the jurors could read through and not be -- not
19 have to say later on the stand that, you know, I -- oh, I
20 didn't understand the question or -- and that happened in a few
21 of the colloquies I saw in two of the jury trials involving
22 January 6th.

23 There's -- and thank you for putting this together, but
24 there were three in particular that I thought might get, like,
25 quicker to what kind of people live in the district, who they

1 are. And I think one -- one of those was -- I had about -- a
2 number of mine did not end up on this list, but there were
3 three in particular.

4 One is where do you get your -- instead of where do you
5 get your news, listing some sources of news. And I didn't
6 pick -- there was *New York Times*, *Washington Post*, NPR, you
7 know, establishment, nonestablishment, a potpourri, so they
8 could say, oh, yeah, I do listen to that. Even Sedition
9 Hunters, which I learned about during this trial, I would want
10 to know if they read it and why and, you know, certain kinds of
11 publications.

12 The second group of questions that I had were -- one
13 involved what do you think about men's groups or fraternities,
14 and I thought that -- since the -- a lot of the gestalt that
15 sort of surrounds the Proud Boys is about it being all male,
16 it's kind of a cultural issue. I'd like to note, you know, the
17 people on the jury thought about that.

18 Also, where does -- the third category is where do you
19 get your information about -- I noticed this from watching some
20 of the *voir dres*. Where do you get your information about
21 what happened that day: workplace, family, friends? Your one
22 question touched on that, but I'd like to see something that
23 gets, you know, to the -- whatever animal that lives here in
24 the District, how did you get it? How did you learn about it?
25 Who did you talk to about it?

1 THE COURT: I do -- that question we might have moved
2 to -- I might have moved, but there is a question about
3 discussion with family members, friends, and co-workers.

4 MR. HULL: Which number is that?

5 THE COURT: It's 44. It may be that one was moved.

6 MR. HULL: You did. There was one that you'll
7 probably find on the -- the draft that was submitted, joint
8 draft. It's a little bit more detailed, but I think, mainly,
9 what I'd like to see is -- you know, list some news sources,
10 ask about men's groups, and ask about, you know, exactly where
11 did you get this information, because they seem to get from
12 family, neighbors, a bar, whatever, and that -- and that makes
13 some sense.

14 I also agree with the firearms points that Mr. Tarrio's
15 counsel is trying to make, and --

16 See if there's anything else. I thought this was a good
17 list, but I don't think we can, like, spend too much time
18 making this just right and, also, so they're not tired of it,
19 so they can go through it, realize it's -- you know, I just
20 can't imagine -- say it again -- that the questionnaire would
21 be more important than in this case.

22 Thanks.

23 THE COURT: All right. Any other defendant before I
24 hear from the government on this point?

25 Okay. Mr. McCullough.

1 MR. MCCULLOUGH: Thank you, Your Honor.

2 I'll be brief. I -- the government's interest here is
3 in making sure that we tease out all areas of inquiry with the
4 jurors. We have designed a jury questionnaire that kind of
5 targets and pinpoints those areas. It's nearly 80 questions.
6 I think that we've identified the right questions.

7 And the -- and the idea here that, you know, we just
8 want to identify those areas for further inquiry with the
9 juror, that inquiry, that colloquy is going to be best served
10 in person. The kind of cold record based on what somebody
11 might write, whether it's five words or a hundred words in
12 response to a question, we're going to have a much better sense
13 by just knowing to target in on those areas based on their --
14 their answers to those questions yes/no.

15 I think that that -- that's the -- the government's view
16 here is that having that person in front of us rather than kind
17 of asking them to write a narrative quickly in -- in a cold
18 room somewhere -- this is designed to be the first step in the
19 process. I think we will then all have an opportunity to
20 participate in that second step, which is a very important one,
21 and I think the one that we should be spending a lot of time
22 on, when the jury -- when the jurors are here in front of us
23 and we can really dig in on any answers to questions.

24 I think that's -- I think that's what this is designed
25 to do. There's no kind of empirical data that defense is

1 pointing to that asking someone to write a narrative question
2 forces them to think more about one issue or another. It's --
3 we trust them to answer these questions faithfully and
4 accurately. We're going to have to trust them once they get in
5 the box to follow your instructions. This is a directive from
6 the Court to answer these questions fairly and accurately.

7 I think that that's kind of what we are -- what we are
8 seeking to do here, and I think this is the right approach.
9 And I think, you know, in terms of -- you know, these issues as
10 to news sources or where information is gathered or inquiries
11 about firearms, there are questions on this questionnaire that
12 get to those points. If there are areas for follow-up, no
13 doubt Your Honor will follow up, defense counsel will follow up
14 at the appropriate time when we actually have the jury in front
15 of us.

16 And so I think that, kind of, this, as a first step of a
17 multistep and time-intensive process, is the right way to
18 proceed.

19 THE COURT: All right. I'll also just note for the
20 parties, Question 47, was one that there was no -- it's -- can
21 you set -- I added it after, sort of, the questions about
22 exposures to news reports about January 6th. It didn't appear
23 to me that there was an analogous question on either what the
24 parties proposed or, frankly, on the Oath Keepers
25 questionnaire.

1 But it struck me -- I mean, it's a slightly separate
2 question than 48, which is, "Do you have any strong opinions
3 about" what you've -- you know, what -- about what happened on
4 January 6th. But, again, can you -- it seems to me another
5 closely related, but not exactly the same question, is, look,
6 you may have seen or heard things about it, maybe you have
7 opinions about it; maybe you don't. But the point is, you have
8 to decide this case based on the evidence in this courtroom and
9 the law, and that's it, and not about anything you saw or heard
10 on the news, if you did. So I just want to point that out.
11 That was one that I added that was not in the parties'
12 proposal.

13 All right.

14 MR. MCCULLOUGH: Yes, Your Honor. And one other
15 thing that my colleague reminds me of -- Ms. Moore, thank
16 you -- on Question 72, this is just the -- the list of charges
17 in this case. The one item that is not in that list, which the
18 parties failed to include, is robbery of government property.

19 THE COURT: Right.

20 MR. MCCULLOUGH: And the -- and the government
21 apologizes for that oversight.

22 THE COURT: All right. Okay.

23 MR. HASSAN: Judge, real quick on the Court's
24 response on the question on 47. If the Court looks at the
25 proposed by -- by both parties, Question 57 and the

1 follow-up a. question, which is on page 14 and 15 of those
2 proposed by the -- joint proposed jury questionnaire, it
3 provides for an open-ended question regarding the January 6th
4 committee, and if they want --

5 THE COURT: Right. I include that the committee --
6 there's a question about the committee, too, in this proposal.
7 I think it's -- it's not open-ended, but it's -- the same point
8 is, have you seen anything about it? If you have, again, we'll
9 jump off from there.

10 But my point on 47 was, it's not about the committee.
11 It's about January 6th as a whole. Whether we're talking about
12 the committee, whether you're talking about what you saw that
13 day, you saw video. You saw someone talking about it.
14 Whatever. You're going to have to take all of that -- again,
15 regardless of -- you have strong views that you're going to
16 have to set aside too, but you're going to set aside what you
17 have seen regardless of your strong opinions or not and judge
18 this case based only on the evidence.

19 So that's --

20 MR. HASSAN: No. And I get it, Judge.

21 THE COURT: Right.

22 MR. HASSAN: I just -- there's certain reasons as far
23 as why we placed the open-ended questions where we did, and
24 that's specifically one of the concerns that we had regarding
25 the January 6th Select Committee.

1 We've been going at this for a long period of time;
2 right? So back in August, the reason for a continuation of the
3 case was the possibility of the notes being released by the
4 January 6th Select Committee, and we don't know when those
5 notes -- if they will.

6 THE COURT: I'm going to -- I take your point of the
7 open-ended questions.

8 MR. HASSAN: Thank you, Judge.

9 THE COURT: I'm going to -- I'm going to consider it.

10 MR. HASSAN: Thank you, Judge.

11 THE COURT: Okay.

12 MR. HULL: Your Honor, very quickly. One more thing
13 about the questionnaire that I have forgotten, and I've asked
14 other people about this and their thoughts. Attachment A --
15 Attachment A has -- is pretty critical in this case because you
16 have -- I guess there were people who -- the jurors could have
17 heard about in the news, like Ryan Samsel, Ray Epps, that kind
18 of thing -- some of these kind of lore and legend, if you will,
19 of January 6th.

20 When does -- how does this get populated, Attachment A?
21 The question is "The following people" -- or the sentence is --
22 "may either be witnesses in this case or individuals who may be
23 discussed during the trial. Please review the list and
24 identify any names that you recognize." That's, in this case,
25 a fairly critical part of this.

1 THE COURT: The parties are going to have to provide
2 that to me.

3 MR. HULL: What's the deadline for that at this
4 point?

5 THE COURT: Well, you-all have a witness deadline
6 now. The government already had a witness deadline. So
7 witnesses are -- the witness deadlines are coming and will be
8 there before we get to December 5th.

9 MR. HULL: November 28th, in other words, that would
10 be --

11 THE COURT: November 28th is when -- I think that's
12 right, but I think separately -- and it's a good point.
13 Obviously, the parties are going to have to provide me with --
14 this isn't just witnesses, as you point out. It's individuals
15 who may be discussed.

16 So let me think about -- I'll probably -- what I'll do
17 is just get a date -- again, sometime between now and
18 December 5th -- I will need the parties to provide me with
19 people they think -- again, witnesses or people who could be
20 discussed.

21 MR. HULL: And what I'm getting at here is that this
22 is likely, unfortunately, to be a long list.

23 THE COURT: It may be. I -- again, the kind of
24 person -- well, we'll --

25 MR. HULL: And we want to focus the jurors' attention

1 on this -- you know, at the very end they have the list of
2 people they, for the most part, haven't heard of, but a few may
3 have, and that could be disturbing, you know, down the line.

4 So thank you. I just wanted to mention that.

5 THE COURT: Very well. Why don't I just -- I'll go
6 ahead and say to have the parties provide me that -- the names
7 they would like on Attachment A by December 1, which is just
8 the Thursday before when the -- when we'll be -- when I'll be
9 administering that.

10 Okay. All right. So let's turn to the government's
11 motion -- actually, you know, in order to get it out of the
12 way, I'm happy to just hear argument from Mr. Pezzola and get
13 this out of the way, which is a little bit out of the -- out of
14 order. But, again, Mr. Metcalf -- I believe he wasn't able to
15 be present during some of those arguments, and so he wanted to
16 follow up and reserve time to make this argument.

17 So why don't we check this box. And, Mr. Metcalf, I'll
18 hear you on your -- I guess it's really a supplement, but it's
19 sort of an individualized, in a way, motion regarding your
20 client.

21 MR. METCALF: That's fine. Thank you, Your Honor.

22 I'll be quick on this one because it's kind of simple
23 and straight to the point.

24 The third superseding indictment charges on -- in
25 Count 10 charges Mr. Pezzola with robbery by force, violence,

1 and intimidation. Mr. Pezzola is alleged to have taken or
2 attempted to take from the persons in the presence of a
3 Capitol Police officer personal property belonging to the
4 United States; that is, a riot shield. So the issue here
5 becomes whether or not Count 10 is facially sufficient and or
6 fails to state a cause of action.

7 Faced with very scant authority and extremely limited
8 body of case law, I've had to look to *Stokeling v.*
9 *United States*. It's a Supreme Court case from 2019. This was
10 not cited in my motion. So I want to mention that to
11 Your Honor based on the conversations that were -- that
12 happened yesterday.

13 THE COURT: Can you give me the cite.

14 MR. METCALF: 139 Supreme Court. So S. Ct. 544, and
15 it's a Supreme Court case from 2019.

16 THE COURT: Okay.

17 MR. METCALF: That case breaks down the analysis of
18 the ACCA's interpretation, which is the Armed Career Criminal
19 Act, of defining robbery and, ultimately, how cases have
20 analyzed force, intimidation, and violence. They're not
21 interchangeable. Any one is sufficient enough to sustain the
22 burden here.

23 Now, that -- I mention that case in particular because
24 the Supreme Court does a great job going through various
25 different interpretations, going through all the different

1 circuits, showing various different types of examples as to
2 what's sufficient facially.

3 And in doing so, the *Stokeling* court highlighting the
4 common law principles of robbery and how they apply today, how
5 they apply to 2112, and explained how the unlawful taking, if
6 not substantiated facially with force, intimidation, or
7 violence is merely a larceny.

8 THE COURT: Right. But isn't -- let me just cut to
9 the chase here. Isn't all of this just a question of whether
10 the evidence is sufficient? Isn't this an argument you can
11 make to the jury and say they haven't proved it? I mean, I
12 don't see how the argument you're making -- and, obviously, I
13 didn't have that case to be able to look at it. So I don't --
14 I can't speak to that. But the argument you were making in
15 your motion struck me as just a question of -- a question of
16 whether the evidence will be sufficient to sustain a conviction
17 under that charge -- under that count, and that's a question
18 we'll -- that the jury will have to decide.

19 MR. METCALF: Well, before we get to that point, I
20 would ask Your Honor to consider facially, as a matter of law,
21 whether or not it's sufficient in the indictment. So let's
22 take a look at the indictment.

23 THE COURT: Okay.

24 MR. METCALF: The indictment has Count 10. I already
25 read that language. What else in the indictment actually

1 supports this issue? Paragraph 86. Paragraph 86 states,
2 "PEZZOLA moved toward the front of the police line and ripped
3 away a Capitol Police officer's riot shield . . ." Now, the
4 second part of this sentence is what is important and what I
5 want to address to Your Honor. ". . . while the officer was
6 physically engaging with individuals who had gathered
7 unlawfully into the west plaza of the Capitol."

8 The next and only other paragraph that substantiates
9 these charges is two paragraphs down, in paragraph --

10 THE COURT: But they don't have to have --
11 Mr. Metcalf, they don't have any paragraph
12 substantiating the -- if they just had an indictment that had
13 no factual -- no facts in it at -- well, very -- if they just
14 used the language of the statute, isn't that sufficient?

15 MR. METCALF: I submit to Your Honor, no, it's not
16 sufficient. It doesn't put us on notice. Rule 7, what's --
17 the Constitutional protection clause, we need to be put on
18 notice to be able to establish a defense.

19 So, essentially, what the *Stokeling* case is saying --
20 and, yes, I get Your Honor's point. Obviously, I'm going to
21 argue this at trial. Obviously, if Your Honor doesn't agree
22 with this motion, then, yes, that's -- I'm going to move to
23 dismiss at the end of the government's case. I'm going to move
24 during closing, the whole nine. But for right now, facially,
25 looking at this indictment -- and if you look at the *Stokeling*

1 case, if you look at *United States v. Bell* -- another case I
2 didn't cite to -- 158 F. Supp. 3d 906. It's a 2016 case. I
3 forget -- I don't have the circuit in front of me, but that
4 breaks down 2112 as well.

5 And the main point of these two cases and why I'm
6 referencing this is because in defining force or violence --
7 because the two definitionally overlap in almost every sense of
8 the word. In order to have force, you have to have violence.
9 In order to have violence, the definition is you use force.
10 But in order to define those -- and if they're sufficient in an
11 indictment -- there has to be a showing that one's resistance
12 was overcome, and that's the purpose of what I'm trying to
13 explain and navigate to Your Honor today.

14 Overcoming one's resistance is not showing. So to
15 answer Your Honor's question, if they just cite the statute,
16 no, that is not enough. That is insufficient as a matter of
17 law to allow us to prepare a defense and ultimately determine
18 whether or not this -- the victims allegedly -- what -- their
19 resistance was overcome as a matter of law, and that's not
20 shown anywhere in this indictment at all.

21 So if you look at the other paragraphs that substantiate
22 the actual statutory language and the language specifically in
23 Count 10 and you go back to paragraph 86 and that second part
24 of the sentence, ". . . while the officer was physically
25 engaging with individuals who had gathered unlawfully . . ."

1 that implies, number one, no intimidation. It also implies
2 that this officer's -- he did not resist, and there's no
3 showing of that, but facially --

4 THE COURT: But what I just -- can't get around is
5 they don't have to show that. They don't have to -- that
6 language that an officer -- I'd be very surprised if there's a
7 case out there, of the cases you cite, that -- that there have
8 to be facts in an indictment that show that the person
9 resisted. But I'll --

10 MR. METCALF: So, for example, if you go through
11 *Stokeling*, if you go through a couple other cases, they talk
12 about pocket picking. So when someone's -- someone's wallet
13 gets taken out of their pocket, do they know at the time? Did
14 they resist at the time?

15 THE COURT: Sure.

16 MR. METCALF: That becomes relevant with regards
17 to --

18 THE COURT: It's relevant in whether the government
19 proves its case. It's not relevant about -- these cases are
20 not motions to dismiss indictments, I'm presuming. And it's
21 not relevant as to the question of whether the indictment is --
22 is sufficient, I don't think. Again, when I say -- when I say,
23 you know, all they use is the statutory language, obviously, to
24 your point, you do need to know the date it happened. You
25 need -- I mean, there's not -- you can't just cite the statute

1 in an indictment and that's that.

2 But in terms of the things you're delving into and
3 suggesting that an indictment has to show, I just don't think
4 there's any case law that's out there that says that, but I'll
5 read the cases you cite, and I'll see if I agree with you.

6 MR. METCALF: I ask Your Honor also consider now
7 there is no -- I do not have any specific case law on this
8 point, and the government does point that out, but in order to
9 be able to defend -- in order to be able to overcome Rule 7,
10 the officer's name should also be listed in there to be able to
11 put us on notice. That's the point of Rule 7 and the
12 constitutional requirements of it.

13 In order to be able to prepare a defense, in order to be
14 able to question certain witnesses -- I don't know which
15 officer that we're talking about -- if I wanted to subpoena
16 that officer, if they're not on the government's witness list.
17 So that's --

18 THE COURT: You don't have that in discovery? You
19 don't have any way of telling that in discovery?

20 MR. METCALF: I do not know this officer's name.
21 Now, if I've overlooked that, then shame on me. But I do not
22 have this officer's name, and in the government's opposition,
23 they basically say -- we said that it was an officer, and it
24 was property from the United States.

25 THE COURT: Okay.

1 MR. METCALF: So I ask Your Honor to consider that as
2 well.

3 THE COURT: All right.

4 MR. METCALF: All right. Thank you, Your Honor.

5 THE COURT: All right. Very well.

6 I'll hear from the government.

7 MR. KENERSON: Thank you, Your Honor.

8 Erik Kenerson on behalf of the United States. The
9 government will be brief as well.

10 I think the Court hit the nail on the head.
11 Mr. Metcalf's arguments seem to be of two types, neither of
12 which are a motion to dismiss. One is either a Rule 29 motion,
13 which is not ripe, of course, to the close of the government's
14 case, and the other is for a bill of particulars.

15 Just to direct the Court to a couple of cites in our
16 filing, *United States v. Williamson*, 903 F.3d 124 at 130,
17 (D.C. Circuit 2018). An indictment parroting the language of
18 the federal criminal statute is often sufficient, and that
19 cites the Supreme Court case. It's in the brief, but the --
20 the -- as the Court noted, the language in the indictment here
21 does, in fact, list -- hits the statutory language. It says
22 that it happened in the District of Columbia for the reasons
23 we've stated. It's not required to go into either the name of
24 the victim or anything else along those lines.

25 Just one note on kind of discovery provided to date.

1 The defendant has -- and has as of November 11th in pretty
2 final form -- the videos the government's going to use, the
3 photos the government's going to use. All of that evidence has
4 been provided to defendants. We've litigated the issue of
5 Mr. Pezzola's robbery, specifically, in two detention hearings
6 before this Court, one of which was with his current counsel.

7 So -- and I'm happy to talk to him -- I don't think that
8 now on the record is the proper time to do it. But I'm happy
9 to talk to Mr. Metcalf about anything he may be missing in
10 terms of the identity of the officer, but it's not a
11 requirement for pleading.

12 THE COURT: All right. Very well. I'll take this
13 under advisement.

14 All right. So now we move to the -- the main event here
15 today, the government's omnibus motion *in limine*. Why don't I
16 proceed the way I did yesterday and give the parties some of my
17 preliminary thoughts on this.

18 I think -- it seems to me -- I mean, some of what I'm
19 going to hear from the parties today, I think, is closely
20 related to some of the arguments you were making to me
21 yesterday. And some of it, frankly, I think -- netting out the
22 briefing at the end of the day, I think the parties -- a lot of
23 it, the parties either came, I think -- arrived at the same
24 place or it turned out the -- some of the parts of the
25 government's motion, the defendants aren't -- either aren't

1 opposing, or at the end of the day, the parties sort of arrived
2 at a place where I think they're mostly in agreement. So let
3 me just walk through some of those areas.

4 The first area is the issue of the relevance of conduct
5 by co-conspirators, but I think this is more appropriately --
6 or the focus of the motion is these folks that the government
7 is calling tools of the conspiracy. Look, I'm going to hear
8 from you-all on this. I think this is -- it feels -- my gut is
9 the -- that the government is on firmer ground here than on the
10 issues about statements, which I think is -- is more
11 complicated, frankly.

12 But if these are folks -- if these -- if this is
13 effectively what the government is arguing was the result of
14 the conspiracy, it seems to me that just factual evidence of,
15 again, what they're alleging is -- was caused by the
16 conspiracy, that strikes me as relevant and admissible. But,
17 again, I want to hear from you, and it may be a question of
18 being able to make that linkage that the defendants focus on.

19 Then the government goes into sort of a long part about
20 the authenticity of certain media. Look, we are certainly
21 going to be arguing, as we did yesterday, about what video is
22 relevant and admissible. I hope -- I hope and pray we are not
23 here discussing authenticity, and I don't think the defendants
24 have filed anything opposing the government's sort of theories
25 of authenticity. The last thing we need to be doing is chewing

1 up time on that.

2 Third is the issue of sort of the statutes and records
3 and the congressional -- and the Congressional Record. My
4 impression is that this type of evidence has been admitted in
5 every -- this doesn't make it right, of course, but my
6 impression is that this type of evidence has been admitted in
7 every single January 6th case in this jurisdiction. Again, I
8 could be wrong, but my inclination is that the government has
9 the better view on that -- on that -- with regard to that
10 evidence.

11 Then we get to the sort of Secret Service issues. And
12 on this one, I do think it felt like the parties were sort of
13 past -- talking past each other, and I think they arrived in
14 the -- sort of the same place; that both sides were sort of
15 trying to leverage -- I guess it was Judge McFadden's ruling in
16 another case that struck me as drawing exactly the right line,
17 and the line that both parties -- I think sort of
18 ultimately -- sort of arrived at by the end of the briefing.
19 Maybe I'm wrong, but that's what it seemed like to me.

20 Let's see. The issue about cross of the CHS; again, the
21 government's motion was to preclude cross-examination of one,
22 but since then, I don't believe -- I don't believe -- let's put
23 it this way: I don't think we're at a part where I need to
24 address that because I don't have before me any -- the
25 government, I don't believe, has any intention of calling a CHS

1 at this point. So I don't think I need to address that motion
2 today. Certainly, I think it's premature.

3 Let's see. The out-of-court statements issue -- the
4 out-of-court statements -- or the self-serving -- the next
5 category was sort of out-of-court statements or self-serving
6 hearsay. Look, I think the parties ended up in a
7 back-and-forth about the rule of completeness. I think at one
8 point the government said, well, the rule of completeness can't
9 be used to circumvent the rule on excluding self-serving
10 hearsay.

11 I think -- you know, again, I think this is one where if
12 there is a rule of completeness issue, you know, I can't rule
13 on this in the abstract, but I would just say, the parties --
14 to the extent we're talking about statements on a back -- when
15 we're talking about a back-and-forth in a chat or emails or the
16 rest, look, you-all can tee it up for me as it comes. But
17 if -- if -- the rule of completeness, I think, can trump the
18 sort of general hearsay rule if it needs to come in because the
19 government has sort of -- is going to be putting in evidence
20 that this is naturally part of.

21 So that doesn't extend -- to the extent the government's
22 arguing, well, that doesn't mean the entirety of -- you know,
23 of every single statement in the chat comes in; oh, yes, I
24 agree with that. But on the other hand, the defense does seem
25 to have a point that if there are legitimate rule of

1 completeness issues there, that's something that the defense
2 can employ to get certain things into evidence in the right
3 circumstance.

4 Last, there's a whole bunch of things on improper
5 argument. I think for -- as I understand it, the government
6 laid out a bunch of things that they thought were -- you know,
7 should be out of bounds, and I don't believe -- for a number of
8 these categories, I don't see the defendants contesting the
9 motion as far as charging and selective prosecution goes, as
10 far as entrapment or a public authority defense goes, as far as
11 the different things the government walked through that they
12 categorized as nullification. So it seems to me, you know,
13 unless I hear differently, those things are -- there's -- the
14 defense has no intention of going down those roads.

15 There's one part of this that's under seal that we can
16 take up under seal. The part that's not under seal, then, is
17 kind of the First Amendment issue. And, you know, to me, I
18 think, again, this felt like a place where maybe the parties
19 don't disagree as much as they -- I thought they would in the
20 beginning. If -- clearly, the defendants can't, it seems to
21 me, argue that conduct like trespassing or other acts that they
22 took are protected by the First Amendment because, as a matter
23 of law, certain of those things are not.

24 On the other hand, if the -- I'd be interested in what
25 the government's view of this is, because it seems to me what

1 the defendants are going -- are -- want to preserve is their
2 right to say to the jury, argue to the jury, well, ladies and
3 gentlemen, if all you find is that -- if all you conclude is
4 that our clients -- the only conspiracy you find is that they
5 were conspiring to get together and lawfully protest on the
6 right side of the police barriers, then you should -- then that
7 is protected by the First Amendment. You should -- you should
8 acquit them.

9 I mean, I think they're entitled to say that, at least
10 that's my -- that's my knee-jerk impression. I don't -- I'd be
11 interested to hear if the government disagrees with that.
12 Again, obviously, I think both parties sort of acknowledged
13 that there isn't, for example, a First Amendment defense to
14 running up into the Capitol past all the -- past all the
15 barriers, and I don't think the defendants are purporting to
16 offer that as a defense to that conduct.

17 But those are some initial thoughts, and I'll hear --
18 it's the government's motion. So I will hear from you-all. We
19 can leave -- if there is this one issue that we have to do
20 under seal, we can -- we can leave that and do it at the end.

21 MR. MULROE: Good morning, Your Honor. Conor Mulroe
22 for the United States.

23 THE COURT: Good morning.

24 MR. MULROE: I'm going to start for the government by
25 addressing the tools aspect of the government's motion as the

1 Court described it, and I think that Your Honor is exactly
2 right; that this is very much bound up with some of the issues
3 that were discussed yesterday, especially the statements by
4 persons other than the defendants. These issues kind of inform
5 each other; so I think that's important to view them together.
6 So some of that might resurface, to some extent, in the
7 argument this morning.

8 We also, as we move forward, would propose to show some
9 of the proposed trial exhibits if the Court is open to that. I
10 think it's difficult to talk about these things in the
11 abstract. So rather than trying to summarize or paraphrase
12 them, we'd like to just put them up on the screen.

13 THE COURT: Is there any objection to this? I
14 mean --

15 MS. HERNANDEZ: I missed that.

16 THE COURT: The government would like to show me
17 certain trial exhibits to get a sense of what they -- what
18 they -- of this tools of the conspiracy argument.

19 MS. HERNANDEZ: Your Honor, I don't know how many
20 exhibits. Perhaps we could take a break and the government
21 could let us know which exhibits they're talking about. I
22 don't know --

23 THE COURT: I mean, we're not -- this isn't --
24 there's no jury here that we need to -- if -- that we need to
25 make sure it doesn't see these exhibits.

1 MS. HERNANDEZ: I just -- how many exhibits? Which
2 ones are we talking about?

3 THE COURT: But you-all should have them so you can
4 respond to the argument, let's put it this way. But --

5 MS. HERNANDEZ: What exhibits is he talking about?

6 MR. HASSAN: Judge, my concern -- Nayib Hassan on
7 behalf of Enrique Tarrio, Judge.

8 My concern as far as showing exhibits at this point in
9 time --

10 THE COURT REPORTER: Can you come to the microphone.

11 MR. HASSAN: Our concern, Judge -- and this is
12 regarding Mr. Tarrio -- is that the government is trying --
13 using this opportunity in order to show more of their case and
14 their presentation for media purposes.

15 THE COURT: For media purposes, there's, like --
16 there's --

17 MR. HASSAN: Whatever it may be, Judge, but --

18 THE COURT: Look, these proceedings are not under
19 seal with regard to the potential evidence that's going to come
20 into the case. They're not releasing these. These exhibits at
21 this point are simply for me to be able to rule on evidence.
22 They're not under seal. I don't know any other way -- I've
23 never heard of a trial in which the -- the government isn't
24 able to say here's the exhibit, Judge; can we admit it or not.
25 So I don't know of any way we can go forward.

1 MR. HASSAN: Judge, I just don't know if these are
2 exhibits that the government has highlighted as being highly
3 sensitive to the defense, and at this time, they're using this
4 opportunity to highlight it to whoever it may be.

5 So, Judge, with all due respect, at least I would ask
6 for an opportunity to review the exhibits in anticipation just
7 to know exactly what we're looking at, Judge.

8 THE COURT: All right. Are they highly sensitive
9 exhibits, Mr. Mulroe? I mean, I wouldn't think you would be
10 using those --

11 MR. MULROE: No, Your Honor; not in the government's
12 view. Just to be clear, these are Telegram messages and Parler
13 posts. So if I don't show them, I'm just going to read them
14 into the record. I think it's just easier for everyone if
15 we're able to put them on the screen. They're the same
16 messages that we've been quoting in the briefing. I just don't
17 see what possible prejudice there is to showing the Court what
18 we're talking about.

19 THE COURT: No, this is -- they're in the briefing,
20 and the briefing is in the public record right now. So,
21 Mr. Mulroe, you can -- actually, here's what we'll do, just
22 because I think probably we need a break for the court reporter
23 anyway -- and I can see her nodding and telling me yes.

24 So just not because we won't be considering it in open
25 court, but because I do think it's -- you know, it may be just

1 good for the defense to be able to see what you're going to
2 refer to, we'll just take our ten-minute break and come back in
3 ten minutes.

4 (Recess taken.)

5 THE COURTROOM DEPUTY: Your Honor, we're back on the
6 record in Criminal Matter 21-175, United States of America v.
7 Ethan Nordean, et al.

8 THE COURT: All right. Mr. Mulroe, you may proceed.

9 MR. MULROE: Thank you, Your Honor.

10 So turning to this issue of the tools that we've teed
11 up, I think a keynote of this argument and a keynote of the
12 case as a whole is this notion of what the defendants called
13 real men. These real men were central to the case. You know,
14 the Oath Keepers had their rifles. The Proud Boys had their
15 real men.

16 And there's a striking symmetry in the evidence that
17 relatively early in the conspiracy, right after the rally on
18 January 6th is announced and right before the formation of
19 MOSD, Defendant Biggs tells Defendant Tarrio: Let's get
20 radical and get real men. And then they form and recruit and
21 organize that group.

22 And then later on, near the climax of the conspiracy on
23 January 6th, as the marching group is walking past the Capitol,
24 Defendant Nordean makes an announcement to his followers
25 through a bullhorn. He says: Real men are here, and these

1 real men represent the spirit of 1776 and are going to remind
2 those who have forgotten what the constitutional oath of office
3 means.

4 And so among the fundamental questions for the jury in
5 this case are what was the purpose of assembling this group of
6 what they called real men and bringing them to the Capitol that
7 day, and why did those real men do what they did when they got
8 there?

9 And so our position is that whether you look at these
10 people as co-conspirators or you -- whether you look at them as
11 tools, through either lens, the case is about the concerted
12 efforts of a group of people, this group that the defendants
13 called real men. And our position is that they weaponized
14 these people. They weaponized their followers critically
15 through a process that occurred over time. It's not the case
16 that they just woke up one day and decided we're going to form
17 this group and carried an objective. This is the type of
18 conspiracy that does not begin from a cold start. It's
19 something that progresses over a period of weeks or months.

20 And so that's part of the government's theory of the
21 case. We expect the evidence is going to show that in the
22 lead-up to January 6th, there was this growing current among
23 Proud Boys.

24 THE REPORTER: I'm sorry. This is?

25 MR. MULROE: A growing current among the Proud Boys

1 that held that it was appropriate and necessary to use force
2 and violence in pursuit of their objectives.

3 So that is part and parcel with the formation of the
4 conspiracy. And the Court has seen that in some of the
5 statements of offense, some of the co-conspirators who have
6 pled guilty already, cooperators. So, for example, in the
7 Donohoe statement of offense at paragraph 6, he admitted that
8 "As a member of the Proud Boys since 2018 and an attendee of
9 prior national rallies attended by the Proud Boys, Donohoe knew
10 and understood that some members of the Proud Boys - known
11 internally as the 'rally' boys - would resort to unlawful
12 conduct to achieve an objective."

13 And, likewise, the Bertino statement of offense at
14 paragraph 6 repeated largely the same language, but then
15 explained further at paragraph 9 that this trend of aggressive
16 violence, that trend accelerated after the December 12th rally
17 and the trend included a willingness on the part of members --
18 who he specifically included these defendants' names, a
19 willingness to use violence affirmatively rather than only in a
20 defensive posture.

21 So this increasing willingness, Your Honor, is part of
22 what formed the conspiracy. And that's part of the
23 government's theory of the case. And so it does go back before
24 December 19th, even before this rally is announced.

25 We're going to show in the days immediately following

1 the election, they initially -- you know, weren't quite there
2 yet. They had a hope that other means might be successful in
3 stopping the transfer of power. So, for example, they hoped
4 the legal challenges would be successful, but as time
5 progressed, they realized that wasn't going to happen, and they
6 were going to have to take matters into their own hands and do
7 it their way through the use of force and violence.

8 So I want to show an exhibit that illustrates that.
9 This is going to be an exchange from a Telegram group that's
10 called Skull and Bones. Skull and Bones was the Telegram group
11 that existed for discussion among the elders of the Proud Boys.
12 The elders being kind of the top-ranking, very small select
13 group of senior leaders. These elders, we mentioned them
14 yesterday. They're the same small group who voted at Tarrio's
15 request to approve the formation of MOSD.

16 These elders are the ones that Tarrio sent the message
17 Whispers 1776 when he was advocating for the creation of this
18 special chapter. And the elders in the Skull and Bones group
19 are the same group that Tarrio, after the riot, told them:
20 Make no mistake, we did this.

21 So, Mr. McCullough, if we could have Exhibit 500,
22 slide -- or page 34.

23 THE COURT: Can I just ask one thing. Your motion, I
24 thought, was principally about conduct, and I know what you're
25 saying is -- your -- I mean, we talked about the issue of

1 statements, the various theories of admissibility, but isn't
2 this motion more about conduct? And -- and I took it as an
3 attempt to establish the relevance of -- well, just reading
4 the -- you know, conduct by co-conspirators and tools. So I
5 took it as an effort for the government to try to get me to
6 rule in videos by folks who would fall into these categories
7 that day rather than statements.

8 MR. MULROE: Yes, Your Honor. So that is the subject
9 of the motion. I don't mean to retread ground we've gone over,
10 but I think it's important. Because as the Court mentioned at
11 the beginning, the fundamental question for the conduct is
12 whether the government can make a linkage between the conduct
13 of these people and the actions of the defendants. So the
14 statements are really -- bear directly on that. We would
15 submit are really inextricable from it.

16 THE COURT: Okay.

17 MS. HERNANDEZ: Your Honor, I'm sorry. Could we get
18 the government to identify who the elders are. I've seen a lot
19 of stuff on the internet who the elders are. I just wondered
20 if they have a particular --

21 THE COURT: I'm not going to interrupt his argument
22 to have this happen. If you want to discuss it with them
23 afterwards, I encourage you to do so.

24 MS. HERNANDEZ: Thank you.

25 MR. MULROE: So if we could scroll down on this

1 exhibit to see the 2:15:29 message and the ones that follow.
2 So here, discussing the election, one of the elders, Nick Ochs,
3 says, "The odds are with us because of the Supreme Court boys.
4 I'm pro violence but don't blow your load too soon." And then
5 he says, "Not to be an anti-murder buzzkill but I really think
6 this ISNT fucked. Once it is, let's go wild."

7 So the point, Your Honor, is that this desire and
8 advocacy of violence is mobilizing as early as early November,
9 directly following the election, and the escalation progresses.

10 And to just raise another point from yesterday, the
11 December 12th rally was a critical step in that progression. I
12 want to just clarify a couple points about that. The Court
13 yesterday raised the question of whether the December 12th
14 rally was actually related to the election, whether we have
15 evidence of that. I would say, first, that the indictment
16 directly alleges that it was. That's at page 5, paragraph 15
17 of the third superseding election [sic], and there will be
18 ample evidence at trial. I'll just put a couple of them up.

19 So Exhibit 603, Slide 18, Mr. McCullough.

20 THE COURT: And what I'd ask the government to do is
21 provide to me any exhibit you're referencing here so that I can
22 look at it afterwards.

23 MR. MULROE: Certainly, Your Honor.

24 So here we have a public Parler post from Defendant
25 Biggs on the 20th, posting a flyer, essentially, March for

1 Trump, Washington, D.C., December 12th, proudboysusa.com. And
2 he says, "Call to action. Get your fucking ass there on the
3 12th."

4 Similarly, Defendant Rehl made posts at Parler 602.37.
5 This is on December 11th, and he says, ". . . Democrats are
6 joining the defendants, almost the whole country is picking
7 sides in this case . . ."

8 "See you all this weekend." This weekend, referring to
9 the 12th.

10 And then the very next post, No. 38, reposting a --
11 looks like a tweet -- I'm sorry. Is this thirty -- 38? So,
12 again, in the day before the rally, posting this post from the
13 President in reference to the coming events, and he does a
14 hashtag on the bottom, #millionmagamarch, which was the name of
15 that event.

16 Finally, 603.6 [sic] is a post by Pezzola. So the green
17 text indicates that he's replying to something that someone
18 else has posted, but another Parler user posts, "MARCH FOR
19 TRUMP SATURDAY DECEMBER 12TH 12 PM AT FREEDOM PLAZA
20 #marchfortrump #proudboys." And Pezzola says, "I'll be
21 there!!!" So this clearly was election related, Your Honor.

22 And another point that I want to clarify and emphasize
23 is that, you know, in terms of the 404(b) analysis of the
24 December 12th event, December 12th is part of the offense
25 charged. So it's alleged specifically in the indictment, in

1 the background section at paragraphs 15 and 16. And I would
2 note also that in alleging the conspiracy offenses, the
3 indictment alleges that the time frame of the conspiracy began
4 in and around December of 2020.

5 MR. NICHOLAS SMITH: Your Honor, this -- this whole
6 line of argument is inappropriate because, as Your Honor knows,
7 we were arguing this issue yesterday; whether there was any
8 connection -- what the 404(b) arguments were for the
9 December 12th. We're proceeding this was the subject of a
10 motion that was litigated yesterday, and what the government
11 has just done is it's tried to bring in more support for its
12 argument but without giving any notice to the defense.

13 THE COURT: Mr. Smith, I'm going to allow the
14 government. It's closely linked to the conduct, and I'm
15 going -- I'm going to hear the argument, but you may respond to
16 it however you would like.

17 MR. NICHOLAS SMITH: So, Your Honor, what I would
18 just like to put into the record is that the defense has had no
19 opportunity to address -- so there's new evidence that's coming
20 into the record that was a part of -- of a 6-terabyte
21 production that we have had about ten minutes to look at,
22 Your Honor. The problem is that even though the government
23 showed us these texts before the hearing, they -- they failed
24 to represent to us that they would be trying to reopen argument
25 on an issue that was argued yesterday. So we're basically

1 caught flatfooted.

2 THE COURT: I don't --

3 MR. NICHOLAS SMITH: Your Honor, we would probably
4 need 30 minutes.

5 THE COURT: The texts are not catching you flatfooted
6 because the texts -- he could be -- the facts are not critical
7 to what you've just objected to. You're objecting to making a
8 certain legal argument, and you're going to have time to -- to
9 address them. So you may be seated. Your objection is noted.
10 You may continue.

11 MR. MULROE: And just for the record, from the
12 government's standpoint, Your Honor, the events of
13 December 12th are going to show and explain and provide context
14 for the actions of the tools. That's why this is related.

15 So, again, this -- this event is in the indictment, and
16 it's in the indictment for a reason, because it is part and
17 parcel of the charged conspiracy. So the Donohoe and the
18 Bertino pleas, their statements of offense both reflect that.
19 They reflect that the events of December 12th shaped their
20 understanding of the agreement that they were part of, and the
21 same is true for these defendants.

22 And I'd note, Your Honor, that it's not just the
23 government saying that, and it's not just Donohoe and Bertino
24 saying that, but it's also the contemporaneous communications
25 among the defendants and their co-conspirators and among the

1 people who would become the tools of this conspiracy.

2 And so there's a video that has been discussed a lot in
3 the hearings on this case, and that's this sort of briefing, a
4 briefing of all the new MOSD recruits, the new members on
5 December 30th. A transcript of that video has been filed at
6 ECF 440, Attachment 1. And at multiple points in this briefing
7 of the membership, the leaders explain that the purpose of this
8 new chapter is to make rallies more successful at achieving
9 their objective by avoiding what they called the
10 disorganization of December 12th in D.C.

11 So the jury just can't understand that without knowing
12 what December 12th was about. That -- December 12th means
13 something to the leaders who refer to it. December 12th meant
14 something to their followers who were there listening to this
15 briefing. Apart from the briefing, the communications among
16 the defendant leaders in the lead-up to the 6th show that for
17 them, the events of December 12th were a major factor that
18 guided their recruitment in advance of the 6th. It guided
19 their preparations in advance of the 6th, and it guided their
20 expectations in advance of the 6th.

21 And I'll show just one exhibit illustrating one of those
22 points, starting with 501.23.

23 MS. HERNANDEZ: I'm sorry, Your Honor. May I be
24 heard for a moment?

25 It's sort of what Mr. Smith said, but I've reviewed the

1 motion that I thought we were arguing. There's no reference to
2 these text messages. There's no reference to December 12th.
3 I'm not sure where we are. I mean, there's these categories
4 that the Court was going to consider, and I think that's why
5 we're being taken aback. We -- we weren't prepared for this.

6 I understand that the Court wants to hear argument, and
7 maybe we'll have to come back on another day. We're just a
8 little puzzled as to what we're arguing today. That's -- and
9 it may be the Court knows or maybe the government could
10 identify where in their motion this is coming from.

11 THE COURT: Okay. As I -- well, what I'm -- the
12 first category of things the government has laid out here in
13 the motion today is about conduct of the tools of the
14 conspiracy.

15 MS. HERNANDEZ: But there's nothing in these pages --
16 nothing -- that talks about -- and I think the Court had the
17 same question.

18 THE COURT: Right. It's clearly related to the
19 statements. So -- to the issue of the statements we talked
20 about yesterday.

21 MS. HERNANDEZ: There's nothing -- I just want to say
22 to the Court --

23 THE COURT: Right.

24 MS. HERNANDEZ: -- ECF 494, the section on tools
25 starts at 3 and goes through 7. There isn't even a reference

1 to December 12th or to any of these things. So we're just
2 really at a loss.

3 THE COURT: Fair enough. You'll -- don't worry. I
4 have not deprived any party in this case --

5 MS. HERNANDEZ: I agree. I agree. I'm not --

6 THE COURT: -- of opportunities to respond to the
7 other side, and in the spirit of trying to get the right
8 answer, I'm going to just let the government make its point and
9 move on, but I have never precluded -- as you know --

10 MS. HERNANDEZ: I agree.

11 THE COURT: -- I have never precluded any party from
12 coming back and providing me additional argument or evidence or
13 whatever they would like, because to me, the ultimate point of
14 the proceeding is for me to get the right answer. So --

15 MS. HERNANDEZ: And I don't mean -- and I agree with
16 the Court wholeheartedly, but the Court has been willing to
17 listen to our arguments, however, whenever they're made. We're
18 just trying to -- really, we're trying to follow where this is
19 coming from, and I can't find it.

20 THE COURT: All right.

21 MS. HERNANDEZ: I know Mr. Smith is even more into
22 the details than I am.

23 THE COURT: All right. So I just ask Mr. Mulroe to
24 just, you know, as much as you can, wrap up on this sort of
25 ancillary point, related point, and get to the conduct issue.

1 MR. MULROE: Yes, Your Honor. I -- I'm just not sure
2 it's ancillary, because the message we're seeing here is them
3 talking about which tools they are going to bring into the
4 conspiracy.

5 THE COURT: Sure. But the motion is most -- is about
6 conduct, not about statements, and I take your point that part
7 of the issue is linking up the conduct to the conspiracy,
8 but -- and -- but I just -- I don't think -- I get the point
9 you're trying to make here.

10 MR. MULROE: Okay. At the Court's request, of
11 course, we'll submit these exhibits --

12 THE COURT: Yes.

13 MR. MULROE: -- for the record, subsequent to the
14 hearing. So I'll summarize now. In 501.23, they're discussing
15 who to recruit based on those people's performance in D.C. You
16 know, the context here is they require that Proud Boys be at a
17 certain level of membership, a certain degree before they can
18 be part of MOSD. But members of the leadership say, well, I've
19 got these guys who did really good in D.C. on the 12th, and so
20 we think they should be able to come in, even if not second
21 degree.

22 We don't have to walk through them all, but 501.25,
23 which we will submit, discusses their need for armor based on
24 what happened in D.C. on the 12th, and so the jury is going to
25 need to understand that. Exhibit 501.49, is their expectations

1 for the 6th. They make reference to the fact that they could
2 have run "them the fuck over," referring to the police in D.C.
3 on the 12th. And there's discussion about how they expect that
4 there's some likelihood of that happening on the 6th.

5 And then I just do want to show one to show it's not
6 only the leadership members, but 603.12 [sic], is a post by
7 Pezzola on Parler replying to a message or a post from another
8 user saying that Antifa and the other agitators are cowards,
9 sometimes chasing them. They kept running behind the cops.
10 Pezzola replies to that saying, "R u the brother [who] I met
11 [at] the hotel after I got maced by the punk ass 5-0."

12 So for these followers, for these tools, the 12th is
13 forefront in their minds. It's an integral part of the offense
14 charged. It's part of an unbroken chain of events, and so it's
15 something that's very significant for the Court to keep in its
16 mind as it considers the admissibility of these tools' conduct.

17 So turning to the tools, Your Honor, I think that in
18 every instance -- or in almost every instance, we would argue,
19 first, that these people are co-conspirators. We think that
20 the evidence supports that, and so for that reason, I think it
21 would be uncontroversial that their conduct and their
22 intentions and their statements are all relevant and admissible
23 on that basis.

24 The tools theory is an alternate basis of relevance that
25 says even if the Court were to find that these people were

1 completely ignorant as to the ultimate aims of the conspiracy,
2 they're still part of the offense because the defendants
3 intentionally weaponized them in order to carry out the
4 offense. And this -- this concept, I think, is not a novel
5 one. We raised an example in the papers of mules who might
6 transport drugs or money kind of unwittingly.

7 THE COURT: I understand this. I think to me, this
8 theory makes sense to me. I don't have to find that they're
9 co-conspirators. At least -- again, putting aside statements,
10 which are -- I think fall in a different category, but it seems
11 to me if -- if you have -- if the theory -- and there's
12 predicate evidence supporting the notion that part of the
13 conspiracy was weaponizing a group of people and then the group
14 of people go do something -- again, I understand your theory,
15 and I think it makes sense.

16 Again, statements -- at least I'm talking about on
17 January 6th, which I think is what you're talking about. The
18 conduct on January 6th, at a minimum.

19 MR. MULROE: Yes. Understood, Your Honor.

20 THE COURT: I know you want all of it in, I get that.
21 At a minimum, the point of what happened -- of the conduct on
22 January 6th, I understand that argument.

23 MR. MULROE: Yes, Your Honor. And so I -- again, I
24 don't want to retry to take it back to the statements, but I
25 think it's -- it's extremely important that the only way the

1 government can demonstrate this theory and show the jury that
2 these people were the tools, they were weapons, they were not
3 just a group of people who the defendants assembled to
4 peacefully protest is by showing some of the -- I'll say
5 they're nonhearsay statements of these people. So they're
6 going to be statements that are not offered for the truth of
7 any matter asserted, but I think it's significant that -- I'll
8 just lay it out.

9 They create this --

10 THE COURT: They link together. I'm not -- I'm not
11 arguing with you. I -- I do think, again -- the other issue is
12 this -- well, I don't want to get into -- none of this has
13 anything really to do with -- I don't think -- with part of
14 what -- the argument yesterday about 404(b) and intent and
15 whether you could use the 12th for -- whether you could use
16 evidence that these -- not these defendants, but any of these
17 folks -- any Proud Boys were the aggressors in terms of
18 violence on that day. To me, that is a -- I'm not -- that's a
19 separate issue through 404(b). That's a separate issue than
20 what you're arguing. It's just a separate issue than the -- of
21 your argument today.

22 MR. MULROE: Yes, Your Honor.

23 THE COURT: I'm saying they're not linked. I could
24 easily agree with everything you're saying today. I don't
25 think that has anything to do with the question of whether you

1 can show on a 404(b) theory, the aggression -- the -- sort of
2 the idea that the Proud Boys were the aggressors that day. I
3 just think that's a separate thing I'm going to mull, but it
4 doesn't really affect, I don't think, your -- what -- the basis
5 for what you're arguing admissibility -- is admissible today.

6 MR. MULROE: That's fair, Your Honor. We're just
7 contemplating a scenario where one of the tools shows up and is
8 wearing a helmet and carrying a baseball bat and bear spray,
9 and there's an argument that they --

10 THE COURT: On what day?

11 MR. MULROE: On the 6th.

12 THE COURT: Okay.

13 MR. MULROE: And there's an argument that they
14 outfitted themselves that way, in part, because of what
15 happened on the 12th. So whether they were ambushed on the
16 12th or something else is hugely significant for the jury to
17 understand.

18 THE COURT: So I would have thought that that's going
19 to come in through the defen- -- you know, as a potential
20 explanation for why they were taking the precautions they were,
21 but -- anyway, but I see your point.

22 MR. MULROE: So, Your Honor, I think that -- there's
23 no need for us to belabor kind of the basic theory of the
24 relevance of misconduct.

25 THE COURT: I understand your theory.

1 MR. MULROE: So I think -- I think I would leave it
2 there on the tools.

3 In terms of some of the other parts of the government's
4 motion *in limine*, it sounded like, actually, there's not much
5 of substance to cover on many of them. So the authenticity of
6 these videos, we agree, I think, from the government's
7 perspective, it's not controversial. There's no serious
8 dispute that these are authentic.

9 I'd note we have requested stipulations as to the
10 authenticity of certain items and haven't received any
11 agreement on those. So just to be clear, when Mr. Smith
12 yesterday was saying we stipulate this or we stipulate that,
13 they haven't entered any stipulations as of this time.

14 THE COURT: All right. As far as -- you know, as far
15 as authenticity goes, again, I'm going to implore the parties
16 to try to reach agreement on authenticity. We can't have -- we
17 can't be talking about authenticity. I understand -- you'll
18 have all your relevance arguments available to you. I'm not --
19 just because something is authentic doesn't mean it's relevant,
20 doesn't mean it's admissible. So on authenticity, you know --
21 I'm not going to go so far as, say, the argument is waived
22 because you didn't put it in your opposition. But I do think
23 it behooves the parties to -- you know, to reach an agreement
24 on authenticity.

25 MR. MULROE: And, Your Honor, if we could just ask

1 for a little bit of clarity kind of on the scope of the Court's
2 comment. So there's -- for one thing, there's videos that
3 depict the events of January 6th, and we submit those are
4 clearly authentic. Another category of admissibility
5 determinations is when we've got extractions from a particular
6 cell phone and we say that this is from the phone of Person X,
7 if they were to really challenge us on that, I think we would
8 probably have to put up a series of multiple agents to show the
9 seizure of that phone, the extraction of that phone, and so
10 forth.

11 From our perspective, that is equally uncontroversial
12 and something that's not worth the jury's time.

13 THE COURT: It shouldn't be. And if we're here
14 talking about authenticity of any of those types of materials,
15 the jury is going to, you know, want to shoot us all. So,
16 please, I implore the parties, authenticity should not hold up
17 our trial.

18 You're not -- you're not -- you know, you're not waiving
19 your right to argue it shouldn't come in, it's not relevant.
20 It's -- it doesn't satisfy 403 and all the rest. Is there any
21 reason why -- well, I'll -- I'm going to hear from them on this
22 in a moment, but authenticity, really, is something, hopefully,
23 the parties can agree on.

24 MR. MULROE: Just taking you through a few of the
25 others, Your Honor, the Secret Service cross-examination, I

1 think that the parties have landed in the same place on that,
2 which was the government's opening position on the question.
3 So we don't think there's any dispute remaining on that.

4 The CHS issue, we agree that this is one that will be
5 fact specific, if any CHS were to testify for the defense, and
6 so there's no need, from our perspective, to argue that now.

7 Similarly, the Rule 106, rule of completeness, is a
8 fact-dependent one. So that can be addressed if and when these
9 issues arise at trial.

10 THE COURT: Sure. But I -- again, on that, let me
11 just pause. I thought there was language in the government's
12 brief about, well, you know, the -- you know, the defense
13 can't -- the usual rule that self-serving here -- the
14 defendants' own hearsay statement doesn't come into evidence, I
15 think there was something to the effect of, well, that's -- you
16 know, that's -- the government -- or the defense can't use the
17 rule of completeness as a way to get those in, but I think
18 that's wrong. I think they can. Now, if you choose to put in
19 the other statements -- so, again, like authenticity -- maybe
20 not like authenticity, which really -- we shouldn't be arguing
21 about at all.

22 On this score, I'm just going to say, you know, we can
23 be sitting here doing it night after night at trial when -- and
24 I'll keep everyone here as late as we have to to get through
25 the next witness to make sure that whatever is coming in is

1 properly -- the rule of completeness is properly complied with.
2 But I encourage the parties to work together to figure out,
3 okay -- if there is -- if the parties can agree, great. If
4 they can't agree, a procedure for me to rule on rule of
5 completeness. It doesn't -- we cannot have -- anyway, I just
6 wanted to make the point that conceptually, just because
7 something is that kind of hearsay, I don't believe, means it
8 wouldn't be subject to the rule of completeness.

9 MR. MULROE: Loud and clear, Your Honor. Our point
10 is only that there are limits to that principle.

11 THE COURT: Sure. Of course.

12 MR. MULROE: So circumvent was maybe an inartful
13 word, but the point is that the rule of completeness cannot be
14 used as a pretext to completely abolish the rule against
15 hearsay.

16 THE COURT: Right. And, again, it doesn't mean the
17 entire chat from days on end comes in. I agree with you on
18 that.

19 MR. MULROE: Your Honor, with those out of the way, I
20 would turn it over to Mr. Kenerson to address a few of the
21 First Amendment points.

22 THE COURT: Okay.

23 MR. MULROE: Thank you, Judge.

24 MR. KENERSON: Thank you, Your Honor. And I'll be
25 brief on this score.

1 I just want to start with the question the Court raised
2 for the government this morning. Our position is that if
3 that's all we prove -- in other words, an agreement to protest
4 outside the restricted perimeter -- and I think that might be a
5 distinction --

6 THE COURT: Right.

7 MR. KENERSON: -- from Mr. Smith, is that -- but that
8 the instructions kind of -- that the Court will give them on
9 the elements of the offense, will instruct them to acquit.

10 So I'm not sure that a First Amendment-specific
11 instruction is required. And so -- so one thing is, I agree, I
12 think, with the Court's major principle that if that's all the
13 government proves, it is First Amendment protected.

14 THE COURT: Right.

15 MR. KENERSON: I'm not sure that an instruction is
16 required, and I think in some ways it can be confusing.

17 THE COURT: Well, I'm not necessarily suggesting an
18 instruction. All I'm -- I think the -- or the motion *in limine*
19 was about argument, I believe. And, again, I'm -- what I'm
20 positing is if the defense wants to argue -- right? -- the
21 government hasn't proven anything other than an agreement to
22 protest lawfully outside the -- you know, in the -- in an
23 appropriate area, you're going to contest that and say, no, no,
24 we've proven something else, We've proven much more than that.

25 But it seems to me fair game for them to argue if,

1 ladies and gentlemen, they haven't proven on an agreement,
2 anyway; right? They haven't proven anything more than the --
3 an agreement to go lawfully protest. And, if so, at least
4 on -- I mean, you know, we'll have to -- at least on -- as to a
5 conspiracy, that can't be the basis for you, you know, finding
6 them guilty because that is a lawful -- that is lawful.

7 I don't think -- you know, we could, I guess, quibble --
8 I don't know whether it's putting aside the issue of an
9 instruction. If they wanted to argue that or ask questions
10 that suggest that, it seems to me that's fair game.

11 MR. KENERSON: That is lawful, sure. I think where
12 the government's concern comes in -- and this is, I guess,
13 where it gets to the interplay between what arguments and
14 instructions would be is that if the defense is going to be
15 permitted to say -- argue that what they did was
16 First Amendment protected, if there's not an instruction that
17 kind of accurately captures what that is, then the jury is
18 going to wonder. So I think that -- the way the Court termed
19 it right there, that they would argue that what they did was
20 lawful, if that's the case. I don't think the government has
21 any issue with that, and I think that's what the instructions,
22 even without a First Amendment instruction, would say.

23 I think that the -- the potential issue that comes in
24 and where it gets tricky is if they start to say that was their
25 First Amendment right and that that leaves the -- that leaves

1 open a lot of questions in the jury's mind to just kind of rush
2 in and talk about that in opening -- or in closing or in
3 opening, frankly, without kind of defining what that means for
4 the jury.

5 THE COURT: Okay. I don't -- I don't know -- it's
6 tricky because you could -- I think it's also tricky because
7 you-all could say, well, they -- yeah, you know, there could
8 have been an agreement to do A and B, a lawful and unlawful
9 thing, I suppose. So I don't know. It -- whether you say --
10 is it really that much more to say all they did was agree to
11 lawfully protest and that's protected by the First Amendment, I
12 think we all agree, probably, on sort of what the law is in
13 this --

14 It struck me from the briefing, I think we all kind of
15 agree on the basic concepts here. It's a question of what
16 rules they would be -- on how it can be argued, and then
17 putting aside -- right? -- instructions, as in all areas are
18 tricky.

19 MR. KENERSON: Right. And I think that's -- I think
20 the Court is right on that. In my -- I guess the only point
21 that I'm trying to raise in response is that what is -- is
22 lawfully permitted to be argued is kind of informed by what the
23 instructions are, if that makes any sense.

24 THE COURT: Sure. But, again, you're not disputing
25 that it's lawful for them to be there, be in a lawful place,

1 not -- not in a restricted area, and to protest to their
2 heart's content.

3 MR. KENERSON: Yes, I agree with nonviolent protest
4 outside the restricted perimeter. Agreed.

5 The one thing I do want to raise -- and I'd be
6 interested in what Mr. Smith has to say when he comes up. I
7 actually read his papers as not making that distinction. I
8 read his papers as an "inside the Capitol/outside the Capitol"
9 distinction without any kind of respect for the restricted
10 perimeter.

11 THE COURT: Right.

12 MR. KENERSON: And the government does not think that
13 that is accurate. But to the extent that we talk about outside
14 the restricted perimeter, we agree with the Court on that
15 point.

16 THE COURT: All right.

17 So I guess the last thing, just -- is if we do get to
18 the point where the Court's considering a First Amendment
19 instruction, I think we would want a large amount of say -- of
20 course, with the defense as well -- in crafting that because I
21 think that does have to get carefully worded. That's the only
22 other point we have on that.

23 THE COURT: I don't know that an instruction -- I
24 don't know. I hadn't thought about this in terms of an
25 instruction. I had just thought of it in terms of what was --

1 again, I think -- I think it was teed up in terms of sort of
2 argument.

3 MR. KENERSON: Yes, it was teed up in terms of
4 argument.

5 THE COURT: All right. Very well. Look, like all
6 instructions here, you're all going to have a lot of say.

7 MR. KENERSON: Right. And I guess we -- part of the
8 government's motion *in limine* as well dealt with, I think,
9 issues that we touched on yesterday that Ms. Hernandez has --
10 has been briefing and talking about at various points about
11 *Wisconsin v. Mitchell*.

12 THE COURT: Yes.

13 MR. KENERSON: And those kinds of cases -- I don't
14 think we need to go into those today; but, I mean, that is also
15 part of why the government is concerned about where
16 First Amendment-type argument may go. Because while the issue
17 about whether they were lawfully protesting outside the
18 restricted grounds -- and the government's view is different
19 than the First Amendment question, than what -- what
20 evidentiary use the jury may put to the government's evidence.
21 So I just want to note that that is separate, and I think
22 those -- that the Court should be separate in how it allows
23 argument on those two issues.

24 THE COURT: Agree. It's a separate issue what --
25 what -- as you say, what use the jury may -- how the jury may

1 use statements, which is what, kind of, we talked about
2 yesterday.

3 MR. KENERSON: Right.

4 THE COURT: Okay.

5 MR. KENERSON: Thank you, Your Honor.

6 THE COURT: All right. Very well.

7 Do you want to hear -- just to close this out, there
8 is -- there is a part of the government's motion that talks
9 about an under-seal matter. Do you-all want to address that
10 orally?

11 MR. MCCULLOUGH: We do, Your Honor. I think, just
12 from a practicality standpoint, we may want to limit the issue
13 here, and then we'll return to that, if that makes sense.

14 THE COURT: Fine. Fair enough.

15 Please, Mr. Smith.

16 MR. NICHOLAS SMITH: Good afternoon -- or morning,
17 Judge.

18 I'd like to start with the First Amendment point because
19 we were just touching on that, sort of close the loop on this.

20 We think the judges -- we think the Court is absolutely
21 correct that the defense has to be able to argue that if there
22 was -- if the jury believes the evidence shows an agreement
23 to --

24 THE COURT: Only an agreement; right? That's the
25 tricky part.

1 MR. NICHOLAS SMITH: Well, at the first -- yeah, an
2 agreement to protest in -- in an area where protest is lawful
3 without the use of force, without the use of violence, or
4 destruction of property. We -- we have to be able to make
5 that -- that argument, and -- and I think one subtlety here
6 Mr. Kenerson was talking about, well, if that's true, if the
7 defense really just wants to argue their behavior is lawful,
8 what is the difference between --

9 THE COURT: At least some of the behavior; right?
10 That's the tricky part because there's other --

11 MR. NICHOLAS SMITH: Exactly.

12 THE COURT: Depending on the defendant, there's
13 different other behaviors that you can't argue that kind of
14 defense for; so it's stricken.

15 MR. NICHOLAS SMITH: So we -- we agree with the Court
16 completely on that point. So -- and, in particular, on the
17 obstruction of justice issue where the *actus reus* is not
18 exactly defined, it's any act that obstructs, interferes, or
19 influences corruptly the proceeding. The government can argue
20 and may attempt to argue that, actually, the actions of moving
21 in assemblages outside the building constituted the *actus reus*,
22 and also from the perspective of the conspiracy to commit that
23 offense.

24 If -- if they're arguing, well, at the very least, the
25 plan was to move in assemblages outside of the building and

1 thereby obstruct the proceeding, then you have a situation
2 where it's not sufficient for the defense to be able to say
3 this is not merely an obstruction offense, because, actually,
4 if they're moving in assemblages and that's their -- if they're
5 moving in assemblages and protesting and the intent is to
6 protest, then you have this situation where the government is
7 arguing that the same intent is an intent to obstruct, even
8 though the defense argument is that's an intent to protest.

9 And you have this First Amendment overlay that says
10 protesting in -- protesting in a public forum is protected
11 if -- to the extent it doesn't involve an intent to involve --
12 use force, destroy property, et cetera. So -- so there really
13 is a need for the First Amendment defense here that's not --
14 that doesn't --

15 THE COURT: Let me see if I can sum up what you're
16 saying.

17 You want to be able to argue that if -- again, I think
18 it's tricky because the government might -- a juror might
19 conclude the government proved A and B, an intent to do one
20 thing and then an intent to do another thing. So it's
21 almost -- so it -- and just because they find an innocent or a
22 noncriminal -- an intent to do something noncriminal doesn't
23 mean the government can't also prove an intent to do something
24 criminal.

25 So it gets tricky. But I think what you are saying is

1 it doesn't necessarily -- you think there's a First Amendment
2 defense, at least to -- let's say to obstruct -- to obstruction
3 if someone's intent -- just imagine a hypothetical defendant
4 who's intent was to go past the outside barriers and so to be
5 in a restricted area, but not inside the building. I think
6 this was what you're arguing, but you tell me if I'm wrong.

7 So you're past the perimeter and so you -- you know,
8 it's not a defense to those kind of trespass offenses where
9 you've gone past the -- where the police have cordoned things
10 off but you're outside the building and you're protesting, and
11 that doesn't necessarily -- you don't think the jury could
12 conclude if a juror found only that intent, that -- could not
13 convict on obstruction?

14 MR. NICHOLAS SMITH: No, Judge. In fact, we think to
15 the contrary. If the jury -- the First Amendment instruction
16 could say if the intent was -- if the plan -- if the agreement
17 was to plan to --

18 THE COURT: If the only agreement.

19 MR. NICHOLAS SMITH: If the -- well, no. This
20 argument is cutting in the government's favor. If the plan was
21 to enter -- enter an area that was restricted, then we agree
22 that's not protected by the First Amendment. I know
23 Ms. Hernandez will make a separate argument. There's a time,
24 place, and manner kind of argument you can make with respect to
25 the restricted area, but I'm arguing something before you reach

1 that point.

2 THE COURT: Right. Okay.

3 MR. NICHOLAS SMITH: Which is that, you know, we
4 would concede for the sake of this argument that if the plan
5 was to enter an area that -- to knowingly enter an area that
6 they're not authorized, that is not under 1752. That, separate
7 from any other argument, is not a first -- is an agreement
8 that's protected by the First Amendment.

9 But let's say -- as the Court knows, a lot of these
10 messages it's seen about planning -- what the government is
11 calling planning -- are not very specific at all. So if
12 there's a generalized -- even if you call it an agreement, a
13 general agreement to come and protest somewhere around the
14 Capitol, that --

15 THE COURT: But not cross a line.

16 MR. NICHOLAS SMITH: Yes. But it's not about
17 crossing a line. It's something that's more general than that;
18 it's a plan to go to D.C. and protest, even if it's near the
19 Capitol, but without specifying whether it's a restricted area.
20 Okay?

21 THE COURT: Right.

22 MR. NICHOLAS SMITH: So in that case, we have to be
23 able to argue that if that is the plan -- if the jury believes
24 the government hasn't proven beyond a reasonable doubt --

25 THE COURT: Any other plan.

1 MR. NICHOLAS SMITH: -- any other plan --

2 THE COURT: Right.

3 MR. NICHOLAS SMITH: -- then that's protected, and
4 the case law is *Jeanette Rankin Brigade*.

5 THE COURT: Again, how you get there is maybe
6 complicated in terms of what an instruction would look like,
7 but that just strikes me as ripe, I think.

8 MR. NICHOLAS SMITH: And we submit an instruction
9 that says -- I think it says almost exactly that. But there's
10 one more nuance, which Mr. Kenerson brought up, which is the
11 distinction between inside and outside the building as opposed
12 to lawful area.

13 THE COURT: Yes. Yes.

14 MR. NICHOLAS SMITH: And our argument why it can't
15 just be lawful area is it is binding D.C. Circuit precedent
16 that the Capitol Grounds are a public forum, and it's also
17 binding precedent that the simple -- the per se act of moving
18 in assemblages within a public forum cannot -- cannot
19 constitute an offense per se.

20 If it's -- if it's assembling and parading per se,
21 the D.C. -- the Supreme Court summarily affirmed *Jeanette*
22 *Rankin Brigade*, which held -- which struck down the parading
23 offense on the Capitol Grounds. And the three-judge panel said
24 if there's something more -- if the offense is something more
25 than merely parading, then we don't find, at least in this

1 case, a facial invalidity on any Title 40 offense.

2 They said -- the Court said if there was something like
3 disorderly conduct on the grounds or -- I think they mention
4 destruction of property. There was -- the Court said we don't
5 find any First Amendment issue there. But they say the mere
6 act of parading and assembly --

7 THE COURT: So you're only talking about the parading
8 count for this argument?

9 MR. NICHOLAS SMITH: No, no. Because let's say --
10 again, we go back to the conspiracy.

11 THE COURT: Yeah.

12 MR. NICHOLAS SMITH: So if the jury -- if the
13 government does not prove beyond a reasonable doubt that the
14 conspiracy contemplated more than parading in a public forum,
15 that -- then that's -- that is -- the jury is unable to find
16 guilt because that --

17 THE COURT: On any of the charged -- well, putting
18 aside --

19 (Indiscernible simultaneous cross-talk.)

20 MR. NICHOLAS SMITH: -- because we're just talking
21 about planning.

22 THE COURT: Right.

23 MR. NICHOLAS SMITH: Because at this point, we're
24 just -- I think it's much more relevant for the conspiracy.

25 THE COURT: All right. So I guess, you know, I'm

1 going to let the -- you know, I'll hear from -- it's the
2 government's motion. I'm going to hear what they say in
3 response.

4 I think on this one, it seems like the parties should
5 talk about -- and I'll think about -- whether there really is
6 anything for me to decide until we get to, like, closings,
7 closings and instructions. I'm not sure. I don't know how it
8 would really impact the receipt of evidence by the jury. It's
9 possible it could affect how you open, I suppose. It might.
10 But how you open, you're going to be -- I don't know.

11 So just think about what I really need to decide and by
12 when. Because I think it's -- this isn't really about
13 evidence. It's just about what you can argue and what the
14 instruction will be. And I don't think we're that -- it may be
15 that the last nuance you've introduced here is one that the
16 government can't quite buy into and so you wouldn't be in
17 complete agreement, but I think there are -- it seems to me,
18 there's a lot of area of agreement.

19 MR. NICHOLAS SMITH: And the other question -- and I
20 know the Court's done with this issue, but one relevant
21 question, I think, is, well, if it's so uncontroversial that an
22 agreement merely to parade on the -- in a public forum or a
23 lawful grounds, if that's uncontroversial, why is the
24 government fighting that?

25 THE COURT: Well, because it's tricky; right? I

1 mean, it is tricky that -- first of all, the only part of it;
2 right? That -- that it could be confusing. The jury has to
3 know, what if there was an agreement to do A and B. If there's
4 an agreement to do A and B and -- or they find that, then just
5 because there was an agreement to do lawful things doesn't mean
6 they acquit on the criminal things. I think we all agree on
7 that. It could be confusing.

8 So, anyway, I think that's probably one reason why
9 they're -- you know, why they've sort of said, look, this is --
10 this is a tricky issue.

11 MR. NICHOLAS SMITH: So, Judge, on the tools point,
12 the Court mentioned that it found this theory of relevance
13 meritorious.

14 THE COURT: I just thought on -- at least, again,
15 just -- and I'm not -- I'm not saying anything one way or the
16 other about the statements. My only point is, as it was
17 presented here -- right? -- the theory that -- their theory is
18 that the -- and even putting aside whether -- exactly what
19 evidence would come in leading up to the 6th, the point is --
20 their theory is, well, this was a conspiracy to weaponize a
21 group of people. And I don't see why the result -- it's sort
22 of the downstream effect of a conspiracy just in human form.
23 That's the argument.

24 MR. NICHOLAS SMITH: So I think -- I want to see if
25 I'm framing this issue right. The tools' actions are relevant

1 in this case if the defendants are responsible for those
2 actions; is that -- I think -- I think it's fair to say that
3 their -- the actions of some people were characterizing it as
4 tools are not relevant if the defendants are not somehow
5 responsible for those actions; is that --

6 THE COURT: They went out of their way to say, no,
7 no, no, we're not trying to hold them responsible, which is, I
8 guess, why you're bringing this up, I think.

9 MR. NICHOLAS SMITH: Well, let me clarify. I don't
10 mean responsible in the sense of, like, a vicarious liability
11 responsible, but I mean that they're -- when we say that the
12 tools' actions are relevant because --

13 THE COURT: There's a causal relationship.

14 MR. NICHOLAS SMITH: -- there's a causal
15 relationship, and the suggestion is that they're relevant
16 because these defendants are -- are responsible --

17 THE COURT: Yeah, in that sense.

18 MR. NICHOLAS SMITH: -- in relevance. Okay.

19 THE COURT: I believe that's the argument; correct.

20 MR. NICHOLAS SMITH: So -- so I guess the defense
21 point is there's already a set of rules for determining when
22 people are responsible for other -- others' actions. So
23 there's theories of liability here. One is *Pinkerton*.

24 THE COURT: Right.

25 MR. NICHOLAS SMITH: And that means that the tools --

1 the tools concept adds no value to the co-conspirator concept
2 because we -- in order to find someone responsible for
3 another's actions, you have to find them co-conspirators and
4 that the -- the other -- the collateral action was within the
5 scope of the conspiracy and reasonably foreseeable to the
6 defendant.

7 THE COURT: Right. But they're not seeking that.

8 MR. NICHOLAS SMITH: But then if we're saying this
9 isn't about responsibility, then what is relevance?

10 THE COURT: It's a causal relationship.

11 MR. NICHOLAS SMITH: But -- so -- so -- but so you're
12 saying the defendants are responsible -- we're showing this to
13 the jury. Why are we showing these other people's actions who
14 are not in this case to the jury?

15 THE COURT: Because purportedly -- again, this is the
16 theory -- right? -- is because purportedly it was caused by the
17 conspiracy that your clients allegedly were part of.

18 MR. NICHOLAS SMITH: And that is evidence of what
19 charged offense in this case? I don't --

20 THE COURT: So if there's a conspiracy to do a
21 particular act or to reach a particular goal and -- take people
22 out of it; right? It's -- and there was some matter or means
23 of reaching that goal and that happened to be by manipulating a
24 person or manipulating -- whatever it might be, some sort of
25 downstream effect, you don't think that would be admissible as

1 evidence that the conspiracy existed?

2 MR. NICHOLAS SMITH: I think there's a reason they've
3 cited no case law for the tools concept --

4 THE COURT: I -- I --

5 (Indiscernible simultaneous cross-talk.)

6 MR. NICHOLAS SMITH: -- and I think it's because what
7 they're trying to do is they're trying to get a *Pinkerton*-type
8 of theory in front of a jury but without having to show any of
9 the normal elements of -- of theories of liabilities. So you
10 have aiding and abetting. You have solicitation. So
11 solicitation would -- the tool concept kind of sounds like
12 solicitation.

13 THE COURT: I agree with you. Mr. Smith, let me just
14 say, I'm going to -- in all ways, I'm going to scrutinize the
15 tool concept very closely for the reasons you've laid out. It
16 is unusual. That doesn't mean in some particular sense it's
17 wrong, but I hear what you're saying. I don't -- and I
18 understand your argument about *Pinkerton*.

19 MR. NICHOLAS SMITH: So, Judge, I think Mr. Mulroe
20 went back to the December 12th arguments from yesterday. And,
21 you know, we just want to reiterate the point really quickly
22 that we haven't had an opportunity to look at and examine the
23 context of the messages that I think Mr. Mulroe suggested made
24 a link between December 12th and -- and January 6th.

25 I think the government was trying to make the argument

1 there that there might be some proper Rule 404(b) (2) purpose.
2 I know the Court was saying, well, this isn't really the same
3 issue, but that's -- I think what the government was doing is
4 cleaning up the argument it was making yesterday and offering
5 some more support for -- for that. So we would just like to
6 respond to that; that yesterday the issue was whether --
7 something about the defendants' actions on December 12th showed
8 an intent that bears on the charges on --

9 THE COURT: Mr. Smith, I don't want to interrupt, but
10 if you would rather put something in writing and submit it to
11 me on Monday, I'm happy to receive it, in the interest of time,
12 and because of the point you raised earlier.

13 MR. NICHOLAS SMITH: Yep.

14 THE COURT: Is that a yes?

15 MR. NICHOLAS SMITH: Yes, Your Honor, we will submit
16 something.

17 THE COURT: All right.

18 MR. NICHOLAS SMITH: We will submit something.

19 So, Judge, on the Secret Service issue, I want to make
20 sure I have this correctly. Mr. Mulroe, I think, said that the
21 parties no longer have any disagreement on this issue. But
22 I -- I'd just like to clarify, for the record, so we don't have
23 to do it again, that the government is not objecting to
24 cross-examination on the issue of whether a section 1752 area
25 existed on January 6th, and that relates to communications that

1 the Secret Service had with the Capitol.

2 THE COURT: If they do object, they will tell me when
3 I hear from them after you.

4 MR. NICHOLAS SMITH: Okay. Judge, on the cross of
5 CHS's issue, the Court mentioned that since this is only --
6 since the government's motion only concerns cross and not
7 direct, it can deal with this issue later, but I just want to
8 point out for the record that the government's motion actually
9 covered the defense use -- the defense potential use of these
10 witnesses in its public motion. So I think we'll need to --

11 THE COURT: If we -- look, if we get to that place,
12 we get to that place. I hear what you're saying.

13 MR. NICHOLAS SMITH: So the Court would like to hear
14 argument at a different time?

15 THE COURT: If we -- if that becomes relevant, yes.

16 MR. NICHOLAS SMITH: Okay. Judge, on the rule of
17 completeness point, I think the government stipulated that
18 there would be some circumstances where if one part of it -- if
19 Mr. A's text message is shown saying something, not X, and then
20 Mr. A sends a later text message suggesting X, you know, the
21 rule of completeness would, in that circumstance, potentially
22 allow the introduction of the text, the second one.

23 We'd only like to point out that the Rule 106 actually
24 says, quote, any other writing or record, end quote, can be
25 used to complete the declarant's statement. So this -- this

1 rule is not limited on its face to just text messages that are
2 on the same page as -- as the earlier out-of-court statement.

3 THE COURT: Sure. But, of course, logically, what
4 would be relevant, for example, would be temporal connection,
5 but, you know -- or something like that.

6 MR. NICHOLAS SMITH: So we think that one other
7 possibility would be -- in addition to temporal connection
8 would be subject matter. So, for example, if a declarant
9 says -- just hypothetically. I'm not saying this is quoting
10 the government's evidence. But, you know, we need to wear --
11 we need to have tactical gear on January 6th. And then let's
12 say a couple of days later the same declarant clarifies in
13 another message, the reason I said we need tactical gear is
14 because we want to protect ourselves from Antifa. So there the
15 same declarant is basically showing that the use of only the
16 first message would be highly misleading.

17 THE COURT: I think -- look, this is highly
18 contextualized. You know, the way you phrased it was the
19 reason I said that, which -- you know, the reason I said that
20 two days ago was X. So --

21 MR. NICHOLAS SMITH: But in that stylized example, I
22 think the Court would agree that if there were clarity like
23 that, then it would be misleading to show.

24 THE COURT: I would say -- it's a stronger case than
25 otherwise, but I hear what you're saying conceptually.

1 MR. NICHOLAS SMITH: So, Judge, on the -- I just want
2 to take one step back about the mules point. The government
3 compared tools to mules where -- you know, of course, like if
4 there's a drug conspiracy case, the actions of the mules are
5 relevant in the case, but I think, Judge, if we look at those
6 cases, that's about -- that, again, goes to aiding and abetting
7 conspiracy or solicitation.

8 THE COURT: Well, no, no. Again, I think -- the way
9 I'm seeing it right now -- and you -- you're talking about
10 theories of liability, and they're talking about whether
11 evidence is relevant. And those are two different things;
12 right? Again, regardless of how or whether you would -- you
13 could find a mule criminally liable for the conduct -- again,
14 if you were trying the person who was using the mule, that
15 person's -- the fact of the mule -- the fact of whatever the
16 mule did would come in as evidence; right?

17 I think that's the difference between what they're
18 arguing and what you're responding to the argument with, which
19 I don't blame you for doing, because I think it's your
20 strongest play, but I do think it's a little bit apples and
21 oranges. But you tell me why I'm wrong.

22 MR. NICHOLAS SMITH: Well, Judge, I just think --
23 maybe it's just me. I'm struggling to understand the idea of
24 relevance separate from responsibility. So I -- like if --

25 THE COURT: The mule is a perfect example.

1 MR. NICHOLAS SMITH: If there's a mob of people and
2 you're trying to argue that, you know, Mr. A is responsible
3 for, you know, B through -- Mr. B through Z, you -- in order to
4 show relevance, a predicate is that there is some
5 responsibility on Mr. A's part. I don't understand the idea
6 of -- of relevance if there isn't -- or some legal theory of
7 responsibility.

8 THE COURT: What about an unwitting mule? Somebody
9 who -- the government puts -- or of the -- you know, the person
10 puts a -- some drugs in someone's luggage who they're going
11 from Country A to Country B. Person doesn't know anything
12 about it and wouldn't necessarily be liable if they didn't --
13 criminally liable if they didn't know that, but they're
14 prosecuting the person who put the drugs in the person's bag
15 knowing that Person B was going to be traveling across the
16 border.

17 MR. NICHOLAS SMITH: Well, then in that case it would
18 be the actions -- and I take that point. But it would be the
19 actions of the mule that are noncriminal that would be
20 relevant. Here what the government is trying to show --

21 THE COURT: Right.

22 MR. NICHOLAS SMITH: -- is that criminal acts by
23 other actors, which involve their own *mens rea*, are now
24 relevant in a conspiracy even without having to show
25 co-conspirator liability. So I think --

1 THE COURT: Look, for a variety of reasons, this is a
2 strange fact pattern.

3 MR. NICHOLAS SMITH: Well, Judge, let me -- one last
4 point -- and it just occurred to me right now -- is that this
5 would create a huge loophole in conspiracy law if the Court
6 were to uphold this. So, for example, in any kind of narcotics
7 conspiracy --

8 THE COURT: Right.

9 MR. NICHOLAS SMITH: -- the government could try to
10 show that drug dealing, you know, by people who the government
11 couldn't prove all the elements of co-conspirator liability or
12 *Pinkerton*, but it just characterizes the actions of these
13 people as tools and, therefore, relevant to show the jury. So
14 we're bringing in ten extra kilos by people who the government
15 can't prove, you know, *Pinkerton* or co-conspirator liability
16 with. But we just characterize them as tools because, we say,
17 well, you know, the conspiracy contemplated lots of drug sales.
18 And so, you know, they were tools, and we can't show --

19 THE COURT: But if they could connect the defendant
20 to all of that, why wouldn't they be able to do that? Again,
21 they're not trying to hold -- in your scenario, they're not
22 trying to hold those people liable through that proceeding.
23 So, again --

24 MR. NICHOLAS SMITH: What's the relevance if the
25 defendants are not liable for their actions?

1 THE COURT: All right.

2 MR. NICHOLAS SMITH: I guess -- I'm struggling to
3 understand how -- maybe the government can explain it. But,
4 Judge, I think when you show a jury a bunch of criminal acts by
5 people who are not defendants and they're not connected up with
6 the conspiracy, I guess what is that suggesting to the jury? I
7 think it's sort of suggesting that they're -- I think at least
8 we would need some kind of instruction telling the jury if this
9 evidence came in, you are not -- you are not being shown this
10 evidence to find that the defendants are criminally responsible
11 for those actions.

12 THE COURT: I'm open -- look, you know, off the top
13 of my head, assuming it came in -- and the defendants wanted
14 that kind of instruction -- I think the government, based on
15 their submission, wouldn't oppose it, so -- anyway, but it's a
16 fair point.

17 MR. NICHOLAS SMITH: Okay. Thank you, Judge.

18 THE COURT: All right. Any -- oh, Ms. Hernandez.

19 MS. HERNANDEZ: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MS. HERNANDEZ: So can I start with the mules?

22 THE COURT: Sure.

23 MS. HERNANDEZ: So there's two types of mules;
24 correct? I mean, as the Court pointed out. There's one mule,
25 obviously. They don't just show up. They get hired. You

1 transport. I pay you. That's the mule -- that's a standard
2 case.

3 THE COURT: Ms. Hernandez, let me just press pause
4 for a moment and just talk about scheduling for one moment.

5 So here's what I'd like to do is -- just so everyone
6 knows -- finish up this argument, let the government respond
7 to what the defense says, go to lunch, and hopefully do that
8 and the brief under-seal part of this motion. Go to lunch at
9 1 o'clock; release everyone except for you, Ms. Hernandez, and
10 your client; and argue your motion to sever after lunch.

11 Is there any objection to that -- to proceeding that
12 way?

13 MS. HERNANDEZ: No. That's fine. That's fine.

14 THE COURT: I don't know if any other defendants
15 wanted to be heard on that, but I do want to try to --
16 especially for folks who may need to catch transportation, let
17 them leave at lunchtime and just have you come back and argue
18 your severance motion.

19 MS. HERNANDEZ: That's fine. Two things, however. I
20 didn't understand the Court. Does the Court want to handle
21 the -- the sealed matter now? Is that what you're
22 suggesting --

23 THE COURT: No, no, no, I'm not suggesting that.

24 MS. HERNANDEZ: -- which is fine, because maybe it
25 could be done -- maybe it could be done in 20 minutes or

1 30 minutes, if that's fine. I'm happy to wait.

2 THE COURT: Your argument is going to take a while?

3 MS. HERNANDEZ: No. I'll try to be brief, but I'm
4 just -- I just thought what you were suggesting is since there
5 are people waiting on the CHS matter, that maybe you wanted to
6 take that up first, which is fine with me, if that's -- I'm
7 obviously here all day, I guess, so it's up to you.

8 THE COURT: No, no. Let's just finish -- finish this
9 up.

10 MS. HERNANDEZ: Okay. The other thing is the motion
11 to sever, there may be CHS references.

12 THE COURT: Okay. Well, we can, again, talk about
13 that after lunch.

14 MS. HERNANDEZ: Given the most recent developments.

15 THE COURT: Okay.

16 MS. HERNANDEZ: So I was talking about the mules
17 issue. So there's two types of mules -- and the Court is -- I
18 try -- I tried to try once -- one case with this innocent -- I
19 forget what the term is -- innocent -- innocent mule, what the
20 Court said. You know, a guy -- and there are some cases -- a
21 guy who, as a normal course of his life, travels across the
22 border, for example, in Texas, has -- has a pass to enter the
23 border without getting inspected and blah, blah, blah. A drug
24 dealer knows about it, sticks drugs in his trunk without his
25 knowledge, and -- and then --

1 THE COURT: Yes, that was the example I used. I
2 understand it.

3 MS. HERNANDEZ: Okay. So that's one type of mule.
4 But that's -- that's a very rare case, and there's certain
5 standards that must be met before you can even make that
6 argument, and I'm happy to bring that -- I tried one case a few
7 years ago. Unsuccessfully, I might add. But I was -- but the
8 standard mule, it's not -- I mean, it's not some tools. The
9 standard mule case, it's not that there's some tool on the
10 corner that you -- no, they get hired, they get -- please
11 transport this, we'll pay you X amount of money, and you do it.

12 So if we're talking about this rare mule, innocent mule
13 case, that's a different thing, and I'm happy to -- I would
14 like to submit something to the Court on that, because there is
15 a -- a narrow body of case -- case law on that because it's not
16 a very common occurrence.

17 THE COURT: All right.

18 MS. HERNANDEZ: So I'd like to submit something to
19 the Court on that.

20 THE COURT: I'll receive it on Monday then.

21 MS. HERNANDEZ: Okay. Yes, sir.

22 The First Amendment issue, Your Honor, the government
23 seeks to preclude a First Amendment defense altogether in
24 their -- in their motion. I mean, they -- they -- they do
25 three parts to it. One is they claim that *Brandenburg* is not

1 applicable for whatever reason.

2 Two, that introduction of defendant's statements does
3 not violate the First Amendment, and I disagree with that
4 wholeheartedly. And I mentioned that in the *Rahman* case, Judge
5 Mukasey actually addressed that.

6 And then the third aspect of it is the defendant should
7 be precluded from raising a First Amendment defense to the
8 jury, and the government's argument is, essentially, we prove
9 the case; therefore, you can't --

10 THE COURT: No.

11 MS. HERNANDEZ: -- you can't raise a First Amendment
12 argument, and that's -- the point is -- our belief is they
13 won't be able to prove their case because of the
14 First Amendment.

15 THE COURT: I don't think this is an area, perhaps,
16 unlike the statements, Ms. Hernandez, where I really do believe
17 the parties are sort of closer than you think. I don't think
18 they're saying -- I think we're in agreement about what --
19 again, put the statements issue aside for the moment. We --
20 you-all do disagree about that.

21 But the question is how to -- how to police the fact
22 that -- I don't think the government would disagree that if all
23 that they prove is an agreement to protest in a lawful place,
24 that -- that's -- the jury should acquit because that's
25 protected by the First Amendment.

1 So I just think this is -- like I said to Mr. Smith, I
2 think it's an area -- whether it's making sure arguments are
3 properly bounded or -- and then an instruction issue, I feel
4 like you-all can get a lot of the way there, but I know what
5 you're saying. The way the motion leads --

6 MS. HERNANDEZ: I don't believe --

7 (Indiscernible simultaneous cross-talk.)

8 THE REPORTER: Hold on. Hold on.

9 MS. HERNANDEZ: I'm sorry.

10 THE COURT: No, I'm sorry too.

11 MS. HERNANDEZ: No. Go ahead.

12 THE COURT: Go ahead, Ms. Hernandez.

13 MS. HERNANDEZ: I don't believe that's what the
14 government is arguing. And even -- even the issue of what
15 is -- what were restricted areas or not implicates the
16 First Amendment because there is D.C. Circuit -- and other
17 circuit case law -- that says where you've got a public
18 forum -- First Amendment public forum, the extent of
19 restriction that you can impose implicates First Amendment
20 interests, so.

21 And there's a case, for example, where during one of the
22 campaigns, I believe -- during the 2016 campaign, the Trump
23 campaign -- or one of the campaigns tried to -- tried to
24 limit -- maybe it was whoever was in office at the time --
25 tried to limit the closeness of protesters to the location

1 where the person was speaking. And the court said that's too
2 far from the speaker. The First Amendment protest protections
3 come into play, and so the fact that you restricted space for a
4 mile is unconstitutional.

5 THE COURT: Right. But no Court has said that here.

6 MS. HERNANDEZ: Well, there's only one case -- I
7 mean, they cite Judge Cooper's opinion, I believe, in
8 *Robertson*. And I read *Robertson*. There's no facts in there
9 that are similar to this case in the sense that -- there are
10 no -- there's very few facts. So I'm not sure what the judge
11 was -- but, literally, the entirety of Judge Cooper's statement
12 is a conclusionary statement the First Amendment doesn't apply.

13 THE COURT: All right. But, I guess, Ms. Hernandez,
14 what -- it seems to me, it behooves you to tell me what you
15 want to argue and why you think the government is not letting
16 you do that.

17 MS. HERNANDEZ: Well, they're seeking to prevent me
18 from arguing it.

19 THE COURT: What exactly?

20 MS. HERNANDEZ: Well, they're saying the defendants
21 should be -- at page 26 and 27 and -- page 26 and 27, top of
22 28, defendants should be precluded from raising a
23 First Amendment defense to the jury. They --

24 THE COURT: Look, I think you're reading the defense
25 issue, and maybe I'm trying to harmonize the briefing too much.

1 I think what the government -- and, again, maybe this will help
2 put a point on where the parties differ.

3 What the government, I think, is saying by saying you
4 can't use a First Amendment defense is that -- in their view,
5 you -- if they prove the elements of one of the charges -- of
6 one or more of the charged offenses, that the First Amendment
7 does not -- is not -- is not a defense to that charge.

8 MS. HERNANDEZ: That's a completely circular
9 argument --

10 THE COURT: Well --

11 MS. HERNANDEZ: -- if they prove it, but the
12 First Amendment is implicated in the proof -- that's a decision
13 for the jury.

14 THE COURT: No, no, no. I don't think that's --

15 MS. HERNANDEZ: Well, at the bottom --

16 THE COURT: -- entirely correct.

17 MS. HERNANDEZ: The last paragraph of 27, they seek
18 to preclude even cross-examination. So it's not after proof.
19 They're seeking -- accordingly, any line of cross-examination
20 or argument that the defendants may wish to make regarding the
21 First Amendment is irrelevant.

22 THE COURT: Well, look, tell me -- no one is
23 saying -- tell me what you want to argue and why do you think
24 what they're -- what they're -- what they've filed here
25 precludes you from arguing it.

1 MS. HERNANDEZ: What they're -- we should be able to
2 establish that the Capitol Grounds are First Amendment -- a
3 public forum.

4 THE COURT: Past -- past the cordoned-off area?

5 MS. HERNANDEZ: The Court has -- the -- there are --
6 there are reversals of convictions for somebody who was handing
7 out pamphlets on the steps of the Capitol, which were
8 restricted, and the -- and the D.C. Circuit reversed the
9 conviction because that area is First Amendment protected. And
10 the Court said -- distinguished the grounds, including the
11 steps, from committee rooms and other -- you know, and inside
12 the Capitol.

13 THE COURT: Sure. But there was no --

14 MS. HERNANDEZ: It was the violation of a statute.

15 THE COURT: Right. But there was no other intent
16 that was part of the charges.

17 MS. HERNANDEZ: That's why I'm saying, that's
18 circular. That's the allegation. They -- the -- the
19 allegations that there was an intent, but that's a proof issue.
20 The jur- -- it's up to the jury to decide whether the
21 government proved that intent. It's not a given. That's why
22 I'm saying it's a circular argument.

23 They're saying you can't present a First Amendment
24 argument because the charges involve a different intent, but
25 that's their allegation in the indictment. It is up to the

1 jury to find whether, in fact, there was an agreement, as they
2 claimed there was, to violate the seditious conspiracy statute
3 or whatever. All of that -- in fact, as -- as -- well, as the
4 CHS -- as -- stuff that I can't talk about, there are -- there
5 are -- there are statements -- there are allegations -- there
6 are statements that, in fact, there was no agreement to -- to
7 attack the Capitol or to any of that.

8 THE COURT: Right. That's separate. That's not a
9 First Amendment defense. That's a -- the government didn't
10 prove the charged conspiracy, that's -- you can always argue
11 that.

12 I guess what I'm trying to get at is how do you think
13 the First Amendment operates to somehow negate -- in other
14 words, if the government proves all elements of conspiracy to
15 obstruct, what work is the First Amendment doing?

16 MS. HERNANDEZ: The --

17 THE COURT: So it's doing none in that case.

18 MS. HERNANDEZ: The point is the government -- if the
19 government proves -- but in getting to how the government
20 proves or what proof is presented to the jury, the
21 First Amendment activities, that is -- the government is saying
22 you can use --

23 THE COURT: This is another flavor of your statements
24 argument then.

25 MS. HERNANDEZ: You can argue. So --

1 THE COURT: This is -- it's sort of your statements
2 argument.

3 MS. HERNANDEZ: Well, it is because the government is
4 using statements, and the case -- the government is using
5 statements which may or may not be protected by the
6 First Amendment. That's the most I'll concede on that issue.
7 They may or may not be protected by the First Amendment --

8 THE COURT: Okay.

9 MS. HERNANDEZ: -- depending on a lot of things. But
10 they don't want me to -- they do not -- they want to preclude
11 any argument that a statement made in November is a statement
12 of polit- -- protected by the First Amendment versus a
13 statement of intent, but that is for the jury.

14 THE COURT: Okay. You have already -- this is -- I
15 don't know that that's correct. I understand your argument,
16 and I understand you're arguing about the statements. I'm
17 going to be looking at that. You argued that to me yesterday,
18 and I understand the government to be arguing you shouldn't be
19 able to make that argument regarding that statement. I mean,
20 I'm not sure that is a jury question. I see you've laid it
21 out. I'll work through it, but --

22 MS. HERNANDEZ: Let me say this: I think -- it could
23 be or it may be a preliminary question of law for the Court,
24 but I do -- at least *Rahman* sets it up as a jury question.

25 THE COURT: All right. Well, I -- I haven't had --

1 MS. HERNANDEZ: And, in fact, you know, Judge Mukasey
2 says there's three types of statements. One you cannot use for
3 any purpose if you -- and the way he puts it is if you believe
4 it's a statement of opinion, you can use it to convict or for
5 any purpose. And the point is that that has -- the only way we
6 get to that point where the jury gets to decide is if we can
7 introduce evidence, if we can cross-examine, if we can -- and,
8 you know, this isn't far-fetched. There are, for example,
9 Capitol Police documents -- and even the Capitol Police
10 documents and other documents -- which refer to what was
11 happening that day as First Amendment-protected activities;
12 right?

13 THE COURT: Yes.

14 MS. HERNANDEZ: So that's the type of --

15 THE COURT: I think that's about as relevant as -- I
16 mean, yes, I understand that.

17 MS. HERNANDEZ: So that's --

18 THE COURT: I understand that's the way the
19 Capitol Police speak of those types of activities. That's --
20 their training tells them to refer to them --

21 (Indiscernible simultaneous cross-talk.)

22 MS. HERNANDEZ: Correct.

23 THE COURT REPORTER: You're both speaking at the same
24 time.

25 MS. HERNANDEZ: Right. Those -- those -- and the --

1 I'm sorry. We're having a conversation. Unfortunately, we are
2 in court and I should -- and in fact -- and I know this is --
3 maybe I should quit at this point, but -- and this is also
4 related to some of the other arguments that the government
5 makes.

6 When -- when Judge Kavanaugh was being nominated, there
7 were demonstrations. There were demonstrations led by the --

8 THE COURT: This is not --

9 MS. HERNANDEZ: No, it is, Your Honor -- let me
10 explain why. I'm not making a selective prosecution argument;
11 that's not the argument I'm making.

12 But -- but there were demonstrations by leaders -- led
13 by leaders of the Women's March and the American Civil
14 Liberties Union, and their purpose was to interrupt the
15 proceedings, and they publicly said that their purpose was to
16 persuade the senators not to confirm. And everyone -- I'm not
17 making a selective prosecution argument.

18 THE COURT: I understand.

19 MS. HERNANDEZ: I'm just saying everyone -- everyone
20 perceived that activity as First Amendment-protected --
21 protected activity and, therefore -- and, therefore,
22 those 200-and-something people -- and the ACLU said we will pay
23 for your bail, which means they believed in advance that they
24 were going to be breaking rules or laws. And those people were
25 fined.

1 I'm not making -- I'm not making a selective prosecution
2 argument, but I'm making an argument that my client, I would
3 say -- I should be able to establish that his agreement and his
4 conduct -- and, again, this goes along with the *Munchel* theory
5 of rhetorical bravado. His conduct is more akin to that
6 activity, which we all understand to be First Amendment
7 protected, than it is to the government's view of how to
8 interpret the statements.

9 And I believe that's a jury issue. The jury has to be
10 able to say, okay, this is what he said, this is what he did.
11 Did -- is -- is that combination of whatever the government can
12 prove through -- and I can undo through cross-examination or
13 evidence -- is that combination of talk and -- and conduct
14 meet -- prove what the government claims, you know, a seditious
15 conspiracy, or does it prove a First Amendment-protected
16 activity.

17 THE COURT: But my point is on this -- putting aside
18 the question of what they can use particular pieces of evidence
19 for-- right? -- you have an argument. We talked about it
20 yesterday. I'm going look to the cases, look at Mukasey.

21 MS. HERNANDEZ: Okay.

22 THE COURT: It doesn't get you anything extra. In
23 other words, if putting that issue aside, either the government
24 proves the charges or they do not; right? Either they -- wait.
25 Either they have sufficient evidence and they prove them or

1 they don't, and the fact that -- the fact that lawful activity
2 is protected -- that lawful protest in a lawful place is
3 protected by the First Amendment doesn't -- they're not seeking
4 to criminalize that.

5 MS. HERNANDEZ: No, but --

6 THE COURT: Other than you've got this --

7 MS. HERNANDEZ: You cannot disassociate -- I have to
8 be able -- you cannot dis- -- for example, let's say my client
9 is testifying. I'm not -- but let's say my client is
10 testifying. And -- and he says, yes, I wrote that. In
11 November, I did write that the people were stealing the
12 election. He should -- he has to be able to say I thought I
13 was making a political statement. I thought I -- this is
14 America. We get to -- we get to speak our mind about
15 political -- that's the --

16 THE COURT: Ms. Hernandez, if someone says on day
17 one, I really hate the President, I'm going to shoot the
18 President, and then a week later someone shoots the President
19 and they're trying to figure out who shot the President --
20 okay? -- is that statement evidence of a crime?

21 MS. HERNANDEZ: The person who said he should be
22 shot?

23 THE COURT: Yes. The person who says, I'm -- I
24 really hate the President. I hate his policies or her
25 policies. I think I'm going to shoot -- I'm going to shoot the

1 President. And then a week later, the President is shot, and
2 it's a whodunit. Who did it? Can they -- can the government
3 use that statement as evidence that that person was the shooter
4 or no? Or because it's political speech, can they not?

5 MS. HERNANDEZ: Well, that that person -- the person
6 who shot him is not the person who made the statement.

7 THE COURT: Yes, it is in this case.

8 MS. HERNANDEZ: I thought you said -- yeah, but my
9 client never shot the President.

10 THE COURT: That's for you to --

11 MS. HERNANDEZ: That's exactly my point. No, I'm
12 not --

13 THE COURT: To be clear -- I regret using that
14 example because I'm not suggesting anybody in this courtroom
15 shot the President or, frankly, shot anybody; that's not the
16 point. But I'm trying to illustrate my thought about -- and
17 I'm going to read all -- and you're back to this issue of what
18 I can use -- what the jury -- wait. How the government can use
19 a statement.

20 MS. HERNANDEZ: There is a --

21 THE COURT: I'm going to look at that.

22 MS. HERNANDEZ: There is, in fact, a case that came
23 out of this district, which is *U.S. v. Watt* [sic], I believe,
24 that went to the Supreme Court, and somebody did make a threat
25 on the President. He didn't shoot him, but the government

1 charged him. And the Supreme Court said no, First Amendment
2 protected.

3 THE COURT: Well, that -- no, no, no. See, this
4 is --

5 MS. HERNANDEZ: But this is --

6 THE COURT REPORTER: Hold on. Wait.

7 THE COURT: Ms. Hernandez, let me finish, please.

8 MS. HERNANDEZ: Yes, sir.

9 THE COURT: Here's what I'm going to do. I'm going
10 to put my hand up like this. I'm not trying to be rude.

11 MS. HERNANDEZ: Sorry.

12 THE COURT: But what I'm trying to do is get a word
13 in edgewise and not drive the court reporter mad because we're
14 talking over each other. I'm not trying to -- this isn't -- I
15 don't mean to be disrespectful.

16 All right.

17 MS. HERNANDEZ: Nor do I.

18 THE COURT: I understand.

19 In those cases, threats cases, the whole point is
20 they're criminalizing the threat. The speech is criminalized
21 or not. And there are a lot of cases that say, hey,
22 criminalizing a threat, that is a tricky thing. I get that. I
23 get that. That's -- but -- but here in this case -- right? --
24 what is not being -- no one is seeking to -- they, maybe, use
25 speech as evidence of a separate crime, but the speech is not

1 the crime. That is a different situation.

2 MS. HERNANDEZ: The government does not want
3 cross-examination. So let's put this example: Bertino takes
4 the stand. He's a cooperating defendant. The government has
5 shown us multiple statements that he made at some different
6 times, and he says, as he says in his -- in his -- in his plea
7 agreement, I intended or I understood or whatever. I get to
8 cross-examine him about other statements he made in the -- in
9 the MOSD meeting where he said the exact opposite of what the
10 government claims he said -- the exact opposite of the intent
11 that he now says he had. But in the MOSD, he was very clear
12 that our intent was to prevent a December 12th from happening
13 again. The government doesn't want me to cross-examine on
14 first --

15 THE COURT: No, they're not. I guarantee you they
16 are -- and I can see from their nodding they're not, and
17 there's no way on God's good green earth they would try to do
18 that.

19 MS. HERNANDEZ: Accordingly -- quote, accordingly,
20 any line of cross-examination or argument that the defendant
21 may wish to make regarding the First Amendment is irrelevant
22 under Rule 401. My argument is my client -- my client --

23 THE COURT: Ms. Hernandez, the point you were just
24 making -- you were just talking about cross-examining someone
25 on a hypothetical prior inconsistent statement; that has

1 nothing to do with the First Amendment.

2 MS. HERNANDEZ: Well, it is, because what he was -- I
3 guarantee you, I can get from him that what he was expressing
4 in November or early December was what he believed to be
5 First Amendment-protected statements. I should be able to tell
6 the jury, my client is charged with seditious conspiracy,
7 obstruction, this and that. My client made a bunch of
8 statements. They were all protected by the First Amendment,
9 and it's up to you -- and the -- the evidence will show that
10 that is all he was there for. He was there for a peaceful
11 protest. He was there -- that's --

12 I have to be able to make that argument, and the
13 First Amendment cases say that it's -- that the Court has --
14 the Court and the jury have to be very careful when you're
15 considering -- even in *Haupt*, which the government cited to the
16 Court yesterday, Supreme Court case, where they used statements
17 to convict of treason. The court in that case -- the
18 Supreme Court in that case says we have to be very careful
19 whether the statements that were used were -- it was a German
20 national who was living in the United States as a resident, who
21 was charged with treason in connection with activities in
22 favor -- and the Supreme Court in that case said we have to be
23 very careful when we consider these statements to determine
24 whether they are statements of -- that support the intent to
25 commit treason or whether they're statements of a political

1 nature.

2 So I -- I will -- I will take the Court's word that I
3 will not be precluded from -- from presenting a -- a defense
4 that my client's conduct on that day and the -- my client's
5 intent on that day -- on that day -- was to -- he came to
6 Washington for a political activity.

7 THE COURT: Ms. Hernandez, to be clear, I don't think
8 the government is seeking to preclude you from making the
9 argument you just made. I understand your argument on the -- I
10 understand your argument. I'm going to read the cases you've
11 cited, but I do not think the First Amendment operates the way
12 you think it operates in this area.

13 MS. HERNANDEZ: I'll -- obviously, the Court will
14 make its ruling. I'm reading the words of the government. I
15 think the Court --

16 THE COURT: No. I agree with you. It's written in a
17 broader way, but -- but I don't think it's -- we'll hear --
18 let's give them the opportunity to respond.

19 MS. HERNANDEZ: You want me to say -- to accept the
20 government's view, we're from the government and we're here to
21 help?

22 THE COURT: No, I'm not. Not in this case. Look, by
23 that, I just mean not here to help you and your client --

24 MS. HERNANDEZ: Thank you.

25 THE COURT: -- not casting any aspersions on the

1 prosecutors in this case.

2 All right. Let me --

3 MR. PATTIS: On the question of tools, I'd like
4 permission to submit two or three pages on Monday, and just to
5 alert the government to what the claim will be, unlike an
6 inanimate object, which is a gun, there's a question of agency
7 with respect to a person. And to simply say they've been
8 weaponized without expert opinion about something like a
9 Stockholm syndrome or what permitted the defendants' words to
10 hijack their agency is crossing so many bridges. I'd like an
11 opportunity to submit a brief -- supplemental brief on that for
12 Monday.

13 THE COURT: Yes.

14 MR. PATTIS: Thank you.

15 THE COURT: A few pages, absolutely.

16 MR. PATTIS: Thank you.

17 THE COURT: All right. Why don't I hear -- why don't
18 we close out the government's rebuttal on all issues except the
19 issue that is under seal, if any.

20 MR. MULROE: Thank you, Your Honor.

21 I think the only one we would just briefly address is
22 the tools issue. And it sounds like the Court kind of follows
23 what we're doing there. So I don't want to talk Your Honor out
24 of it.

25 But on the question of the analogy, I mean, there was

1 discussion of the mules, and it's an analogy. It's not a
2 perfect match to these facts. But I think the only difference
3 there is that in the classic mule case, the person is generally
4 completely unwitting to sort of the unlawful nature of what
5 they're -- they're being caused to do.

6 And I think this -- this is just a little bit different.
7 I think maybe a closer analysis here -- closer analogy, you
8 could think of a gang leader who's got subordinates and those
9 people are willing to follow him and use violence and they
10 don't particularly care what the purpose of it is. So they go
11 and beat somebody up, and for all they know, it could be part
12 of an extortion. It could be part of a witness tampering. It
13 could be just revenge. They're not privy to and part of the
14 ultimate objective, and, frankly, they don't care.

15 I think in some way that's a good match for --

16 THE COURT: Ordinarily, those people, though, would
17 be charged as co-conspirators; right?

18 MR. MULROE: Depending on the case that's charged.

19 THE COURT: Sure.

20 MR. MULROE: And so if it were a witness-tampering
21 case and these people just went and beat the guy up and they
22 didn't have any knowledge that this person was a prospective
23 witness, I don't think they would be charged, and I don't think
24 they could be charged. And so this really is directly
25 responsive to some of Mr. Smith's kind of overarching

1 arguments, which we think are wrong; but his arguments that in
2 order to be a co-conspirator of these defendants, somebody
3 would need to share in every one of the charged unlawful
4 objectives that the indictment lays out. Now, we think that's
5 wrong.

6 But part of what the tools theory does is says, even if
7 these people were just signed up to commit violence without
8 knowing why or against whom it would be directed, that's still
9 relevant. That's still a central part of the case.

10 And so there was, you know, a remark yesterday that the
11 Proud Boys at least were, at large, not a gang, but I think
12 what these facts show, respectfully, is very gang-like conduct.
13 The MOSD members were brought into this for a specific reason,
14 and it will be clear through, in part, the statements of those
15 people that they understood that their role was to follow
16 orders and to, in their words, kick the fuck ass when it's time
17 to kick the fuck ass.

18 So just sort of as a practical matter -- but we're not
19 arguing as a technical matter. As a practical matter, I think
20 the tools are part of a conspiracy with the defendants. Maybe
21 that's a conspiracy just to commit assault even if they're not
22 part of the charged conspiracy in a way that would, you know,
23 cause us to argue for relevant conduct or *Pinkerton* or things
24 like that.

25 So that was just the one point I wanted to give the

1 Court to think about it, but we'd leave it there otherwise.

2 THE COURT: All right. Very well.

3 Let's -- and I know --

4 MR. MULROE: I'm sorry. There was maybe something on
5 the First Amendment.

6 THE COURT: I'm sorry. Go ahead.

7 MR. KENERSON: Thank you, Your Honor. Erik Kenerson
8 again for the United States.

9 Just to respond to Mr. Smith -- and I suppose the
10 portion of Ms. Hernandez that went into the issue of the
11 Capitol Grounds and *Jeanette Rankin Brigade* and *Lederman* or
12 *Lederman* -- I'm not sure how it's pronounced -- case, that was
13 a leafletting case that Ms. Hernandez referenced. I don't --
14 we haven't had much argument, and I think the papers lay it out
15 relatively well.

16 But the *Jeanette Rankin Brigade* and *Lederman*, I don't
17 think, are on point on these facts. Because *Jeanette Rankin*
18 *Brigade* dealt with a statute that was going to prohibit all
19 parading, assembling, et cetera, moving in assemblages on
20 Capitol Grounds. That's what was struck down. Same thing with
21 the leafletting regulation that was at issue in *Lederman*. That
22 was certain portions of the Capitol Grounds. That was not
23 allowed at any time.

24 What we have on January 6th is that for a temporary
25 period of time, the entire grounds were restricted. So it was

1 illegal for anyone to be on those grounds, and there is a
2 number of cases from a number of circuits upholding those types
3 of restrictions on a temporary basis. We cited them in ECF 522
4 at page 13. I won't go over them again here.

5 But I heard both Mr. Smith and Ms. Hernandez say that
6 they want to, essentially, be able to argue that if their
7 clients were only planning to move in assemblages on
8 Capitol Grounds even within the restricted area on January 6th,
9 that that is First Amendment-protected activity. And I do not
10 think that is at all supported by -- supported by the case law
11 here. I think that that actually -- to the point of the Court
12 trying to get to where there's disagreement between the
13 parties, there very much is on that point.

14 THE COURT: I agree with you on that point.

15 MR. KENERSON: Just the other thing I wanted to ask
16 too, as well, is I know Ms. Hernandez brought up the issue of
17 the -- it being a jury issue as to whether certain statements
18 were First Amendment protected or not. We disagree with that.
19 I understand she brought a case cite to the Court's attention
20 yesterday. To the extent the Court is considering giving such
21 an instruction, we would just be requesting a chance to brief
22 it as well.

23 THE COURT: Sure. Absolutely. We'll be talking
24 about the instructions.

25 MR. KENERSON: Thank you.

1 THE COURT: All right. So I also note, I -- do we
2 have an attorney in the gallery who would like to address me?

3 All right. If you'll just come up and identify
4 yourself.

5 Thank you for waiting all this time.

6 MR. MISHKIN: Of course.

7 Good afternoon, Your Honor. Max Mishkin on behalf of
8 the Press Coalition.

9 I understood from being in the gallery that there --
10 Your Honor is anticipating sealing a portion of today's
11 hearing. I guess I'm here because this will be, as I
12 understand it, the third sealing of the courtroom this week. I
13 don't believe any members of the press are here at the moment,
14 but at least in one -- one or both of the prior hearings,
15 members of the press were expelled from the courtroom.

16 You know, my -- my search of the docket didn't turn up a
17 sealing order or a notice that the hearing would be closed or
18 an opportunity to object. And so I'm sort of here, sort of
19 here -- I was here in the off-chance there might be another
20 closure today so that I could sort of object for the record
21 formally and make sure that, you know, to the extent that you
22 wanted to hear argument on our papers, which -- which we filed
23 a few days ago, I could offer that as well.

24 THE COURT: With regard to the motion, I'm going to
25 give -- and it was addressed, I believe, on Monday -- or

1 whatever day it was, when I closed it, I'm going to let any
2 party have an opportunity to respond under the rules, and then
3 I will rule on it.

4 With regard to today's sealing, it is a matter that the
5 parties at this point have agreed should remain under seal. I
6 happen to know, unlike in every -- unlike in every case, in
7 this particular instance, I happen to know the issue. Again,
8 it's one the parties -- that is under seal at the moment, and
9 so I am going to close the court briefly because this is a
10 matter that's under seal at the moment.

11 Your objection is noted. And, obviously, you can, if
12 you would like, file a motion or amend your prior motion to
13 include receiving a transcript of what we talked about, and
14 I'll consider that motion. But in the first instance, I know
15 the matter at issue, and I'm going to close -- seal the
16 courtroom for discussion of this one small matter only.

17 MR. MISHKIN: Sure. I appreciate Your Honor's time
18 on this. And I guess I would just -- turning from today to
19 sort of forward looking as we are approaching trial, if there
20 are likely to be continued portions of pretrial proceedings or
21 even trial proceedings that might happen in a closed courtroom,
22 you know, the more advance notice the press can have, you know,
23 to send me or one of my colleagues down here to argue it, we
24 would certainly appreciate that.

25 And it's -- you know, our position would be that, you

1 know, advance notice is, to the extent possible, required
2 under, you know, *Globe Newspapers*.

3 THE COURT: All right. Very well. I think today --
4 well, fair enough. A lot of times, as you can appreciate, we
5 don't know what's going to come up. So fair enough. But I'll
6 consider this in a more fulsome way afterward, and, you know,
7 if you want to -- as I said, if you want to amend your motion
8 to include today, I'll certainly -- I'll take it up.

9 MR. MISHKIN: Thank you very much, Your Honor.

10 THE COURT: All right. Very well.

11 MR. NICHOLAS SMITH: Judge, just one housekeeping
12 point, not argument.

13 So in the course of Ms. Hernandez's argument on the
14 First Amendment, it became clear that there's slightly
15 different arguments that are being made by Defendant Rehl and
16 Defendant Nordean on the First Amendment. And it happened that
17 Your Honor was asking some questions of Ms. Hernandez that
18 relate more to the argument Nordean is making than the
19 statements, First Amendment piece. So I'd just like to --
20 Nordean would like the opportunity to file something very short
21 clarifying what the difference is between these two types of
22 arguments, if that's --

23 THE COURT: On Monday.

24 MR. NICHOLAS SMITH: Okay. Thank you, Judge.

25 THE COURT: Thank you.

1 All right. So let's -- the matter the parties have
2 briefed under seal will close -- so it's 1 o'clock. Let me ask
3 this: It's a pretty, I think, straightforward issue. Can
4 either side imagine needing more than five or ten minutes to --
5 to argue this?

6 Okay.

7 MS. HERNANDEZ: Which -- the severance issue?

8 THE COURT: No, no. The matter that the parties have
9 briefed under seal in connection with the motions that are in
10 play right now.

11 So what I'd then like to do is just seal the courtroom,
12 hear this argument, and then go ahead and release everyone but
13 Ms. Hernandez and her client and to talk about the severance
14 motion.

15 MR. METCALF: Your Honor, I have a scheduled
16 appointment with a doctor at 1 o'clock because I thought that
17 we were going to be breaking. Can I step outside real quick to
18 be able to call my office and have someone try to arrange that
19 for me right now?

20 THE COURT: Yes. Yes, you may.

21 MR. METCALF: Thank you, Your Honor.

22 THE COURT: All right. So if you will seal the
23 courtroom, Ms. Harris.

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(Proceedings held in open court.)

THE COURT: We are out from under seal.

Let me release everyone who would like to be released, other than the government. But all other defendants and their counsels, other than Mr. Rehl, who wants to argue his motion for severance, you may remain, if you would like, but, also, you are free to go.

We'll come back in an hour, at 2:15, and I'll hear Mr. Rehl on the motion to sever.

Mr. Hull.

MR. HULL: Your Honor, may I raise two quick issues

1 before we break for lunch. And these are loose ends, is the
2 way, I think, a lot of people think of them. The first is the
3 House transcripts, which we've had emails about and
4 discussions. There's quite a few of them, and my -- my
5 impression from emails in talking with Mr. McCullough is that
6 it's the same regime. You have not had any kind of, you know,
7 information about any of those being released or --

8 THE COURT: All right.

9 MR. HULL: -- in the possession of any of them. And
10 I was wondering if that's true -- and I think it probably is --
11 is there a way for us to access at least the transcript of --
12 for Bertino and possibly for Tarrio?

13 THE COURT: All right. Again, the government, I
14 think, will say they don't control or have access to it, but
15 I'll ask them to address that.

16 Anything else?

17 MR. HULL: And is it possible to -- and I should know
18 the answer to this, but is it possible to subpoena just those
19 two from the House clerk?

20 THE COURT: Well, that's, again, something for the
21 parties to chat about, not at the moment.

22 MR. HULL: Thank you.

23 One other thing, I take it there's no Oren Segal that
24 will be testifying here? No -- we talked about that a little
25 bit this morning.

1 THE COURT: There's no --

2 MR. HULL: He was identified as a -- either case in
3 chief or rebuttal expert on extremism, and I don't -- normally
4 we would have addressed that today.

5 THE COURT: Right. So let me -- I'll go into that.
6 Let me address that real quickly.

7 So there are two motions that became moot; right? They
8 are ECF No. 46, the marital communications motion, and
9 Nordean's motion to exclude this expert testimony, which is
10 490. I will say right now, I will deny them both as moot
11 because the government has said they are not seeking to
12 introduce any of that evidence.

13 Mr. McCullough, do you want to address this issue of the
14 transcripts very briefly?

15 MR. MCCULLOUGH: Yes, Your Honor.

16 Your Honor has ordered the government to advise the
17 Court and the parties within 24 hours of its access to the
18 transcripts. The government is aware of that order, is
19 complying with that order. That's where we are.

20 With respect to any efforts to kind of subpoena the
21 transcripts, in any case, setting aside, you know, co-equal
22 branches of government and the like, you know, kind of the
23 process of kind of asking for ones and twos of transcripts here
24 does not make a lot of sense, so.

25 THE COURT: All right. Very well. We'll be back

1 at -- then in one hour, and I'll hear from Mr. Tarrio.

2 Mr. Tarrio is waiving his hands. I just happened to catch him.

3 Yes, sir.

4 DEFENDANT TARRIO: Can you guys hear me?

5 THE COURT: We can hear you.

6 DEFENDANT TARRIO: Am I -- okay. Am I coming back,
7 or do I stay here?

8 THE COURT: You do not need to come back, unless --
9 there's no reason --

10 MR. HASSAN: No, Judge.

11 THE COURT: All right. Yes, you're done. You're
12 released. You're dismissed, Mr. Tarrio.

13 DEFENDANT TARRIO: Thank you.

14 THE COURT: All right. Very well. See everyone at
15 2:15.

16 (Recess taken.)

17 THE COURTROOM DEPUTY: Your Honor, we're back on the
18 record in Criminal Matter 21-175, United States of America v.
19 Ethan Nordean, et al.

20 THE COURT: All right. Ms. Hernandez, you tell me
21 how much of your argument here -- you mentioned there might be
22 some under-seal things you want to mention. If -- if that's
23 really kind of a -- we can -- we can wait to go under seal to
24 do that, if you would like, or I'll hear it separately in open
25 court, as much as you can make your motion in open court.

1 Obviously, your motion was filed -- I think the basis for your
2 motion was nothing sealed. So I'd like to do as much of it in
3 open court as we can.

4 MS. HERNANDEZ: Yes. I'm just going to answer the
5 judge's question for a minute.

6 Yes, for the most part, it will be open court. I mean,
7 I just think some of the recent materials that we received that
8 are under seal support the argument, so -- just slight
9 references I can make. I don't --

10 THE COURT: Okay.

11 MS. HERNANDEZ: We don't even have anybody in the
12 courtroom.

13 THE COURT: You can just make your point. I mean,
14 it's not a lot of material, so.

15 MS. HERNANDEZ: I think Mr. Smith wants to --

16 MR. NICHOLAS SMITH: Judge, just on scheduling, I
17 learned that there's an oral argument scheduled in the Court of
18 Appeals on December 12th at 9:30 a.m. So what struck me and my
19 co-counsel immediately about that was that in other circuits,
20 we were accustomed to receiving a notice form that asked the
21 parties to provide any conflicts, if there were any.

22 And I think what the D.C. Circuit does instead -- I
23 found a local rule that says, basically, the circuit court will
24 just go ahead and schedule when it does, and then the local
25 rule says that the trial court has to defer when trial counsel

1 is in both the court -- this only applies to one circuit, this
2 one. So I've checked in with the government and the defense,
3 and they both are fine with beginning in the afternoon on
4 December 12th, if that's --

5 THE COURT: If -- well, let's put it this way: We'll
6 have a little bit of time. I'm going to confirm the law is as
7 you suggest.

8 MR. NICHOLAS SMITH: Judge, it's Local Rule 57.5(a).

9 THE COURT: I will do so, but assuming you are
10 correct, we will begin in the afternoon.

11 MR. NICHOLAS SMITH: Okay. Thank you, Judge.
12 Thanks.

13 THE COURT: Ms. Hernandez.

14 MS. HERNANDEZ: Good afternoon, Your Honor.

15 THE COURT: And before you begin, let me also just
16 put on the record, I know our court reporter has a -- has to
17 leave us in one hour. So I don't think we'll be butting up
18 against that, but I just wanted to put that on the record.

19 MS. HERNANDEZ: No, I don't expect -- I'll try to be
20 brief.

21 So I filed a motion to sever defendants and counts.
22 With respect to defendants, so -- as the Court knows, my
23 argument is that Mr. Rehl stands apart from the other
24 defendants. He's not -- so the indictment alleges a particular
25 conspiracy that supposedly Mr. Biggs tells Mr. Donohoe on the

1 evening of the 5th: We have a plan. I spoke -- I'm with
2 Nordean. I spoke to Tarrío. And the only information about
3 the plan that's sent out is meet at the Capitol -- at the
4 Washington Monument at 10:00 a.m.

5 In fact, the Bertino and Donohoe pleas both relate,
6 essentially, that -- that there was a plan, but we were -- we
7 weren't given the specifics. However, we surmised, blah, blah,
8 blah, that the plan was whatever.

9 THE COURT: Although the indictment alleges that the
10 conspiracy -- conspiracies began much earlier.

11 MS. HERNANDEZ: Sometime in December.

12 THE COURT: Right.

13 MS. HERNANDEZ: No question. But the -- the
14 indictment at the same time explicitly states that on the 5th,
15 there's this text messaging about the plan. That's the first
16 time that the reference to a particular plan is alleged.
17 Obviously, the conspiracy alleges an agreement -- a conspiracy
18 to violate, which began in December, but at the same time, the
19 conspiracy alleges this particular event on the 5th, which is
20 supposedly we have a plan. So my argument -- so that's the
21 background.

22 Number one, I -- I think that the -- my theory of
23 defense, in part -- and I -- why not. We're close enough to
24 trial, and I've been pretty clear. The theory of defense is
25 that Mr. Rehl did not enter any plan to attack the Capitol, to

1 interfere with the Electoral College count, to invade the
2 Capitol or storm the Capitol or whatever, however you want to
3 describe it. And that -- the only plan -- and, again, this in
4 the text messaging, after that text message -- or Telegram
5 message from Mr. Biggs where he says: We have a plan, meet at
6 the Capitol -- meet at the Washington Monument; Mr. Rehl says:
7 Well, the plan still is to break off into groups of ten. We
8 can do that at the Washington Monument. So, again, there's a
9 revelation from his point of view that the plan had nothing to
10 do with attacking the Capitol.

11 And, of course, we have allegations, which I think so
12 far are undisputed, that Mr. Pezzola stole a shield and broke a
13 window and had some sort of scuffle with law enforcement; and
14 that Mr. Donohoe threw two water bottles at the -- at two
15 officers.

16 And I have argued -- and I think the recent materials
17 that we received support my argument. I've argued, one,
18 that -- and Mr. -- that that violence was unrelated to any
19 plan, it's inconsistent with the discussions in the --
20 inconsistent with the discussions in the MOSD meetings. And
21 part of my theory of defense is that those acts of violence, of
22 destruction of property should probably be prosecuted, but that
23 my client was there to protest and to engage in First Amendment
24 activities, and he did. That's a separate conspiracy, which he
25 didn't have.

1 I think that's an inconsistent -- and -- and so I would
2 be pointing the finger at Pezzola, yes. He broke a window. He
3 stole property. He destroyed property. He scuffled with
4 police. That's not me. That's not part of the conspiracy, and
5 I think that's a fairly inconsistent conspiracy. And I would
6 submit to the Court that on that basis alone I should be
7 severed from Mr. Pezzola.

8 In addition, Your Honor, I think, as I've argued, that
9 what the government has alleged, really, is multiple
10 conspiracies. They've alleged this -- the 1776 Returns to
11 conspiracy, which involved allegedly some plan to occupy the
12 government -- the Capitol Grounds. And, again, that particular
13 statement, that that was the intent to occupy the
14 Capitol Grounds, is supported by some of the statements made
15 that were recently disclosed to us. One or more of the
16 persons -- at least one of the persons who was interviewed --
17 who -- whose materials we received states exactly that.

18 THE COURT: I understand.

19 MS. HERNANDEZ: Those persons also state -- some
20 or -- more than state that the -- that there was no plan to
21 attack the Capitol; that the plan was to avoid confrontation
22 with the police; that acts of violence were spontaneous and not
23 part of any agreement. Each -- one or more of these people
24 that were -- whose -- whose information we recently received
25 have said that at different times during interviews.

1 So what I would submit to the Court -- and the motion to
2 sever goes hand in hand, to some extent, to the motion to
3 dismiss based on multiple conspiracies that I have filed. That
4 what the government has is multiple conspiracies. At best, you
5 know, one could be the plan that Biggs, Nordean, and Tarrio had
6 as of January 5th in the evening; one that may have involved
7 Donohoe and -- and, apparently, Bertino and -- and Pezzola to
8 become violent and attack the Capitol. One that involved just
9 to move along with groups of people; to avoid contact, which is
10 what my client does.

11 He ends up with the Philadelphia folks and also with
12 Mr. Finley, who is the president from -- I believe it's the
13 West Virginia chapter. They enter the Capitol. Per the
14 allegations in the indictment, they -- the statement is that
15 they entered the Capitol. There's no allegation in the
16 indictment that they forced their way -- forcibly entered or
17 forced their way. And, in fact, they only enter the Capitol at
18 2:53, long after Pezzola breaks the window. And there is
19 audiotape of someone saying, the -- we had this discussion
20 before -- the Vice President has left the building. Whether
21 that's accurate or not, you can hear people believing that.
22 And someone in that little group saying, I wonder what -- let's
23 go inside and -- sort of curiosities. Let's go inside and see
24 what happened. It's not let's go inside and stop the
25 certification.

1 So -- and it's clear that the government intends to
2 introduce all sorts of statements by a number of people, and
3 one of the grounds for severance is that this -- this
4 difference in the quantity and quality of the evidence. And I
5 would submit to the Court that with respect to Mr. Rehl,
6 there's very little evidence of any intent to commit any of
7 these offenses that the government alleges or -- that the
8 indictment alleges.

9 And -- and, again, I mean, I believe on the 4th he makes
10 some comment about the Capitol Grounds in response to someone
11 saying, we should -- we should -- the theater should be in
12 front of the Capitol and there -- and that person who says that
13 says something about there should be speeches and that type of
14 thing. And Mr. Rehl mirrors that or -- or sort of says, yeah,
15 it's -- is Tarrío going to give a speech that day, or where's
16 Tarrío going to give a speech.

17 So I think it would be very prejudicial to Mr. Rehl to
18 have to stand trial with these other people who have made --
19 or, you know, Donohoe and all these people who apparently the
20 government will seek to introduce testimony from Mr. Tarrío --
21 or -- not testimony, but statements from Mr. Tarrío and others.

22 So for those reasons, the multiple conspiracies -- it
23 will be the inconsistent defenses, the undue prejudice from
24 introducing all these statements, which the government will
25 seek to bring in against everyone on theories of -- on theories

1 that are novel, to say the least. They're not co-conspirator
2 statements.

3 THE COURT: Not all the theories, but some of them
4 are.

5 MS. HERNANDEZ: I think there's very little case law
6 that supports the argument that nonco-conspirator statements
7 come in against -- like excited utterance that is not a
8 co-conspirator statement comes in against the other defendants.

9 THE COURT: Actually, I'm -- I think that -- well,
10 I -- I'm poking around at this, and I do think that is the law.
11 I do think that is the law, like it or not, that non- -- to the
12 extent that any statement is admissible against a defendant for
13 a non- -- for a nonhearsay -- or I shouldn't --

14 MS. HERNANDEZ: A nonco-conspirator.

15 THE COURT: On a nonco-conspirator basis. Let's just
16 say excited utterance. I think that is right that comes in
17 against all of them, and I actually think that might be the
18 case regardless of whether it's a conspiracy or not, but,
19 anyway, we're off the track.

20 MS. HERNANDEZ: Well, I mean, I think there's case
21 law in this circuit that says you don't look at those -- first
22 of all, you don't look at those statements until you've
23 determined that there is a conspiracy, and you cannot really
24 use those statements to make a finding of a conspiracy. So you
25 only attribute those statements by others, even co-conspirator

1 statements, to the defendant after you found the existence of a
2 conspiracy.

3 In any event -- and then I think the government now have
4 another theory, which I believe is at variance with what is
5 charged; this notion that the conspiracy was really about the
6 tools. And it took me a while to -- I felt like -- took me a
7 while to figure out whether the tools were useful idiots or
8 items you purchase at Home Depot. And I gather that the
9 government's theory is tools being -- well, I think the -- they
10 suggested they were like mules. That -- I don't think that's
11 the allegations in the indictment. It may be a variance, which
12 may call for another motion. Anyway, I -- I'm submitting to
13 the Court that our defense will be -- will be --

14 THE COURT: You've given me all, I think, the reasons
15 you want to articulate, Ms. Hernandez.

16 MS. HERNANDEZ: Right.

17 THE COURT: So let me just pose this question back to
18 you. How would you say -- I guess multiple conspiracy issues
19 aside, how is this different from any -- I mean, so in any
20 conspiracy case -- right? -- there are often situations where
21 at the end of the day, if there happens to be a conviction, the
22 parties show up for sentencing and the government and the
23 defense argue, Person A was much more culpable, Person B was
24 much less culpable. You know, they're really -- you know, how
25 is this different from that kind of relatively -- maybe you're

1 -- that situation is relatively common.

2 MS. HERNANDEZ: Right.

3 THE COURT: And, I guess, how would you say this is
4 different? Is it something different in kind, or is it simply
5 a difference in magnitude?

6 MS. HERNANDEZ: I think both.

7 THE COURT: Okay. Well, that's always the best
8 answer when a judge poses a question like that, I suppose.

9 MS. HERNANDEZ: Both, Your Honor.

10 THE COURT: So why don't you describe to me at this
11 point --

12 MS. HERNANDEZ: Well, I think in a magnitude, as I've
13 suggested -- I mean, Mr. Rehl does not come in until 2:53,
14 which is long -- you know, the window is broken at 2:13 by
15 Mr. Pezzola. At 2:14 Mr. Biggs is alleged to have entered the
16 Capitol, Mr. -- oh, and Mr. Rehl stops hanging out with these
17 gentlemen sometime -- I don't know -- around -- sometime after
18 1:00 p.m.

19 And, in fact, you know, the government has a number of
20 videos or -- which they allege where Mr. Biggs and Nordean were
21 present and they videotaped some statements or whatever.
22 Mr. Rehl is not seen with them. He -- he's -- when he enters
23 the Capitol, he no longer -- he doesn't meet up with them.
24 He's with the group from Philadelphia, the people he traveled
25 to D.C. with, and none of whom have been charged with any

1 felonies at all in connection with that date, including
2 Mr. Finley, who traveled by himself, but was with Mr. Rehl most
3 of the day.

4 So I think it's -- it's a -- it's sort of magnitude,
5 along the lines that -- the Supreme Court case in *Kotteakos*
6 lays out. And I -- I can see that it's -- it's judgment for
7 the Court to make. You know, does -- you know, *Kotteakos* is
8 here at the top of the -- of whatever -- the pyramid, and then
9 all the other cases that the Court describes. And I think it
10 is a judgment call.

11 But I do think that in the nature of this particular
12 case, on every -- the government alleges -- and I'm not
13 saying -- the government alleges, for example, that Biggs and
14 Nordean knock over the bicycle rack. Mr. Rehl does not. The
15 government alleges that Pezzola breaks a window -- you know,
16 steals this shield, breaks a window.

17 And as the Court may recall, there is a conversation
18 that's captured on video by someone -- maybe on one of the
19 phones -- where Mr. Rehl expresses surprise at what happened --

20 THE COURT: Yes.

21 MS. HERNANDEZ: -- doesn't -- he doesn't know that
22 Pezzola -- he doesn't know that it was a Proud Boy who broke
23 the window. Donohoe tells him a Proud Boy. I know the
24 government in their response included a photograph of a -- one
25 of the marches in Washington --

1 THE COURT: Oh, yeah.

2 MS. HERNANDEZ: -- where Pezzola -- but there is no
3 other evidence of any contact between the two of them.

4 And I know the government has alleged that Pezzola is in
5 some of the chats, but there's no -- there's no evidence that I
6 have seen of any communications back and forth. So there's no
7 evidence where Pezzola says something and Mr. Rehl responds.

8 And that picture that the government has produced,
9 there -- Mr. Tarrio is in the middle, and they're not looking
10 at each other. They're not talking to each other. And -- and
11 I think the evidence would show that they had not met. I think
12 the evidence would show that -- or will show that Mr. Pezzola
13 became a Proud Boy, I think, in November or December. He was
14 brought into the organization by Mr. Bertino. And so -- so
15 there really is no contact, other than that photograph that I'm
16 aware of.

17 So, again -- and I do think that -- and then I also
18 argued that the counts should be severed because of the -- that
19 they really don't belong together. They're different in kind.

20 And, of course, you know, all the -- the destruction of
21 property count, the civil disorder count, all of those are on
22 some theory of aiding and abetting, *Pinkerton*, or some other
23 theory of liability, because Mr. Rehl does not commit any of
24 those acts. Mr. Rehl does not destroy any property. Mr. Rehl
25 did not engage in civil disorder, and those counts are not

1 charged as -- as conspiracies.

2 And under the *Rosemond* Supreme Court case of some -- not
3 too long ago, I would submit that he should not -- there's no
4 evidence that Mr. Rehl -- notwithstanding the government's
5 arguments to the contrary, there's no evidence that Mr. Rehl
6 signed on to any violence on that day.

7 And, in fact, I know the government has this theory of
8 what was going on with the MOSD, but, as the Court may recall,
9 the explicit -- the express reason for creating the MOSD is to
10 avoid the chaos of what happened on December 12th. I mean,
11 they do talk a lot about December 12th, about the stabbing.
12 But there's all this conversation about we have to take control
13 of the situation. We can't -- we have to make sure it doesn't
14 happen again.

15 The government picks out other -- other -- I guess
16 their -- their -- the way they spin that information is
17 different from what I think is explicit in the statements made.
18 As I said, I mean, it's explicit at the beginning and
19 throughout. It's three reasons. One, we want this hierarchy
20 so that we can control. We only want to limit the number of
21 people -- not so we can create chaos, but we can control and we
22 don't have crazy people doing crazy stuff, and we want to make
23 sure that -- to avoid violence. I mean, they continuously talk
24 about that.

25 Anyway, I don't want to belabor the point. As I say,

1 I -- I agree that it's a judgment call. I do think that in the
2 end, this notion -- I think in the end what you're going to
3 have is multiple conspiracies, and I think I -- and/or a
4 variance from -- I mean, this notion of the conspiracy was to
5 rile the tools or whatever it is to -- not just rile, to --
6 what they've been saying today and yesterday, I guess, was that
7 that was the conspiracy.

8 THE COURT: All right. Let me hear from them.

9 MR. MULROE: Your Honor, you have heard from the
10 parties a lot over the past couple days so I don't want to
11 spend too much time. We rely largely on the papers. I think
12 we laid out the law of joinder and severance and rebutted any
13 possible basis for severance that Defendant Rehl could argue.

14 I just want to punctuate, kind of, a couple points,
15 especially those that sort of have new light on them after the
16 past couple days. Fundamentally, I think what Ms. Hernandez
17 was up here arguing were all factual questions that are going
18 to be exactly what the jury needs to decide. Was he a member
19 of the conspiracy? Was he part of an agreement that led to
20 these things? Was it one conspiracy or multiple conspiracies?
21 So none of those are a basis to sever the case.

22 The case properly alleges a conspiracy, and he's in each
23 of those conspiracy counts. They are based on conduct that he
24 did, in almost every instance, along with the other defendants.
25 They're part of the same chat groups. They were present on the

1 12th together. They were present on the 6th together. He
2 marched at the front of that marching column with the other
3 leaders, Nordean and Biggs, when they brought the crowd to the
4 Capitol. So to say that we're not going to be able to prove
5 those things is something that she can argue, just not here and
6 not now.

7 It is illuminating, I think, some of the arguments she
8 makes to the extent they reveal sort of what the issues that
9 the defense is going to tee up in trial. Ms. Hernandez says
10 that the charged conspiracy, she claims, is inconsistent with
11 the discussions that are taking place in the MOSD chat groups.
12 So that -- I mean, that goes directly to our point about we've
13 got to see the messages. The jury needs to be able to see what
14 these discussions are to see what it was that these people were
15 contemplating. So we -- I mean, again, we're certainly not
16 going to retread all that, but I think it illuminates it.

17 The issue the Court identified about relative
18 culpability, that is an issue in almost any case that involves
19 multiple defendants. So she can argue that at sentencing, but
20 that's not a reason for severance. And we cited in the brief,
21 ECF 513 at, I think, 8 -- I'm sorry -- 4, a number of cases
22 where the disparity sort of in the gravity of the charged
23 conduct was very, very different, more of a disparity than we
24 see here. Severance was, nonetheless, denied.

25 Similarly, the antagonistic defense theory that she's

1 raised now, I don't think that's unique to the case. For one
2 thing, the case law is that antagonistic defenses are not
3 per se a reason to sever the case. They can contribute to
4 severance under some circumstances, but I don't think what
5 she's described is the defendant's pointing fingers at one
6 point. What she's describing is her saying, what this other
7 guy was worse and, basically, conceding that the government --

8 THE COURT: And I had nothing to do with that.

9 MR. MULROE: And I had nothing to do with that.

10 THE COURT: I mean, the argument.

11 MR. MULROE: Right.

12 I think, if anything, though, it would be an argument
13 for Pezzola to try to get out of this case because it's not
14 going to involve the other defendants, you know, conceding what
15 he did. But I don't see how that's an argument for Rehl to be
16 severed from the case.

17 Part of the basis for severance is the notion that
18 evidence is going to come into a joint trial that would not be
19 admissible in a trial of Rehl by himself and that he would be
20 unfairly prejudiced by that. So, again, this dovetails with
21 all the arguments from the past couple days about who these
22 things are admissible against.

23 I think the Court is right that when something comes in
24 under a hearsay exception or if it's nonhearsay, I just haven't
25 seen any authority anywhere that says that that should be

1 limited to any particular person. I think if it were only
2 admissible -- so take an excited utterance. If an excited
3 utterance were only admissible against the declarant, then the
4 excited utterance exception would be completely swallowed by
5 the party opponent rule. The party opponent rule always allows
6 the declarant's statements to come in, whatever they are. And
7 so the whole purpose of these other hearsay exceptions or
8 nonhearsay bases is to bring it in against other people other
9 than the person saying the statement.

10 So whether or not he is tried with his co-defendants,
11 those things are coming in against him. That's something that
12 we've argued in other filings in this case. So with respect to
13 statements being admissible against all the members of the
14 conspiracy, that is at ECF 512 at 16 through 19. We would
15 direct the Court there.

16 And the admissibility of, kind of, nonstatement conduct
17 by one member of the conspiracy against others, this was raised
18 kind of specifically with respect to the 1776 Returns document,
19 and we explained why that is admissible against all the
20 co-conspirators at ECF 515, pages 26 through 27. So assuming
21 we're right about those, which we think we are, his trial with
22 respect to that evidence would look exactly the same whether he
23 was by himself or tried jointly with his co-defendants. And so
24 that's no reason to sever it.

25 I think those are all the points I wanted to hit. I'm

1 happy to answer any questions Your Honor might have.

2 THE COURT: Nope. I don't have any questions.

3 MR. MULROE: Thank you.

4 MS. HERNANDEZ: Number one, the statements the
5 government is seeking to introduce are not MOSD, the statements
6 we've been arguing over, and I don't think it's -- I understand
7 they want to take a third bite at the apple. So I'll respond.

8 But those statements are -- what I -- what I mentioned
9 is the MOSD, and what they've been trying to bring in are these
10 statements on Parler and other places that predate the
11 conspiracy and -- and are not MOSD statements. In fact, you
12 know, they want to bring in -- one of the things they mentioned
13 was Mr. Pezzola's Parler posts from November. And there's no
14 evidence that Mr. -- Mr. Rehl was anywhere near that Parler
15 post.

16 And with respect to whether there's any case law about
17 whether these statements that are not co-conspirator statements
18 come in or don't come in, I will cite the Court to *Bruton*, the
19 Supreme Court case, which I think -- even though *Bruton* allows
20 with a limiting instruction, what -- what I think the biggest
21 problem in this case --

22 THE COURT: *Bruton* is when --

23 MS. HERNANDEZ: And it's not a confrontation clause
24 issue. It's just -- I don't -- I think *Bruton* is pretty clear
25 that it does not come in against all the other defendants.

1 THE COURT: Okay.

2 MR. NICHOLAS SMITH: With a limiting instruction.

3 MS. HERNANDEZ: With -- right.

4 THE COURT: Well, look --

5 MS. HERNANDEZ: And I think the problem in this
6 case --

7 THE COURT: Hold on. Hold on. It doesn't make any
8 sense to say it doesn't come in against all the other
9 defendants without a limiting instruction.

10 MS. HERNANDEZ: Correct.

11 THE COURT: Either it -- if it comes in against
12 everyone, then you don't need a limiting instruction.

13 MS. HERNANDEZ: Right.

14 THE COURT: If it only comes in against one, then you
15 do need a limiting instruction.

16 MS. HERNANDEZ: Well, and *Bruton*, I think, is pretty
17 clear that you do need a limiting instruction, which would
18 indicate that it doesn't come in against everyone. In fact,
19 *Bruton* would say it doesn't come in against everyone. And I
20 think the problem in this case, although -- there -- there are
21 cases where you get some *Bruton* statements. The bulk of these
22 statements --

23 THE COURT: Yes.

24 MS. HERNANDEZ: -- are not going to be co-conspirator
25 statements, and they're going to require -- you do not need a

1 *Bruton* instruction in a co-conspirator statement.

2 THE COURT: But we don't --

3 MS. HERNANDEZ: So you're going to be giving a *Bruton*
4 instruction after every text message.

5 THE COURT: No, because --

6 MS. HERNANDEZ: We would be requesting one.

7 THE COURT: No one has -- certainly you didn't tee
8 this up in your motion. But *Bruton* is a situation where one
9 defendant specifically points the finger or names -- right? --
10 another.

11 MS. HERNANDEZ: We went -- we did this or we --
12 right.

13 THE COURT: Right. Or just you did. Or just the
14 other defendant. You know, you did this; right?

15 MS. HERNANDEZ: Well, I think it also -- Zac and I
16 went -- went and robbed the bank.

17 THE COURT: Fine. Fine.

18 MS. HERNANDEZ: And it comes in against the declarant
19 but not against -- I mean, *Bruton* would say --

20 THE COURT: Right.

21 MS. HERNANDEZ: -- either it doesn't come in at all
22 or you have to give the limiting instruction.

23 THE COURT: Because *Bruton* is construing the party
24 opponent; right? You're -- because if it's coming in simply as
25 a party opponent statement, it can only be against the maker of

1 the statement, which is not the case in this situation where
2 you're talking about, for example, an excited utterance.

3 MS. HERNANDEZ: Well, I would say that the reason
4 it's -- because it's an exception to the hearsay rule. In
5 other words, it's an admission by the party -- the admission by
6 the party opponent is the exception to the hearsay rule; that's
7 why it's coming in. But I would submit --

8 THE COURT: Only against -- only against the party.

9 MS. HERNANDEZ: Right. But I would submit to the
10 Court that that same limiting theory or principle would apply
11 to the other. Because if it's an excited utterance, it's my
12 excited utterance. It's -- it's not his excited utterance.

13 THE COURT: But as Mr. Mulroe, I think, rightly
14 pointed out -- that it makes no sense -- then the excited
15 utterance -- the excited utterance exception would be
16 completely swallowed --

17 MS. HERNANDEZ: By the admission.

18 THE COURT: -- by the other one; right? So we all
19 know that; right? Excited utterances or dying declar- -- I
20 mean, thinking about -- right? -- like someone who's dying who
21 fingers this is the person who shot me. It doesn't -- it's not
22 only -- it's not limited to the person making -- it's not --
23 right? -- offered against the person who's dying, so.

24 MS. HERNANDEZ: But, I mean, some of the theories,
25 Your Honor, Your Honor even asked -- like, some of the theories

1 is the effect on the listener, and Your Honor said: Who is the
2 listener?

3 THE COURT: Well, look. We're getting far afield.
4 These are interesting and difficult issues that I'll sort
5 through, but I don't -- tell me how they relate to your
6 severance motion.

7 MS. HERNANDEZ: Anyway, I do think that what you're
8 going to have in this case is a request for a limiting
9 instruction after every -- every -- other statement that the
10 government will seek to introduce.

11 And -- and the other thing about the MOSD and what the
12 government now wants to make it -- make it into is that the
13 theory -- the MOSD and the theory alleged in the indictment is
14 the MOSD created a hierarchical group with a troika at the top
15 who directs what -- you know, who's calling the shots. And
16 nowhere in the indictment is there an allegation and nowhere in
17 the discovery is there an allegation of what that troika
18 decided other than we have a plan, call you in the morning --
19 or -- we have a plan, see you in the morning. That was it.

20 And, again, I always point this out because I -- in many
21 ways this case is a unicorn -- or the government is trying to
22 fit a round peg into a square peg or whatever that saying is.
23 I have never -- I don't think -- before this case -- or before
24 these cases -- seen a situation where a co-conspirator pleads
25 guilty without an admission I entered the conspiracy on -- you

1 know, like this notion that there was a plan but I don't know
2 what it was. I've never seen that.

3 THE COURT: Your severance motion.

4 MS. HERNANDEZ: I've never seen that.

5 THE COURT: Your severance motion.

6 MS. HERNANDEZ: My severance motion is that this is a
7 bizarre case and you're going to be -- we're going to be asking
8 for -- and the -- there's -- Mr. Rehl stands apart. He didn't
9 enter with the others.

10 THE COURT: There we go. We're to your severance
11 motion.

12 MS. HERNANDEZ: He didn't enter with the others. He
13 didn't forcibly enter. He didn't destroy any property. He
14 wasn't even aware that a Proud Boy did this. He's not at the
15 troika. So that would differentiate him from some -- I mean --

16 THE COURT: Right. I'll look at the cases you cite.

17 All right. I'll do my best to get back to you-all to
18 give you more guidance as soon as I can.

19 Thank you all for your time and attention.

20 Mr. Smith, you look like you want to say something.

21 MR. NICHOLAS SMITH: Yeah. Judge, it relates to
22 Ms. Hernandez's motion, which is if the Court doesn't sever
23 Defendant Rehl and -- on scheduling on the 12th, if the Court
24 is not inclined to -- to start in the afternoon, Ms. Hernandez
25 has offered to temporarily represent Mr. Nordean for three

1 hours. We don't think there's any conflict there for just
2 purposes of the *voir dire*.

3 MS. HERNANDEZ: And just to be clear, I'll do it even
4 if you sever me.

5 MR. NICHOLAS SMITH: The reason I'm telling the Court
6 this is because we're giving contest if the Court is inclined
7 to go ahead with the morning.

8 THE COURT: All right. I mean, I told you already
9 that I -- assuming the rule is what you say -- and I don't
10 doubt that -- that I would do it in the afternoon. So I'm
11 going to accommodate you on that.

12 MR. NICHOLAS SMITH: Thank you, Judge.

13 THE COURT: All right. Very well. Everyone have a
14 good weekend.

15 The parties are dismissed.

16 (Proceedings were concluded at 3:04 p.m.)
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CERTIFICATE OF STENOGRAPHIC OFFICIAL COURT REPORTER

I, Nancy J. Meyer, Registered Diplomate Reporter,
Certified Realtime Reporter, do hereby certify that the above
and foregoing constitutes a true and accurate transcript of my
stenograph notes and is a full, true, and complete transcript
of the proceedings to the best of my ability.

Dated this 21st day of November, 2022.

/s/ Nancy J. Meyer
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