

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

**UNITED STATES OF AMERICA** :  
 :  
 v. : **Criminal No. 21-cr-312 (JEB)**  
 :  
 **BRADLEY STUART BENNETT,** :  
 :  
 **Defendant** :

**UNITED STATES’ OPPOSITION TO DEFENDANT’S  
MOTION TO DISMISS COUNT ONE OF THE INDICTMENT**

**I. Introduction**

Defendant Bradley Bennett seeks dismissal of the sole felony charge in the Indictment claiming that the United States Attorney’s Office unfairly targeted him because he is a man. ECF No. 97 (Motion to Dismiss Count One”). In the alternative, he seeks discovery to support this claim. *Id.* Bennett cannot meet the “rigorous” standard required to obtain discovery on a selective prosecution claim, let alone the higher “demanding” standard to prove one. *United States v. Stone*, 394 F. Supp. 3d 1, 30 (D.D.C. 2019). His Motion must be denied.

To obtain discovery on a selective prosecution claim, Bennett must show some evidence of both discriminatory intent and discriminatory effect. Bennett fails to meet this standard. Though his female co-defendant, Elizabeth Williams, was not charged with a felony, she is not similarly situated to Bennett—she did not destroy evidence, become a fugitive—and, at the time the prosecutor made charging decisions, the government did not have significant evidence of her statements, including statements about storming the Capitol. And he has not alleged, let alone offered evidence, that the government charged him with a felony because he is a man. The government sought a felony charge against Bennett in this case because it developed evidence that, in unlawfully entering the Capitol on January 6, 2021, Bennett’s intent was to obstruct the

certification of the 2020 Presidential election results. Bennett is not a victim of selective prosecution. Rather, he is a defendant who committed serious offenses on January 6, 2021.

## **II. Background**

### **a. Bennett's Conduct Before and On January 6, 2021**

These charges stem from Bennett's unlawful conduct at the U.S. Capitol on January 6, 2021. On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd, including Bennett, gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress were halted until law enforcement was able to clear the Capitol and its grounds of the thousands of unlawful occupants and ensure the safety of elected officials.

In the months leading up to January 2021, Bennett sent messages and posted on Facebook about the certification proceeding. For example, on November 17, 2020, Bennett posted on Facebook that he was "in the loop of information" and knew about the upcoming "Constitutional process" involving "an electoral college, Congress and SENATE certification by Vice President Pence" that would officially decide who would be the "President-elect":

**Time** 2020-11-17 21:28:51 UTC  
**Type** Videos  
**Summary** As we all with basic common sense truly know, the media does not call these legal matters like a President-elect lol. Don't make me laugh.. There is a Constitutional process for that. It's an electoral college, Congress and SENATE certification by Vice President Pence. Social media sure as hell doesn't. There is a mountain of evidence gathering now + massive release happening. The Supreme Court will rule. It will flip. I'm in the loop of information and Im here to confidently tell you that POTUS will absolutely 100%, unequivocally STAY IN.. based on law and Constitutional provisions for these situations, like the enormous amount of fraudulent electronic and digital vote switching and hundreds of pages of spent and signed affidavits of Eyewitnesses seeing systematic election cheating/ asked to cheat. DOMINION SOFTWARE is at the center of this. The US ARMY seized servers.. some in Germany as early as election night and found evidence of the fraud. Here's what went down.. they created algorithms to discreetly switch votes Trump to Biden inside machines, but after seeing just how many millions of fed up people voted Trump, they couldn't make up the cheat difference needed to win, so they stopped all counting so trump numbers couldn't rise further. They then trucked in all the illegal non-official ballots in the cover of night on election night and we all awoke to wonderful magic tricks done as Biden passed Trumps lead overnight. But they're caught red-handed. I will guarantee On my life he stays. We won! □□□□ Key pictures in comments to see also!

*Image 1: Post from Bennett's Facebook Page*

And, on December 14, 2020, the day the electoral college met in each of the states, Bennett sent a message to his then-girlfriend Elizabeth Rose Williams identifying “January 6” as the “official...vote day” in Congress:

Couple pointers today as electors vote. 1. Pa Nevada GA voted Trump Pence 2. Those for example on the Michigan vote session in Congress illegally selecting Biden, are knowingly defrauding the American voters and literally signing their TREASON evidence on these documents and are about pay dearly. 3. January 6 is the official UNITED STATES CONGRESS vote day and 1/20 is the true day that matters. Stay cool & watch how awesome the next scene is for FREEDOM!!

A few days later, Bennett posted on Facebook about making “EPIC HUGE noise” at the Capitol on January 6, 2021:

**Time** 2020-12-28 21:44:46 UTC  
**Message** Who's headed to the nations CAPITOL to make some EPIC HUGE noise with 1 million PATRIOTS January 6?! Sounds like a massive event coming together to be a part of history! □□□□

*Image 2: Post from Bennett's Facebook Page*

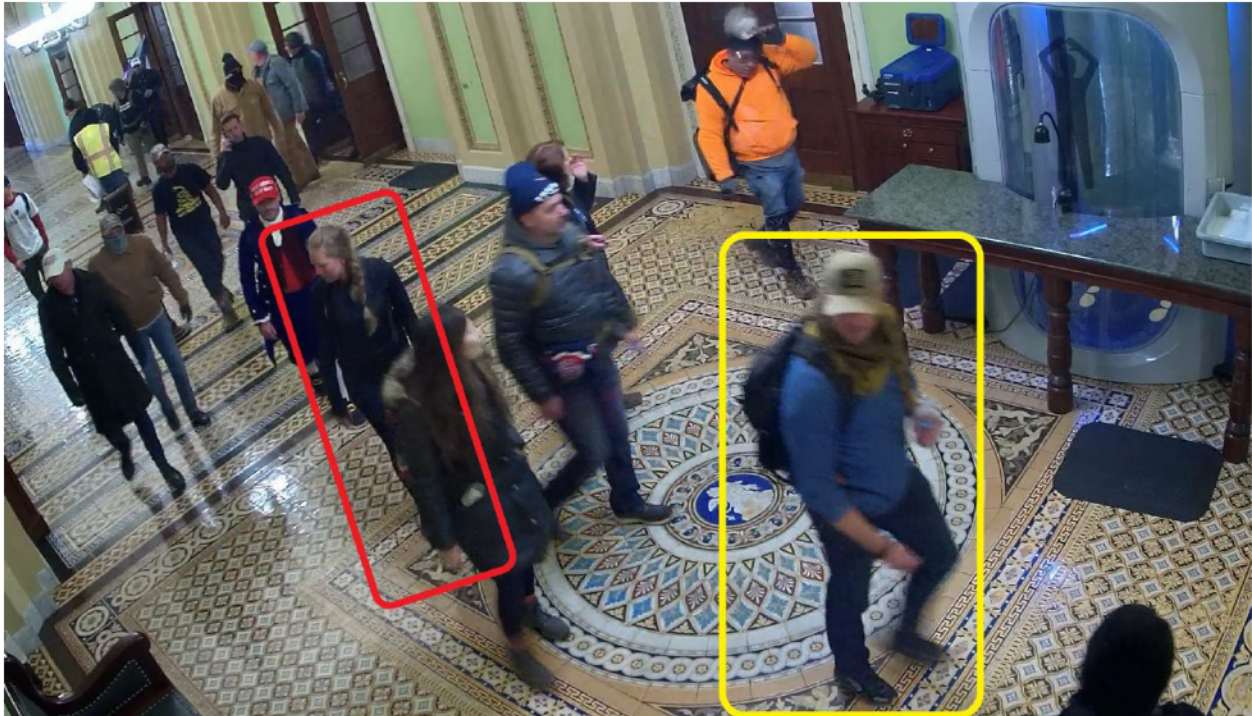
On January 6, 2021, Bennett attended the former President's rally. Following the former President's rhetoric about a stolen election, Bennett and Williams began walking towards the Capitol. As they walked, Williams filmed a video of Bennett saying:

What's up everybody. Brad and Rosie here from Texas and Carolina. We're headed to the United States Capitol right now. Here we go. A couple hundred thousand people.

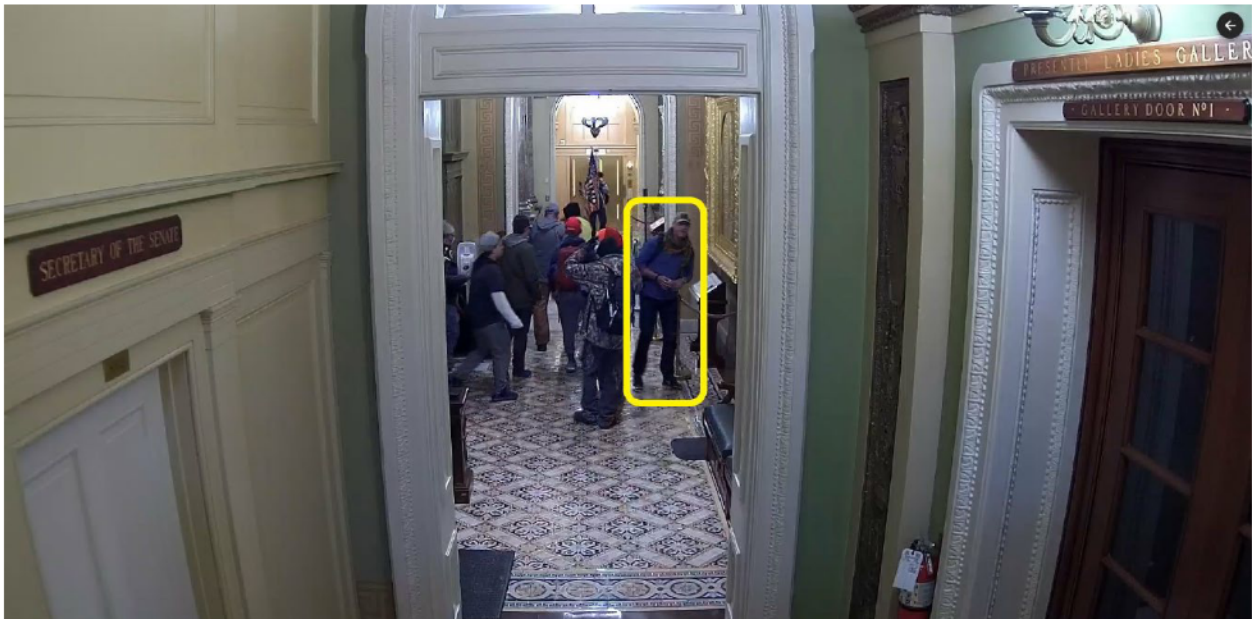
Once Bennett and Williams reached the restricted Capitol grounds, they joined a large crowd by the scaffolding for the inaugural stage. They made their way up to the North West Terrace of the Capitol, and went into the Capitol through a broken-out doorway known as the Senate Wing Door. Once inside, Bennett and Williams walked south through the Crypt and went upstairs to the Rotunda. From the Rotunda, they went up the Gallery Stairs, and went into the Senate Gallery.



*Image 3: Bennett (circled in yellow) walking towards the Senate gallery at approximately 2:41 p.m.*



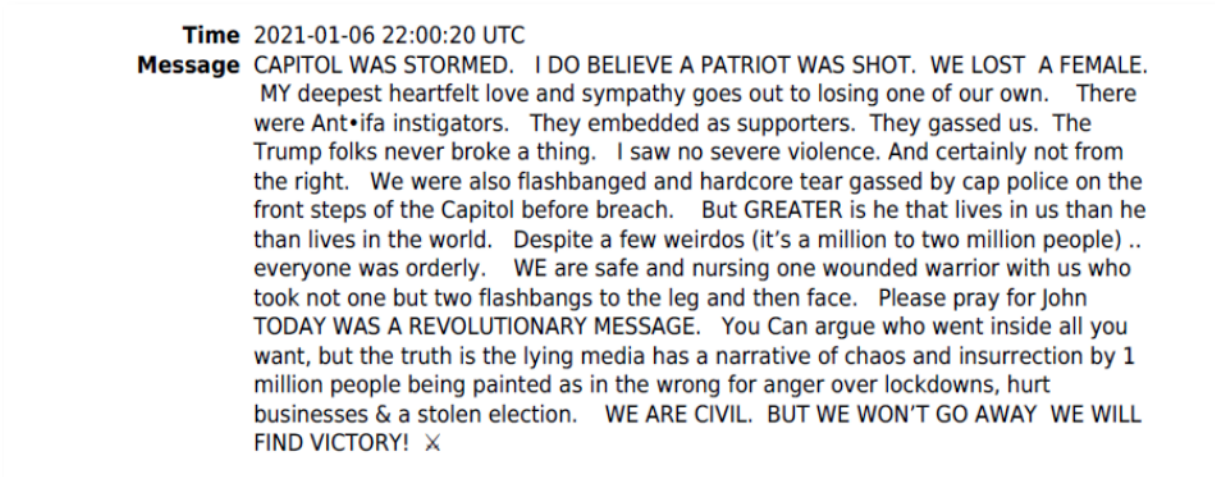
*Image 4: Bennett (circled in yellow) and Williams (circled in red) just after leaving the Senate gallery*



*Image 5: Bennett (circled in yellow) near the Senate gallery at approximately 2:47 p.m.*

Bennett and Williams spent approximately 25 minutes inside the Capitol—from approximately 2:23 p.m. to 2:49 p.m. —before leaving through the Senate Carriage Door.

That evening, at approximately 6:00pm EST, Bennett posted on Facebook about his experience, leading with “CAPITOL WAS STORMED” and recalling that he was “hardcore tear gassed by cap[itol] police” before the building was breached:



*Image 6: Post from Bennett's Facebook Page*

Approximately two hours later, Bennett admitted that he “stormed” the Capitol and that he went “in that senate room”:



*Image 7: Post from Bennett's Facebook Page*



*Image 8: Post from Bennett's Facebook Page*

b. The Origins of this Prosecution, Procedural History, and Flight

Following the events of January 6, the FBI began receiving tips identifying individuals who had unlawfully entered the Capitol. The FBI received multiple tips about Bennett being in

the Capitol as well as information about Bennett's texts and posts about January 6. *Statement of Facts*, ECF No. 1-1, at 2-4. These include Facebook posts on and before January 6:



*Images 9 (left) and 10 (right): Images from Bennett's Facebook page provided to the FBI by a tipster*

*Id.* at 3. The FBI also received information about texts that Bennett sent after unlawfully entering the Capitol, including a screenshot of a text in which he described “CAPITOL FULLY BREACHED” and again recalling that he was “gassed and flashbanged like crazy but we climbed and hiked up and inside”:



*Images 11: Screenshot of texts from Bennett provided to the FBI*

During the investigation, the FBI identified images of Bennett and a woman in and around the Capitol and determined that the woman with Bennett on January 6 was Williams.

On March 19, 2021, Bennett and Williams were charged by Complaint with four misdemeanor counts related to their conduct at the Capitol on January 6. Based upon the evidence developed at that time, Bennett was also charged with an additional misdemeanor, that

he (but not Williams) entered the Senate Gallery, and one felony, Obstruction of an Official Proceeding, in violation of Title 18, United States Code, Sections 1512(c)(2) and 2. Williams was arrested a few days later, on March 23, 2021. Simultaneously, agents obtained a warrant to seize and search Williams' electronic devices. Agents seized and imaged her iPhone and laptop and returned those devices to her in May of 2021. *See*, Stipulation Regarding Return of Digital Devices and Electronically Stored Information, ECF No. 36.

On March 29, 2021, Bennett left a voicemail for a friend: "I don't know if you can help but they arrested her, she's released and they're probably looking for me. I'm just laying low." Two days later, an FBI agent left a voicemail and sent a text message to Bennett, advising him about the arrest warrant and his need to surrender. Bennett did not surrender for twelve days.

During this time, Bennett took other steps to avoid arrest. From approximately March 16, 2021, through March 30, 2021, Bennett stayed with a friend in Fort Mill, South Carolina. When Bennett decided to leave this residence, he lied about his plans, stating that he was going to stay with family in South Carolina, when Bennett does not have family in that state. Though Bennett previously posted on Facebook several times a week, he stopped posting on Facebook altogether. He also started using Telegram, an encrypted social messaging application, to communicate with friends. Several individuals reported that Bennett would call and say, "Telegram" and then hang up. Then, Bennett threw his iPhone 11 (which retails for approximately \$1000) out of the window on the way to the courthouse when he finally did self-surrender.

On April 21, 2021, Bennett and Williams were indicted by a grand jury with charges that mirror those in the complaint. Williams pled guilty on Feb. 3, 2022, to Parading, Demonstrating, or Picketing in a U.S. Capitol Building.

### III. Argument

#### a. The Rigorous Standard for Evaluating Selective Prosecution Claims

When acting on probable cause that the accused committed a federal crime, the government generally has substantial discretion in making prosecutorial decisions, including whether to prosecute and what charges to bring. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains broad discretion as to whom to prosecute.” (internal quotation marks omitted)). “This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.” *Id.* “Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis courts are competent to undertake.” *Id.*; *see also United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) (“[J]udicial authority is ... at its most limited when reviewing the Executive’s . . . charging determinations” because “the Judiciary ... generally is not competent to undertake that sort of inquiry.”) (internal quotation marks and citations omitted). Given these considerations, there is a presumption of regularity attached to prosecutorial decisions and, with that, a presumption of good faith. *Fokker Servs.*, 818 F.3d at 741 (noting the presumption that prosecutors have properly discharged their official duties).

A prosecutor cannot, however, base a charging decision upon a person’s “race, religion,” or other “arbitrary classification.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996). The doctrine of “selective prosecution” is a narrow exception to the general rule that a prosecutor’s charging decisions are immune from judicial review where a defendant has sufficient evidence to show that a charging decision was based, at least in part, upon an improper ground. *See*

*generally, id.* Nonetheless, a defendant bears a heavy burden in showing selective prosecution, because the prosecutor's presumption of regularity remains. The presumption is "formidable," *United States v. Lewis*, 517 F.3d 20, 27 (1st Cir. 2008), and can be overcome only by presenting "clear and convincing evidence" that the government acted improperly. *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 21 (D.C. Cir. 1999).

Specifically, a defendant must make two showings. First, he must proffer "clear evidence" that similarly situated individuals of a different gender were not prosecuted. *Id.* This standard is "a demanding one." *Armstrong*, 517 U.S. at 463. A similarly situated offender is one whose "circumstances present no distinguishable legitimate prosecutorial factors that might justify different prosecutorial decisions" between that person and the defendant. *United States v. Judd*, 579 F. Supp. 3d 1, 4 (D.D.C. 2001). The phrase "similarly situated" is "narrowly" interpreted. *Judd*, 579 F. Supp. 3d at \*4 (quoting *Stone*, 394 F. Supp. 3d at 31). In determining whether offenders are similarly situated, the court should "assess every" fact that is "at least arguably material" to the prosecutorial decision. *Lewis*, 517 F.3d 27. Legitimate prosecutorial factors include "relative culpability, the strength of the case against particular defendants, willingness to cooperate, and the potential impact of a prosecution on related investigations." *United States v. Khamu*, 664 F. Supp. 2d 28, 32 (D.D.C. 2009).

Second, a defendant must show that the government singled this defendant out for prosecution based on the impermissible reason. *United States v. Stone*, 394 F. Supp. 3d 1, 30 (D.D.C. 2019). In other words, here, to show discriminatory purpose, Bennett must present clear, credible evidence that the government is prosecuting him "at least in part because" he is a man. *Wayte*, 470 U.S. at 610.

The standard for obtaining discovery in support of such a claim is also a high one. The rigorous “showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.” *Armstrong*, 517 U.S. at 464; *United States v. Bass*, 536 U.S. 862, 864 (2002) (per curiam) (reversing selective-prosecution discovery order that “threatene[d] the ‘performance of a core executive constitutional function.’”). To meet this standard, a defendant must “come forward with some evidence tending to show the existence of the essential elements of this defense.” *United States v. Navarro*, 627 F. Supp. 3d 1, 5 (D.D.C. 2022) (quoting *Armstrong*, 517 U.S. at 468). To meet this standard, the defendant must put forward “some evidence tending to show both discriminatory effect and discriminatory intent.” *Lewis*, 517 F.3d at 25 (internal quotation marks omitted). Discovery is not permitted unless the defendant’s evidence supports both branches of the inquiry: “if either part of the test is failed, defendant cannot subject the Government to discovery.” *United States v. Stone*, 394 F. Supp. 3d 1, 31 (D.C. Cir. 2019) (internal quotation marks and alterations omitted).

A defendant cannot shift the burden to the government by claiming he cannot obtain better evidence without discovery from the government. It “is not enough to say that evidence will materialize if the discovery is ordered.” *United States v. Stone*, 394 F. Supp. 3d 1, 35 (D.C.C. 2019); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1071 (9th Cir. 2003) (“Merely demonstrating that better evidence cannot be obtained without discovery does not suddenly render otherwise insufficient evidence sufficient.”).

b. Bennett Has Not Established that Similarly Situated Actors were Not Charged with Felony Offenses

Bennett alleges that the government selectively targeted him for prosecution of Obstructing an Official Proceeding based on his gender and that, otherwise, his conduct on January 6 is indistinguishable from Williams’s conduct. Def. Mtn. to Dismiss at 5-6. In this

argument, Bennett’s motion misses a key factor: similar actions committed with different knowledge and intent may subject a person to different crimes. The government has charged hundreds of individuals for their roles in this one-of-a-kind assault on the Capitol, ranging from unlawful entry misdemeanors to assault on law enforcement officers, to conspiracy to corruptly interfere with Congress. Although all other defendants participated in the Capitol breach on January 6, 2021, many salient differences—such as how a defendant entered the Capitol, how long he remained inside, the nature of any statements he made (on social media or otherwise), whether he destroyed evidence of his participation in the breach—help explain the differing charges.

Here, Bennett fails to identify any sufficiently “similarly situated” individual or group of individuals that the government afforded “different treatment.” *Armstrong*, 571 U.S. at 470. Bennett relies entirely on the comparison of his case to Williams. And while Williams and Bennett unlawfully entered and marched around the Capitol together, there are significant differences. When determining what charges to seek by complaint, the government had evidence of Bennett’s statements before and after January 6. *Statement of Facts*, ECF No. 1-1, at 2-4. A tipster reported seeing “Bennett make numerous posts encouraging people to gather and attend events in Washington, D.C. on January 6, 2021.” *Id.* at 2. Another tipster provided screenshots from Bennett’s Facebook page, which referenced going “to war” and included an admission that Bennett had “Stormed the Capitol.” *Id.* The fact that the government had obtained evidence of Bennett’s statements, both on social media and in private texts, distinguishes him from Williams. *See, Khamu*, 665 F. supp. 2d at 32 (accepting as a distinguishing feature that indicted defendant “was more involved and took a leadership role in the conspiracy.”).

Bennett also destroyed evidence and fled from law enforcement. Early in the

investigation, a tipster reported that Bennett deleted most of his Facebook posts about January 6 within 24 hours of storming the Capitol. SOF at 2. While on the way to the Courthouse for his initial appearance, he also threw his iPhone out of a car window. Moreover, Bennett knew about the arrest warrant, took steps to evade detection, and was a fugitive for weeks. Bennett's flight and destruction of evidence also distinguishes him from Williams.

Even if Williams was similarly situated, a defendant typically must provide evidence of more than a few similarly situated persons because there will always be examples where deserving individuals escape prosecution for a variety of innocuous reasons. *United States v. Tibbetts*, 646 F.2d 193, 195-96 (5th Cir. 1981) (finding no selective prosecution of a tax protester partly “[d]ue to limited resources of the government, there will always be some tax evaders and tax protestors who elude prosecution by the government. This factor is not sufficient to show selective prosecution.”); *United States v. Hayes*, 586 F.2d 811, 819, 819 n. 4 (5th Cir. 1979) (finding the defendant failed to satisfy the first prong of the selective prosecution test because he only presented evidence of three other cases in which there was no federal prosecution after a state prosecution had been pursued in good faith).

While Williams was not charged with a felony, other women have been charged with felony offenses based on their conduct on January 6. For example, Pauline Bauer was charged and convicted with Obstruction of an Official Proceeding. *United States v. Bauer*, 21-cr-00386-TNM. Like Bennett, the affidavit in support of the complaint in *Bauer* includes social media posts *Bauer* made, including stating:

I am at the capitol and was inside. No [*sic*] of us are armed just pissed that this is what we have to do to take our country back from communism.

Statement of Facts, ECF No. 2-1, at 3, *United States v. Bauer*, 21-cr-00386-TNM. Similarly, Audrey Southard-Rumsey was charged with Obstruction of an Official Proceeding. *United*

*States v. Southard-Rumsey*, 21-cr-387-APM. The statement of facts in *Southard-Rumsey* included the defendant's social media posts as well as information that she had removed posts from her social media page. Statement of Facts, ECF No. 2-1, at 3, *United States v. Southard-Rumsey*, 21-cr-00387-APM. Other women the government has pursued felony Obstruction charges against include *United States v. Bisignano*, 21-cr-036, *United States v. Carpenter*, 21-cr-305, *United States v. Eisenhart*, 21-cr-118, *United States v. Hazelton*, 21-cr-0030, *United States v. Montoni*, 23-cr-195, *United States v. Mooney-Rondon*, 21-cr-722, *United States v. Powell*, 21-cr-179, *United States v. Southard-Rumsey*, 21-cr-387, *United States v. Steele-Smith*, 21-cr-77; *United States v. Williams*, 21-cr-618. This non-exhaustive list may grow as the government continues to bring new January 6 cases.

Simply put, the government is not making charging decisions based on gender. Rather, the government makes charging decisions based upon the evidence available at the time charges are brought.

c. The Government Did Not Pursue Felony Charges Against Bennet Based on an Impermissible Motive

Bennett fares no better under the second prong of the selective prosecution analysis. Nowhere in his motion does he explicitly allege, let alone present evidence, that the decision to charge Bennett with a felony was motivated by his gender.

Bennett's premise seems to be that, because he is a man and was charged with a felony, the prosecutorial decision must have been based on his gender. But Bennett "must provide something more than mere speculation" of selective prosecution. *Stone*, 394 F. Supp. 3d at 31, 36. Ultimately, however, Bennett cites no specific evidence indicating that the prosecutor sought felony charges for any reason other than his own criminal conduct. *Id.* at 36 ("[I]t is not enough to simply state that the prosecutor was biased. Defendant must *show* that in his case, the

decisionmaker acted with a discriminatory purpose.”). This alone requires denial of Bennett’s motion.

**IV. Conclusion**

Bennett has not met his formidable burden to obtain discovery on a prosecution claim, let alone obtain dismissal of the felony charge. Bennett has failed to identify similarly situated women who were spared from felony charges and failed to present evidence that prosecutors acted with a discriminatory purpose. The Court should deny his motion.

Respectfully submitted,

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