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

UNITED STATES OF AMERICA v. MICHELLE MACCHIO OLIVER HARRIS BRITTNE LAWSON EMILY HORSTMAN MARISA MATTHEWS JENNIFER ARMENTO	Crim Nos. 2017 CF2 001183 2017 CF2 001193 2017 CF2 001237 2017 CF2 001254 2017 CF2 001256 2017 CF2 001284 HON. LYNN LEIBOVITZ

NOTICE OF FILING

The American Civil Liberties Union of the District of Columbia files herewith its proposed amicus brief in this action. Our motion for leave to file this brief was filed on October 13, 2017 and remains under advisement. A hearing on the issues addressed by this brief is scheduled for October 20, 2017 at 9:30 a.m.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF DEFENDANTS' MOTION FOR A PRE-TRIAL HEARING ON THE ADMISSIBILITY OF ALLEGED CO-CONSPIRATOR STATEMENTS AND MOTION FOR JURY INSTRUCTION ON *STRICTISSIMI JURIS*

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INTRODUCTION

On January 20, 2017, thousands of concerned citizens took to the streets of the District of Columbia to protest the incoming presidential administration. More than 200 people were arrested after a smaller number of people engaged in property destruction in the vicinity of Franklin Square. Among those arrested were journalists, legal observers, and others who did not participate in the destruction of property. Now, the government seeks to prove that each of the defendants in these cases was a member of a criminal conspiracy to riot. Although the government has apparently designated no evidence "that any of the Moving Defendants were involved in planning the protest, engaged in any acts of violence or destruction, or otherwise directed others to engage in such acts," Defs. Memorandum in Support of Motion for a Pretrial Hearing Regarding Alleged Coconspirator Statements and an Order Excluding Evidence of Acts of Property Destruction or Violence Committed by Non-November 20, 2017 Trial Date Co-Defendants or Other Third Parties, at 11, the government seeks to hold each of them criminally liable for the actions of those who did. To do so, the government intends to introduce statements and actions of alleged co-conspirators against these defendants. Gov. Omnibus Opp. to Pretrial Mots., at 14.

However, the vital First Amendment speech and associational interests underlying many people's participation in the January 20th protests trigger a set of special protections under the doctrine called *strictissimi juris*, established by the Supreme Court, which applies in situations in which some participants in lawful First Amendment activity are alleged to have engaged in criminal behavior. In order to ensure that individuals who were exercising First Amendment rights are not convicted based merely on their association with those who broke the law or chilled from exercising those vital rights for fear of such conviction, *strictissimi juris* requires courts to apply stricter-than-usual evidentiary standards to the admissibility, and the consideration, of others' acts

and words. As one leading scholar of the doctrine has put it, *strictissimi juris* requires that "courts protect individuals' First Amendment rights to associate by taking special care to ensure that" criminal liability be "proven as to the individual defendant and . . . not wrongfully imputed from the conduct of the group of which the individual may have been a part." Steven R. Morrison, *Strictissimi Juris*, 67 Ala. L. Rev. 247, 257 (2015).

Based on the constitutional necessity of these protections, the Court should grant Defendants' motion for a pretrial hearing on the admissibility of alleged coconspirator statements and Defendant Emily Horstmans's motion for a jury instruction on *strictissimi juris*.

ARGUMENT

I. The Danger of Convicting People Who Were Lawfully Exercising First Amendment Rights Based on the Criminal Conduct of Others Requires the Application of Heightened Evidentiary Standards.

A. Development of the Doctrine

American jurisprudence has firmly rejected the concept of "guilt by association" in criminal prosecutions. *See, e.g., Uphaus v. Wyman*, 360 U.S. 72, 79 (1959) ("[G]uilt by association remains a thoroughly discredited doctrine[.]"); *Mercer v. United States*, 724 A.2d 1176, 1185 (D.C. 1999) ("[T]his court has admonished against engaging in tactics that promote the concept of 'guilt by association.'"). While "guilt by association is a very dangerous principle" in any criminal case, *Irick v. United States*, 565 A.2d 26, 30 (D.C. 1989), that danger is particularly pronounced in cases in which the underlying facts implicate protected First Amendment expression and association. *See e.g. United States v. Robel*, 389 U.S. 258, 265 (1967) (holding that "guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it," has an impermissible "inhibiting effect on the exercise of First Amendment rights"). This danger is compounded by the possibility of protected but

unpopular speech being used to hold a defendant criminally liable. *See e.g. Street v. New York*, 394 U.S. 576, 594 (1969) ("[W]e are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects."). In cases in which members of a larger group that is engaged in protected First Amendment activity are prosecuted for the activities of a subset who have allegedly committed crimes, the doctrine of "*strictissimi juris*" squarely addresses these dangers by imposing prophylactic safeguards as a form of as-applied constitutional avoidance to prevent criminal convictions for protected speech and assembly.

Strictissimi juris means "[o]f the strictest right or law" or "to be interpreted in the strictest manner." *Strictissimi Juris*, Black's Law Dictionary (10th ed. 2014). The Supreme Court has adopted the concept as a prophylactic to safeguard First Amendment rights in two cases arising from criminal convictions under the "membership" clause of the anti-Communist Smith Act, which made it a crime to advocate the violent overthrow of the U.S. government or to organize or be a member of any group or society devoted to such advocacy. *See Scales v. United States*, 367 U.S. 203, 229 (1961); *Noto v. United States*, 367 U.S. 290, 299 (1961). In *Noto*, the court reversed the membership clause conviction of defendant Francis Noto based in part on the doctrine of *strictissimi juris*. *Noto*, 367 U.S. at 299-300. The Court held that in order to convict for the unlawful advocacy of violence, the government had to prove that the call to violence was "both sufficiently strong and sufficiently pervasive" to "justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." *Id.* at 298 (citation and internal quotation marks omitted). The insufficient evidence of "illegal Party advocacy" was enough to reverse Noto's conviction; however, the court saw fit to discuss the evidence of Noto's individual intent as well. *Id.* at 299. Although the court opined that Noto's

active participation in one of the Party's programs may have been probative of his individual intent, the court cautioned that in membership crimes, all elements, including that of criminal intent, "must be judged *Strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Id*. at 299-300.

In the companion case to *Noto*, *Scales v. United States*, the Supreme Court applied similar reasoning, holding that in order to convict someone of being a knowing member of "any organization which advocates the overthrow of the Government of the United States by force or violence," 367 U.S. at 205 (quoting 18 U.S.C. § 2385), the government must establish "clear proof" of a defendant's specific intent "to accomplish (the aims of the organization) by resort to violence." *Id.* at 229 (quoting *Noto*, 367 U.S. at 299). The court explained that "quasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose, so that all knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned." *Id.* In contrast to the rules applicable to ordinary criminal conspiracies, a "similar blanket prohibition of association with a group having both legal and illegal aims" would create "a real danger that legitimate political expression or association would be impaired." *Id.* As a result, in order to preserve its constitutionality under the First Amendment, the membership clause of the Smith Act had to be construed so that it did "not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent.'" *Id.* (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)). By interpreting the statute to require "clear proof" of an individual's specific intent to advocate immediate violent overthrow, the court ultimately engaged

in a form of constitutional avoidance, ensuring—as a means of protecting the underlying First Amendment interests—that a "member for whom the organization [was] a vehicle for the advancement of legitimate aims and policies" could not be convicted. *Id.* at 229-30.

The First Circuit applied the *strictissimi juris* rule in the context of a conspiracy prosecution in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969). There, the court reversed the convictions of Dr. Benjamin Spock, Rev. William Sloane Coffin, Jr., and two other defendants who had been involved in anti-Vietnam War activities including publishing anti-war statements and attending demonstrations. Two of the defendants participated in a "draft card burning." All were found guilty after trial on a single count of "conspiring to counsel, aid and abet Selective Service registrants to disobey various duties imposed by the [Military Selective] Service Act." *Id.* at 171 (citing 50 U.S.C. § 3811). Unlike an ordinary criminal conspiracy in which the aims are unquestionably illegal, the court concluded that "the ultimate objective of defendants' alleged agreement," namely, "the expression of opposition to the war and the draft, was legal" but that "the means or intermediate objectives encompassed both legal and illegal activity without any clear indication . . . as to who intended what." *Id.* at 169. The court found that the "intertwining of legal and illegal aspects [of the alleged agreement], the public setting of the agreement and its political purposes, and the loose confederation of possibly innocent and possibly guilty participants" raised "the most serious First Amendment problems." *Id.* at 169. Based on the fact that "the substantive purpose of all conspiracy law . . . is directed only at those who have intentionally agreed to further the illegal object," *id.*at 172 (citing *Scales*, 367 U.S. at 229), and the sum of the Supreme Court's First Amendment jurisprudence, the court found that "the defendants were entitled . . . to certain protections before they could be convicted of conspiracy in what we might call a bifarious undertaking, involving both legal and illegal conduct." *Id.*

As articulated by the *Spock* court, the "principle of strictissimi juris" embodies the necessary protections for alleged conspiratorial agreements that are "both bifarious and political within the shadow of the First Amendment" as a form of as applied constitutional avoidance, requiring that courts "make sure that [otherwise facially valid] statute[s] do[] not improperly infringe upon" First Amendment rights "in any particular instance." *Id.* at 173 & n.20 (citing *Street*, 394 U.S. at 576). Applying the principle, the court held that the "panoply of rules applicable to a conspiracy having purely illegal purposes" was "at direct variance" with *strictissimi juris*. *Id.* at 173. In particular — and of particular relevance here — the court found that the trial court erred in admitting "numerous statements of third parties alleged to be co-conspirators," since "[t]he specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof." *Id.* at 173.

The Seventh Circuit's decision in *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), an appeal arising out of the trial of the "Chicago Seven" after the 1968 Democratic National Convention, is perhaps most factually pertinent to the case at hand. The defendants, organizers of the Mobilization Committee to End the War in Vietnam (known as Mobe) and the Youth International Party (known as Yippies) were charged with inciting a riot and conspiracy to incite a riot. They were found guilty at trial only of the incitement charge. *Id.* at 348. The court invoked *strictissimi juris* in evaluating the sufficiency of the evidence of the individual defendants' criminal intent; the doctrine was "necessary to avoid punishing one who participates in such an undertaking and is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means," and also "because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some participants to all others." *Id.* at 392. The court adopted *Spock*'s articulation of the trigger for *strictissimi juris* —

"a bifarious undertaking, involving both legal and illegal conduct," *id.* at 393 (quoting *Spock*, 416 F.2d at 172) — and noted that "this duality would usually exist in an undertaking involving activity of a group . . . out of which a riot arises." *Id.* The *Dellinger* court also adopted the First Circuit's requirement that criminal intent in such circumstances may only be proved using: (1) "the individual defendant's prior or subsequent unambiguous statements," (2) "the individual defendant's subsequent commission of the very illegal act contemplated by the agreement," or (3) "the individual defendant's subsequent legal act if that act is 'clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.'" *Id.* at 393 (quoting *Spock*, 416 F.2d at 173). Those forms of evidence, unlike co-conspirator statements, could prove criminal intent without infringing upon individuals' protected First Amendment rights. *See id.* The *Dellinger* court ultimately found sufficient evidence of intent, based on the defendants' individual acts and statements alone, to satisfy a reasonable trial judge's application of *strictissimi juris* and become questions for the jury. *Id.* at 398-407.

In *Castro v. Superior Court*, 9 Cal. App. 3d 675 (Ct. App. 1970), a California appellate court, relying on *strictissimi juris*, reversed the convictions of several individuals convicted of conspiracy to disturb the peace, based on their participation in a high school walkout in protest of inferior school conditions. *Id.* at 682-94. The prevailing opinion explained that "where the conspirators are admittedly engaged in the exercise of fundamental First Amendment rights," the government could not rely solely on circumstantial evidence to prove "the illegal nature of the conspiracy." *Id.* at 682 (Opinion of Kaus, Presiding J.). It noted that "fundamentally the demonstrations . . . were designed to publicize grievances," *id.*, and as such were entitled to First Amendment protections in the form of applying "more exacting" "substantive and procedural criteria" in the trial court's decisionmaking. *Id.* at 691. The normal evidentiary rules applicable to

conspiracy prosecutions, wherein "[t]he existence of an agreement may be shown by circumstantial evidence," were contrasted with the increased protections required when fundamental First Amendment rights were at stake. *Id.* at 686. Although in ordinary criminal cases, the jury could be permitted to make their own reasonable choices between competing possible inferences from circumstantial evidence, the danger that they would unjustly infringe on First Amendment rights was too great in the context of the case at hand. *Id*. at 691. One of the dangers was the admission of alleged co-conspirator statements in accordance with the standard hearsay exception, which would lead to a defendant being "confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself." *Id.* at 692. Although such evidence would be admissible in the context of a normal criminal conspiracy, "what is permissible when ordinary criminal conduct is involved, frequently comes to grief when tested against the First Amendment." *Id.* Ultimately, the prevailing opinion concluded that, "any rule of law which unnecessarily discourages the exercise of free speech by making it dangerous to engage in certain constitutionally protected activities, must fall." *Id.* at 686-87. Based on the increased "risk of an unjust conviction," which "has a sufficient tendency to induce a constitutionally undesirable self-censorship," the prosecution's use of circumstantial evidence was "too 'insensitive' a tool," since, unlike other forms of conduct, "free speech is not just grudgingly tolerated - on the contrary, it is a national goal to be actively nurtured and encouraged." *Id.* at 698.

More recently, in *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009), the Third Circuit reviewed convictions of animal rights activists for conspiracies to violate the Animal Enterprise Protection Act, commit interstate stalking, and use a telecommunications device to abuse, threaten, and harass. Recognizing that the defendants' activities included First Amendment

aspects, the court recognized that "[t]o establish a conspiracy under these circumstances, the government must "'establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims,'" and that "[t]his evidence must be judged 'according to the strictest law,' or the '*strictissimi juris* doctrine.'" *Id*. at 160 (quoting *United States v. McKee,* 506 F.3d 225, 239 (3d Cir. 2007) (in turn quoting *NAACP* v. *Claiborne Hardware Co.,* 458 U.S. 886, 919 (1982))). Applying "this strict standard," the court upheld the convictions. *Id*.

B. The Scope of the Doctrine

Unsurprisingly, appellate decisions reviewing convictions apply the *strictissimi juris* doctrine to test the sufficiency of the evidence to convict. But the rationale of the doctrine necessarily requires its application at trial, as the First Circuit recognized in *Spock,* holding that the government erred in "introduc[ing] numerous statements of third parties alleged to be co-conspirators." *Spock*, 16 F.2d at 173.

The rights to freedom of speech and freedom of association "are delicate and vulnerable, as well as supremely precious in our society" and "need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). *Strictissimi juris* provides that breathing room in the context of group First Amendment activity that coincides in time and place with unlawful conduct, by requiring courts to take extra protective measures to keep information away from the jury that risks unfairly implicating those who only exercised their First Amendment rights lawfully. Pursuant to that purpose, prophylactic protections, such as a pre-trial hearing on the issue of a predicate conspiracy under Rule 801(d)(2)(E), are an important tool to protect against the potential chilling effect inherent to the prosecution of individuals engaged in core First Amendment speech and association. *See generally* Peter E. Quint, *Toward First Amendment Limitations on the*

Introduction of Evidence: The Problem of United States v. Rosenberg, 86 Yale L.J. 1622, 1646-49 (1977) ("Procedural rules of particular stringency are required where First Amendment values are threatened, in recognition of the fact that First Amendment rights form the 'matrix, the indispensable condition' of other constitutional freedoms." (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937))).

Ultimately, when it comes to the possibility of criminal punishment for First Amendment activity, "[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions." *Button*, 371 U.S. at 433 (citing *Smith v. California*, 361 U.S. 147, 151-154 (1959); *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). For that reason, *strictissimi juris* is not the only example of a prophylactic rule designed to safeguard First Amendment interests in some aspect of the criminal process. For instance, the Supreme Court has required courts to apply Fourth Amendment standards with "scrupulous exactitude" when material to be seized implicates protected First Amendment activity. *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *accord Roaden v. Kentucky*, 413 U.S. 496, 502 (1973) ("The seizure of instruments of a crime, such as a pistol or a knife, or contraband or stolen goods or objects dangerous in themselves, are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards." (citation and internal quotation marks omitted)). Similarly, the First Amendment doctrines of overbreadth and vagueness are meant primarily to oppose "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Button*, 371 U.S. at 433 (citing *Marcus v. Search Warrant*, 367 U.S. 717, 733 (1961)).

The imperative to prevent the chilling of protected speech applies in non-criminal cases as well. For instance, the First Amendment creates heightened standards for otherwise valid tort suits.

See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring "actual malice" in order to hold a newspaper liable for defamation against a public figure, based primarily on the danger of "chilling effect" to protected speech); *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) ("The Free Speech Clause of the First Amendment—'Congress shall make no law . . . abridging the freedom of speech'—can serve as a defense in state tort suits").

Similarly, the Supreme Court has applied the *Scales* and *Noto* rule in the civil context by requiring that plaintiffs prove individual unlawful conduct or intent in civil lawsuits against members of a larger group engaged in First Amendment activity. *See Claiborne Hardware Co.*, 458 U.S. at 920 ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."). Although *Claiborne* involved a legal proceeding whose standard of proof, like a court's determination under Rule 801(d)(2)(E), was merely "more likely than not," the court found that the "sensitive field" of First Amendment associations forbids the State from employing any "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

Like the *Times v. Sullivan* rule and the "scrupulous exactitude" principle, the *strictissimi juris* doctrine provides the necessary "breathing space" for the lawful exercise of First Amendment rights of many without the threat of undue prosecution and conviction based on the unlawful acts of a few. Without its protections, a citizen who would otherwise be interested in joining a First Amendment demonstration might be deterred based on a legitimate fear of criminal prosecution if a small number of the larger group begins to act unlawfully. This sort of chilling effect is exactly

what the First Amendment, and its subsidiary doctrine of *strictissimi juris*, is meant to prevent. In this context, the doctrine puts a necessary thumb on the scale in favor of taking extra protective measures, and strictly analyzing legal questions, to ensure that the jury is not presented information that is likely to unfairly prejudice an individual based solely or primarily on guilt by association.

II. The *Strictissimi Juris* Doctrine is Directly Applicable to This Case.

In Amicus's view, based on news reports, publicly-available video recordings, and interviews with a number of participants and witnesses, it is indisputable that the primary purpose of the demonstration originating at Logan Circle on January 20, 2017 was to express a political opinion about the inauguration of Donald Trump and his incoming administration. *See* Charlie Beckerman, *11 Most Creative Inauguration Protests in the D.C. Area and How You Can Join Them*, Bustle (Jan. 18, 2017) (listing the demonstration originating in Logan Circle alongside other actions such as "Climate Convergence," "The Future is Feminist Counterinaugural Action," and "Inaugurate the Resistence"), https://www.bustle.com/p/11-most-creative-inauguration-protests-in-the-dc-area-how-you-can-join-them-31294. Unlike cases in which courts have held *strictissimi juris* did not apply because the alleged criminal activity did not arise in any First Amendment context, *see, e.g., United States v. Cerilli*, 603 F.2d 415, 421–22 (3d Cir. 1979) (coercive solicitation in violation of the Hobbs Act); *United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991) (forcibly impeding the service of federal search warrants by setting up roadblocks); *United States v. Marzook*, 03 CR 0978, 2005 WL 3095543, at *6–7 (N.D. Ill. Nov. 17, 2005) (racketeering); *United States v. Stone*, 848 F. Supp. 2d 719, 723 (E.D. Mich. 2012) (seditious conspiracy and conspiracy to use weapons of mass destruction), the government cannot establish here that the sole purpose of the demonstration at issue in this case was criminal, or that all participants were intent on breaking the law. Rather, as in *Spock*, the group's "primary object was

publicity." *Spock*, 416 F.2d at 169. As a result, even if the government's factual allegations of illegal conduct by some participants are true, the group that participated in the "Disrupt J20" demonstration can fairly be described as a "bifarious undertaking involving both legal and illegal conduct" that is well "within the shadow of the First Amendment." *Id.* at 172, 173. Thus, the doctrine of *strictissimi juris* applies.

III. The Court Should Grant Defendants' Motion for a Pretrial Hearing on the Admissibility of Alleged Co-Conspirator Statements and Defendant Horstmans's Motion for a Jury Instruction on *Strictissimi Juris*.

The doctrine of *strictissimi juris* and the important constitutional principles it implements should compel the Court to protect the First Amendment interests at stake in this case by granting the motion for a pre-trial hearing on the admissibility of alleged co-conspirator statements and for a jury instruction on *strictissimi juris*.

A. The Court Should Hold a Pre-Trial Hearing on the Admissibility of Co-conspirator Evidence

The Court should hold a pre-trial hearing on the existence of, and defendants' participation in, an unlawful conspiracy. Although the D.C. Court of Appeals has indicated that pre-trial hearings are not generally required for 801(d)(2)(E) rulings, the crucial First Amendment associational implications of this case, and the necessary application of the *strictissimi juris* doctrine, constitute the sort of "very unusual circumstances" contemplated by the Court of Appeals in *Butler v. United States*, 481 A.2d 431, 441-42 (D.C. 1984) (holding that the existence of the conspiracy must be proved to be "more likely than not" in order to admit coconspirator statements); *cf. Jenkins v. United States*, 80 A.3d 978, 989-90 (D.C. 2013) (holding that only "independent, non-hearsay evidence" may be considered in establishing the predicate conspiracy).

As in every case in which the government wishes to introduce the statements of alleged co-conspirators, in addition to showing that the statements themselves were made "during the course

of and in furtherance of the conspiracy," the government must prove that it was "more likely than not," based solely on "independent, non-hearsay evidence," that (1) an agreement to engage in specific criminal activity existed among members of the Disrupt J20 demonstration, and (2) that each of the defendants in this trial was a party to that agreement. *See Jenkins*, 80 A.3d at 989-90; *see also, e.g. United States v. Perholtz*, 842 F.2d 343, 356 (D.C. Cir. 1988) ("In order to admit co-conspirator statements, the trial judge must determine that a conspiracy existed, that the co-conspirator and the defendant against whom the statement is offered were members of the conspiracy, and that the statements were made in furtherance of the conspiracy."). Courts have run afoul of the *strictissimi juris* principle by improperly admitting co-conspirator statements. *See Spock*, 416 F.2d at 173 (holding that, under *strictissimi juris*, "the conduct or statements of another" could not be admitted in order to prove "[t]he specific intent of one defendant in a case" involving First Amendment protected group activity).

Holding a pre-trial hearing on the admissibility of alleged co-conspirator statements will serve several vital purposes. First, it will enable the Court to isolate and closely scrutinize the government's evidence of the predicate conspiracy and the defendants' involvement in it. *Cf. Tann v. United States*, 127 A.3d 400, 463-64 (D.C. 2015) (agreeing that there was "justification" for trial judge's concern, "given the number of (charged and uncharged) coconspirators," for "tightly controlling the admission of coconspirator statements"). In the context of a group clearly intended to be, at least in part, a political demonstration protected under the First Amendment, to prove each defendant's "membership" or "involvement" in whatever unlawful purpose the group also had, the government would have to show that it was more likely than not that either (a) each individual defendant demonstrated specific intent to further the unlawful goals, as opposed to the lawful expressive goals, of the protest, or (b) the unlawful goals of the conspiracy were "sufficiently

strong and sufficiently pervasive" to "justify the inference that such a call to violence may fairly be imputed to the [demonstration] as a whole, and not merely to some narrow segment of it." *Noto*, 367 U.S. at 298. This evidence is essential both to the Court's decision as to the applicability of the co-conspirator hearsay exception and in weighing the probative value of both alleged co-conspirator statements and alleged co-conspirator acts against their potential for undue prejudice. *See, e.g. Punch v. United States*, 377 A.2d 1353, 1358 (D.C. 1977) (even regarding relevant evidence, trial judge must weigh probative value against risk of prejudicial impact); *cf.* Defs. Memorandum in Support of Motion for a Pretrial Hearing Regarding Alleged Coconspirator Statements and an Order Excluding Evidence of Acts of Property Destruction or Violence Committed by Non-November 20, 2017 Trial Date Co-Defendants or Other Third Parties, at 14 ("[E]vidence regarding violent or destructive conduct by alleged coconspirators who are not on trial with the Moving Defendants will be highly prejudicial. The limited probative value, if any, of such evidence is outweighed by that prejudice."). Because the significant First Amendment interests at stake require close scrutiny of these evidentiary questions, a pre-trial hearing on these issues will be more efficient and more likely to lead to an unhurried and therefore correct decision than a ruling in the heat of trial.

Conducting a pre-trial hearing regarding the admissibility of co-conspirator evidence will also conserve judicial resources and allow both the government and the Defendants to prepare for trial knowing whether such evidence will be admissible, and thus, how best to present their respective cases. Absent a pre-trial hearing, the Court will be required to rule mid-trial on the predicate 801(d)(2)(E) questions as well as the potential prejudicial impact of co-conspirator statements as compared to their probative value. There are likely to be extended sidebar conferences, which would cause a significant interruption to the government's case-in-chief and

intrusion upon the jury's time. And both the government and defendants would have to formulate multiple alternative trial strategies in preparation for trial because they would not know in advance whether the co-conspirator statements would ultimately be admissible. Defense attorneys appointed under the Criminal Justice Act would need to be compensated by the Court for this additional preparation.

A pre-trial hearing would also protect against the significant risk—in the event the government is ultimately unable to meet its burden in meeting the predicate requirements of 801(d)(2)(E) or its substantive burden of proving individual intent—that the jury would improperly use the evidence initially presented regarding the predicate conspiracy and defendants' involvement as "guilt by association" evidence in favor of conviction. Although limiting instructions would be required at that point, the jury would not be able to unhear the evidence it already heard. *See*, *e.g. Thompson v. United States*, 546 A.2d 414, 425-26 (D.C. 1988) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (quoting *Krulewitch v. United States,* 336 U.S. 440, 453 (1949) (Jackson, J. concurring))). The danger of such jury taint is particularly troubling when the alleged conspiracy is closely connected with First Amendment activity. *See*, *e.g.*, *Castro*, 9 Cal. App. 3d at 692 (noting the danger of the co-conspirator hearsay exception with respect to juror prejudice in the context of conspiracy prosecutions arising from First Amendment demonstrations). Indeed, in amicus's view, the very considerable likelihood that the government will not be able to demonstrate by a preponderance of the evidence that each of the defendants in this trial was a party to any conspiracy to engage in criminal behavior provides an additional strong reason to hold a pre-trial hearing, because a pre-trial ruling may cause the government to dismiss some or all of the pending charges before trial.

The Court should therefore exercise its discretion to allow a pre-trial hearing to ensure that the admissibility questions can be closely and independently scrutinized, to allow for a smoother trial for all parties, and to properly safeguard against the jury improperly using evidence that *other* individuals broke or intended to break the law against those who only intended to lawfully exercise their constitutional rights.

B. The Court Should Instruct the Jury that the First Amendment Requires Special Sensitivity in this Case

Additionally, the Court should grant Defendant Emily Horstman's motion for a jury instruction on *strictissimi juris*. As the ultimate factfinders in the case, the jury should be familiarized with the important First Amendment interests at stake and with the strict requirements of individual intent the government is required to prove in order to convict. Such a jury instruction should "inform the jury that it must consider the evidence under a heightened level of scrutiny, remind them that they cannot impute guilt from the group to the individual, and remind them that they play a role not only in determining guilt, but also in protecting defendants' First Amendment rights." Morrison, *supra*, at 280.

CONCLUSION

For the foregoing reasons, the Court should apply the doctrine of *strictissimi juris* to the case at hand, and grant Defendants' motion for a pre-trial evidentiary hearing on the admissibility of alleged co-conspirator evidence as well as Defendant Horstman's motion for a jury instruction on *strictissimi juris*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing has been served on the United States Attorney's Office for the District of Columbia and all counsel of record by e-filing and/or electronic mail, on this 17th day of October, 2017.

/s/ *Shana Knizhnik*
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