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

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| **UNITED STATES OF AMERICA**<br><br>**v.**<br><br>**MELODY STEELE SMITH,**<br><br>**Defendant.** | **Crim. Action No. 21CR77** |

**MS. STEELE SMITH'S REPLY TO THE GOVERNMENT'S OPPOSITION TO HER MOTION TO DISMISS COUNTS TWO AND THREE**

Melody Steele Smith, through undersigned counsel, submits this reply to the government's Opposition to her Motion to Dismiss Counts Two and Three.[1]

In its Opposition, the government asserts that Vice President Pence was present at the U.S. Capitol on January 6. Gov't Opp. at 3. However, the Indictment does not charge that "the Vice President was present" at the time Ms. Steele Smith entered the Capitol. Instead, the Indictment charges that the area was restricted because it was where the "Vice President and Vice President-elect were temporarily visiting."[2] Therefore, the Indictment does not charge what the government now apparently wishes it had previously done and cannot stand on that basis.

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[1] As a preliminary matter, the government devotes five pages to an issue that Ms. Steele Smith did not raise and the Court need not address. Specifically, Ms. Steele Smith did not argue that because the Capitol Police barricaded the Capitol, she cannot be charged with a violation of Section 1752. *See* Gov. Opp., ECF No. 37 10-25.
[2] Notably, the government makes no attempt to justify the inclusion of Vice President-Elect Harris when it has now become clear she was not present at the Capitol and has now filed superseding indictments in numerous cases removing her from January 6 charges altogether. *See, e.g. U.S. v. Sean McHugh*, 21-CR-453(JDB) ECF No. 39; *U.S. v. Isaac Sturgeon*, 21-CR-091 (RCL) ECF No. 53. Therefore, the government has

In any event, even if the Indictment did charge that Vice President Pence was present at the U.S. Capitol building, the Indictment would still fail to state any offense under Section 1752, because he would not be "temporarily visiting" the U.S. Capitol on January 6, 2021 within the ordinary meaning of that term in the context of the criminal statute at issue.[3]

The government acknowledges that Vice President Pence lived and worked in the District of Columbia and maintained an office at the Capitol. The government also acknowledges that he was at the U.S. Capitol on January 6 "as President of the Senate," "to preside[] over" and "oversee the Joint Session of Congress." *Id*. at 3-4. These undisputed facts, and the totality of the undisputed circumstances here, demonstrate that the statute does not apply as a matter of law as the government attempts to apply it. Nor did Congress intend the statute to apply here. The "temporarily visiting" language of the statute was specifically promulgated to address the difficulties of protecting the President "when he is outside the White House complex traveling or residing temporarily *in some other section of the country*." Auth. Of Sec'y Treasury to Ord. Closing of Certain Sts. Located Along the Perimeter of the White House, 19 Op. O.L.C. 109 (1995) ("*Authority of the Secretary*") (emphasis added).[4] In the floor debate on the bill, legislators discussed "the problems

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essentially conceded that Counts Two and Three in this case each fail to state an offense "with respect to" Vice President-Elect Harris.

[3] Nor was the U.S. Capitol building and grounds "posted, cordoned off, or otherwise restricted" because of any Secret Service protectee's presence (or planned presence) there on January 6.

[4] Available at https://www.justice.gov/file/20226/download.

confronting the Secret Service when protecting the President *outside of Washington*." *Id.* (emphasis added). Nonetheless, Ms. Steele Smith does not suggest that the statute may apply "only to locations outside the District of Columbia." *Id.* at 4. Ms. Steele Smith simply highlights the obvious: that a person generally cannot be said to be "temporarily visiting" his own office building located approximately four miles from his residence.

Still, the government claims that Vice President Pence was "temporarily visiting" the Capitol because he was "physically present . . . for a particular purpose" and "intended to leave at the close of the session." *Id.* at 4. According to the government, then, every person "physically present" at the Capitol that day—every Congressperson, every staffer, every U.S. Capitol Police officer—was "temporarily visiting." By that logic, only a person meandering aimlessly through the Capitol for no purpose, or a person who lived within and never left the Capitol (i.e., no one), would fall outside the scope of "temporarily visiting." The Court should reject the government's invitation to read all meaning out of an express limitation in a criminal statute. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself" and "is founded on the tenderness of the law for the rights of individuals . . . .").

To the extent that "two" unidentified "immediate family members" of Vice President Pence (Gov't Opp. at 4) are now alleged to constitute a basis to impose federal criminal liability on thousands of people for trespassing on January 6, the government's argument fares no better. Members of Vice President Pence's family

were, in the government's own words, allegedly "present" to "attend" and "to observe" a Congressional meeting in a federal building where the Vice President maintains a *permanent* office and *presides*. The Vice President's family members were not on vacation or at a speaking event. That a family member may not work independently or have an independent office at the U.S. Capitol does not transform the U.S. Capitol into a "temporary visit," as expressly required by the criminal statute at issue. After almost one year of charging January 6 defendants, the government now tries to interject new protectees without having included them in in the Indictment or providing a basis for why they were "temporarily visiting" as intended by Congress.

In effect, the government reads the words "temporarily visiting" out of the statute completely. Under the government's limitless interpretation, *see* Gov't Opp. at 3, the words "temporarily visiting" are meaningless and superfluous. "The Government's reading is thus at odds with one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (discussing "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (citing *United States v. Menasche*, 348 U.S. 528, 538–539 (1955)).

## Conclusion

For the reasons stated herein and Ms. Steel Smith's Motion to Dismiss, ECF No. 33, Ms. Steele Smith moves the Court to dismiss Counts Two and Three of the Indictment.

Respectfully Submitted,

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