**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **No. 1:25-CR-76-JMC** |
| | ) | |
| **CORTNEY MERRITTS,** | ) | |
| **Defendant.** | ) | |

**DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION TO RECONSIDER ORDERS DENYING MOTION TO DISMISS FOR SELECTIVE PROSECUTION AND ORDERS CONCERNING FORMER CONGRESSWOMAN CORI BUSH**

When reading the Government's opposition (Doc. 51), it is easy to lose sight of the fact that three important premises remain undisputed: *first*, the Government splits hairs over whether they "hid" the critical documents at issue from the defense and from this Court but in no way disputes that they were not previously disclosed even though they have existed for more than 18 months; *second*, the Government disputes that this investigation was motivated by Merritts's marriage to former Congresswoman Cori Bush but cannot and does not dispute that one investigative agency that participated in this investigation documented in its internal records that this investigation would be "impactful" precisely because it would generate "media attention since he is the husband of a congresswoman"; and *third*, the Government takes pains to argue with a straight face that Merritts was never a "target" of the campaign funds investigation but does not dispute (a) that the response to Question 2(c)(i) of the IRS-CI document asking about "Notoriety ***of Target***" (emphasis added) identifies Merritts as the "target" and states he is "the husband of Congresswoman Cori Bush", and (b) that the U.S. Attorney's Office's May 19, 2023 letter to IRS-CI identifies *both* Cori Bush and Cortney Merritts in the same category as each other, stating this was "an ongoing grand jury investigation of CORI BUSH, CORTNEY MERRITTS, [and others]" even though the entire premise of the Government's position in this case has been that, with respect to that investigation, Bush and Merritts fell into different categories.

But what particularly stands out about the Government's response is that it raises more questions than answers and that the prosecution is continuing to double down on revisionist history—because the actual history establishes a clear-cut constitutional violation. In this respect, the Government asserts that IRS-CI "*declined*" (italicized in Government's pleading) to participate as an investigative agency in this federal PPP loan fraud investigation—which the Government maintains is separate and distinct from the campaign funds investigation. *See* Doc. 51 at 4. And the Government even goes so far as to state, "That is why the agent did not initial the case opening document…why there is blank space next to 'Date Initiated' on that document, and why none of the *draft* documents in the package bear the signature of any IRS official." *Id*. "Accordingly," the argument continues, "all the defendant's arguments about who approved the instant investigation or their motive for doing so are also without merit." *Id*. As to this core response, the Government's date stamp of the documents is critical: "Importantly, all the documents at issue were drafted on or before May 1, 2024…" *Id*. at 3. Thus, the Government's argument ultimately boils down to this: on May 1, 2024, IRS-CI *considered* an invitation to participate in this separate PPP loan fraud investigation targeting Merritts and "declined," therefore the statements in IRS-CI's internal agency memoranda are not relevant.

The documentary paper trail in this case establishes that IRS-CI *did* participate in this investigation—not that IRS-CI supervisors considered participating and decided not to. On April 19, 2024—12 days ***before*** IRS-CI purportedly "declined" to participate in this federal criminal investigation targeting Merritts, an attorney from DLA Piper LLP emailed the two FBI special agents on this case ***and the IRS-CI special agent*** (Joaquin Sequeira) and referenced a grand jury subpoena in this case issued to its client that is directly tied to the allegations in this indictment:

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**From:** Jones, Emma <Emma.K.Jones@us.dlapiper.com>
**Sent:** Friday, April 19, 2024 10:47 PM
**To:** Mehochko, Daniel A. (WF) (FBI) <damehochko@fbi.gov>; Major-Waithe, Asia (WF) (FBI) <AMAJOR-WAITHE@fbi.gov>; Joaquin.Sequeira@ci.irs.gov <Joaquin.Sequeira@ci.irs.gov>
**Cc:** Masella, Jessica A. <jessica.masella@us.dlapiper.com>
**Subject:** [EXTERNAL EMAIL] - Prestamos - Grand Jury Subpoena

Special Agent Mehochko,

We represent Prestamos and write regarding a grand jury subpoena (GJ078) that you served on Jose Martinez for his appearance/testimony in D.C. on May 7, 2024. Are you available Monday or Tuesday afternoon to speak about this subpoena and matter?

Best,
Emma

Emma Jones
Associate

This reflects, despite the Government's assertion to the contrary, that IRS-CI was *already participating* in this federal criminal investigation targeting Merritts while memorializing in internal memoranda less than two weeks later that the investigative agency's appeal of targeting Merritts in this $22,000 PPP loan fraud case was that he was married to a sitting member of the United States House of Representatives *and* that he was working on her campaign. That the Government is continuing to maintain that the two investigations were "unrelated" (even though there was clearly just one "ongoing investigation" in the words of the U.S. Attorney's Office in 2023) and that Merritts was not a target of the investigation (even though he was expressly identified as a "target" in IRS-CI documentation drafted 12 days *after* email correspondence clearly reflects IRS-CI was already involved) is disingenuous at best—and, at a minimum, warrants further discovery and factfinding by this Court.

Moreover, instead of accepting responsibility for its incorrect representations before this Court and the fact that those misrepresentations clearly prejudiced Merritts, the Government tries to shift the blame *to the defense*: "The record demonstrates that all the parties were less than artful in their use of the word 'target' during the pretrial hearing and may have been using the term in a colloquial fashion to indicate that the defendant was not the focus of the campaign funds investigation." *See* Doc. 51 at 10. But "all the parties" were not "less than artful." *Id*. The defense has been clear from the outset: there was one ongoing federal criminal investigation (not two unrelated ones) and Merritts was a target of that one ongoing investigation as evidenced by the May 2023 U.S. Attorney's Office letter. It was the Government that was less than candid—well beyond "less than artful" in its terminology.

This Court even incorporated the Government's misrepresentations in its own questions and analysis, stating, "Can I hear from defense counsel? One is, I forgot to ask you your response to the government's argument about the mismatch, meaning, you know, ***maybe this would be a closer question if Ms. Bush were the defendant***. ***But because Mr. Merritts was not the target of the investigation***, this idea that, you know, you had to find something, doesn't that suggest that they would have -- ***if they were going to kind of pin something on someone, wouldn't they pin it on the target of their investigation?***" (*Id*. at 63) (emphasis added). At that moment, the Government did not say, "Your Honor, neither Congresswoman Bush nor Mr.

Merritts were targets but both were in the same boat" or something along those lines. Instead, the Government stood silent while this Court ruled against Merritts without ever notifying this Court that its May 19, 2023 letter placed Congresswoman Bush and Cortney Merritts in the exact same category. Thus, even if for the sake of this discussion they were not "targets" of the campaign funds investigation—which, by the Government's curious analysis, would mean it was a federal grand jury investigation using the full force of the grand jury to investigate a sitting United States Congresswoman with no target[1]—that is ultimately beside the point because they were in the exact same category and the Government persuaded this Court to make a ruling predicated on the notion that they were in different categories.

To be clear, and as set out in detail in the underlying motion, at least one agency that participated in this investigation—IRS-CI—expressly targeted Merritts because he was married to Congresswoman Bush. The Government's response that "the agent did *not* identify Congresswoman Bush's party" is as hollow as it is offensive: it was widely known, including by federal agents with the IRS and by anybody with access to Google, that Congresswoman Bush was an outspoken Democratic (a member of a group commonly called "The Squad" and a member of Congress known to challenge her own political party) who was frequently as critical of the Biden administration as she was of the Trump administration. (For example, she publicly voted against Biden's infrastructure plan (as one of only six Democrats) and she openly criticized the Biden Administration's expansion of Title 42 as "unconscionable.") IRS-CI's decision to target Merritts because of the elected official to whom he is married is not, as the Government argues, "akin to noting that the defendant was married to a famous athlete or actress and thus that he had notoriety derived from that person's fame." *See* Doc. 51 at 5. Not even close. Instead, it is akin to noting that the defendant was married to an elected official (which is very different from a famous athlete or actress because Congress is a co-equal branch of government to the Executive Branch and Congresswoman Bush was an elected representative) *and* that he personally worked on that elected official's campaign (which is very different from simply being married to somebody and therefore being known because of that spouse's "fame"). It is profoundly concerning that the

[1] To be clear, there is no credible universe in which the U.S. Department of Justice and its Public Integrity Section was actively pursuing a grand jury investigation of a sitting member of the U.S. House of Representatives and even serving subpoenas on the U.S. House of Representatives itself—without a single target of that investigation.

Government is arguing to this Court that a person *can* be criminally targeted for being married to an elected official and actively working on her political campaign.

This is why we have courts—because what the documents reveal the Government did in this case is plainly unconstitutional. To that end, the Government remarkably argues, "The defendant has offered no authority, and the government is aware of none, to support the proposition that being a person of note, or the spouse of a person of note, constitutes a protected class." *Id*. at 5, fn. 3. But that is just the Government building a strawman and knocking it down—instead of grappling with the actual judicial precedent.

In *Judd*, the United States District Court for the District of Columbia, relying on the D.C. Circuit's binding precedent in *Branch Ministries*, expressly held, "the Government cannot base its decision to prosecute on some unjustifiable standard, such as a defendant's 'political beliefs.'" In other words, as the Second Circuit explained, Merritts cannot be "singled out." *United States v. Fares*, 978 F.2d 52, 59 (2d Cir. 1992). In its response, the Government does not grapple with, let alone even acknowledge, this case law—and for good reason: there is no response. The law prohibits targeting a person based on "some unjustifiable standard" including, but not limited to, "a defendant's 'political beliefs'" and internal IRS-CI memoranda reflect that is precisely why Merritts was targeted. Interestingly, in *Branch Ministries*, the D.C. Circuit ordered discovery because the litigant in that case "could not be expected to have access to internal IRS documents, witness statements or other direct evidence of discriminatory intent." *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 21 (D.D.C. 1999), aff'd 211 F.3d 137 (D.C. Cir. 2000). And the Government in this case even opposes that discovery—because the Government knows what it will further reveal.

The evidence of discriminatory purpose is overwhelming and the evidence of discriminatory effect—that Merritts was treated differently because of his marriage to Congresswoman Bush and his work on a Democratic elected official's campaign—is reflected by the direct evidence contained within the IRS-CI documents and the circumstantial evidence explaining why this person was targeted for a $22,000 alleged fraud scheme. But what is most telling is that the Government opposes *discovery and further fact-finding* on these issues. For instance, the Government asserts based on no evidence before this Court that the IRS-CI special agent was simply motivated by promoting "general deterrence" and "wanted to ensure the investigation was approved at the correct level of supervision." *See* Doc. 51 at 6. First, there is no evidentiary support for those assertions. And second, the Government's position is totally inconsistent with the fact that IRS-CI Special Agent Joaquin Sequeira was *already* participating in this investigation (explaining why he was on email correspondence from DLA Piper related to a grand jury subpoena to one of the PPP loan processors) *before* the prosecution claims he "wanted to ensure the investigation was approved at the correct level of supervision." *Id*. This glaring inconsistency (among many others) is a reason to permit discovery and necessary fact-finding—to the extent that is even necessary given the record that already exists—*not* to deny it.

Ultimately, for these reasons and all those set out in the underlying motion, Merritts requests that this Court reconsider his motion to dismiss for selective prosecution and dismiss this case because it was clearly unconstitutionally politically motivated. In the alternative, Merritts requests that this Court permit discovery on the motion for selective prosecution, set this matter for an evidentiary hearing, and reconsider all of its previous rulings related to Congresswoman Bush given what actually transpired.

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Embedded in its response, the Government has apparently moved this Court to quash three trial subpoenas to IRS-CI witnesses. While this is not a procedurally proper way to lodge this motion, the defense will nevertheless respond out of an abundance of caution.

As an initial matter, the defense both complied with the arguably applicable *Touhy* regulations for compelling the testimony of IRS employee witnesses and served trial subpoenas to appear at trial. Curiously, the Government states that these "subpoenas appear to have been served on the assumption the Court would grant his request for discovery in support of his selective prosecution motion." *See* Doc. 51 at 1. But that is not the case and the *Touhy* regulations letter sent to Government counsel sets out that these are subpoenas for testimony "at the trial of this case." In fact, the defense is requesting that this Court dismiss the indictment for selective prosecution as the law requires or, in the alternative, that this Court permit the parties to engage in further discovery concerning those issues. But given the current trial date notwithstanding these unexpected developments, the defense issued subpoenas in the event this case does proceed to trial on the currently scheduled date.

The subpoenas were issued to IRS-CI Special Agent Joaquin Sequeira, who literally participated in this federal criminal investigation targeting Merritts even though he apparently sought approval to do so *afterwards* and his request was apparently denied, and he is *also* the undisputed author of the internal IRS memorandum targeting Merritts for his marriage to Congresswoman Bush and for his work on her congressional campaign. The Government effectively acknowledges that he is a potential witness with relevant testimony but states the Government "does not expect to call [him] as a witness at trial." *Id*. at 12. But that is irrelevant. The defense expects to call him as a witness at trial. That is why the trial subpoena was issued and there is no legal basis to quash it. And to the extent the Government is arguing that impeachment evidence is not applicable just because the prosecution opts not to call a material witness, the law clearly states otherwise. *See* Fed. R. Evid. 607 ("Any party, including the party that called the witness, may attack the witness's credibility"). And it cannot reasonably be disputed that impeachment of a witness concerning his bias and prejudices is entirely proper. *See, e.g., Davis v. Alaska*, 415 U.S. 308, 316–17 (1974) ("A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination") (citing 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970); *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

The remaining two subpoenas are for individuals listed on the newly-disclosed IRS-CI records: IRS-CI Special Agent in Charge Kareem Carter (who was the direct supervisor in the D.C. field office of IRS-CI Special Agent Sequeria), and IRS-CI Chief Guy Ficco (who is listed as the author of a draft document the prosecution now claims without any evidentiary support he did not write). There is no basis to quash either of these two subpoenas as they both appear as the *named author* of documents directly related to the federal criminal investigation of this case against Merritts.

Respectfully submitted,

**Margulis Gelfand DiRuzzo & Lambson**

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**Certificate of Service**

I hereby certify that the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the Office of the United States Attorney and all other counsel in this case.

*_/s/ Justin K. Gelfand_*
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