UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 1:21-cr-00184-BAH**
	:	
JAMES ALLEN MELS,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION
TO DISMISS COUNTS ONE AND TWO

Defendant James Allen Mel asks this Court to dismiss Counts One and Two of the Information, charging him with, respectively, entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1), and disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2). Specifically, he contends that these charges fail to state an offense because, in his view, the Vice President was not "temporarily visit[ing]" the U.S. Capitol when he was carrying out his constitutionally and statutorily mandated obligations in the Capitol building on January 6, 2021. Mel's argument defies the plain text, structure, and purpose of the statute. This Court correctly rejected an analogous claim in *United States v. Williams*, No. 1:21-cr-377, ECF No. 88 (D.D.C. Jun 8, 2022), earlier this month. And at least five other judges of this District have rejected permutations of the same arguments in other January 6 cases. *See United States v. McHugh*, No. 21-cr-453, 2022 WL 296304, at *20-21 (D.D.C. Feb. 1, 2022) (Bates, J.); *United States v. Andries*, No. 21-cr-93, 2022 WL 768684, at *16-17 (D.D.C. Mar. 14, 2022) (Contreras, J.); *United States v. Puma*, No. 21-cr-454, 2022 WL 823079, at *16-18 (D.D.C. Mar. 19, 2022) (Friedman, J.); *United States v. Bingert*, No. 21-cr-91, 2022 WL 1659163, at *15 (D.D.C. May 25, 2022) (Lamberth, J.); *United States v. Riley Williams*, No. 21-cr-618, ECF No. 55, at 39-43 (D.D.C. June 22, 2022) (Jackson, J.). No

district judge has sided with Mels' view. This Court should reach the same conclusion in this case and deny Mels' motion to dismiss.

BACKGROUND

1. At 1:00 p.m., on January 6, 2021, a Joint Session of the United States Congress, consisting of the House of Representatives and the Senate, convened in the Capitol Building. The Joint Session assembled to debate and certify the vote of the Electoral College of the 2020 Presidential Election. With the Joint Session underway and with Vice President Mike Pence presiding, a large crowd gathered outside the U.S. Capitol. At approximately 2:00 p.m., certain individuals in the crowd forced their way through, up, and over the barricades and officers of the U.S. Capitol Police, and the crowd advanced to the exterior façade of the building. Members of the U.S. Capitol Police attempted to maintain order and keep the crowd from entering the Capitol; however, shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol, including by breaking windows. Shortly thereafter, at approximately 2:20 p.m., members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to – and did – evacuate the chambers.

On January 7, 2021, the FBI received a tip that James Allen Mels of Shelby Township, Michigan entered the Capitol building during the previous day's attack. On January 25, 2021, FBI task force officers interviewed Mels in the parking lot of his residence. During that interview, Mels told the investigators that he traveled to the Capitol in January 2021 with 11 other "like minded Patriots," whom he met through online platforms such as "The Patriot Hour" and "X-22," because he believed that the 2020 presidential election had been fraudulently decided. Mels also told the FBI that, on January 6, 2021, he entered the Capitol building intending to speak with an officer, to present his copy of the United States Constitution, and to have his voice heard. Mels also showed the interviewing officers pictures he took inside and outside the Capitol building on

January 6. Closed-circuit surveillance video from inside the Capitol shows that Mels entered the Capitol building through the breached Senate Wing Door only moments after other rioters forcibly broke the door and adjacent windows open.

2. On February 10, 2021, Mels was charged by complaint. On March 3, 2021, the government filed an Information, charging Mels with four offenses: entering and remaining in a restricted building or ground, in violation of 18 U.S.C. § 1752(a)(1) (Count One); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2) (Count Two); disorderly conduct in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Three); and parading, demonstrating, or picketing in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(G) (Count Four). (ECF No. 7). Mels now moves to dismiss Counts One and Two on the ground that the Vice President cannot "temporarily visit" the U.S. Capitol, as required to make the Capitol a "restricted building or ground" for purposes of Sections 1752(a)(1) and (2).

LEGAL STANDARDS

A defendant may move before trial to dismiss an information, or a count thereof, for "failure to state an offense." *See* Fed. R. Crim. P. 12(b)(3)(B)(v). The main purpose of a charging document, such as an indictment or (as here) an information, is to inform the defendant of the nature of the accusation. *See United States v. Ballestas*, 795 F.3d 138, 148-149 (D.C. Cir. 2015) (discussing purpose of an indictment). Thus, an information need only contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). When assessing the sufficiency of criminal charges before trial, an information "must be viewed as a whole and the allegations [therein] must be accepted as true." *United States v. Bowdoin*, 770 F. Supp. 2d 142, 145 (D.D.C. 2011)). The "key question" is whether "the

allegations … , if proven, are sufficient to permit a petit jury to conclude that the defendant committed the criminal offense as charged." *Ibid.*[1]

ARGUMENT

The Court Should Deny Mels' Motion To Dismiss Counts One And Two – Which Allege Violations Of 18 U.S.C. § 1752 – Because The Vice President Plainly Can "Temporarily Visit" The U.S. Capitol

Counts One and Two allege violations of Section 1752 of Title 18, which prohibits the unlawful entry into and disruptive or disorderly conduct in a "restricted building or grounds." A "restricted building or grounds" is a "posted, cordoned off, or otherwise restricted area … where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(c)(1)(B). At the time the defendant entered the U.S. Capitol during and in furtherance of the January 6, 2021, attack, the Vice President was present in the Capitol building. Mels' conduct accordingly falls within the Section 1752's plain sweep: as alleged in the information, Mels unlawfully entered and engaged in disorderly or disruptive conduct in a restricted building – *i.e.*, in an area where the Vice President was "temporarily visiting."

Mels nonetheless argues that Counts One and Two fail to state violations of Section 1752 because Vice President Pence's presence at the Capitol on January 6, 2021, does not establish that he was "temporarily visit[ing]" the U.S. Capitol that day. (ECF No. 43, at 2-19). He even claims that his is the "commonsense" reading of the statute. *Id.* at 10. Mels is wrong. His reading of Section 1752 contravenes the statute's plain terms, structure, and purpose. As this Court expressly concluded earlier this month (in a decision that Mels does not acknowledge), "[c]ommon sense

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[1] Mels repeatedly asserts, incorrectly, that an "indictment" was returned in this case. (*See, e.g.*, ECF No. 43, at 7, 18). In fact, Mels, who faces misdemeanor charges, was charged by information, not indictment. (ECF No. 7). In any event, because the legal standards governing a motion to dismiss for failure to state an offense are the same whether the defendant is charged by indictment or information, Mels' error does not affect the disposition of his motion.

easily resolves this debate" in the government's favor. *United States v. Williams*, No. 1:21-cr-377, ECF No. 88, at 5 (D.D.C. Jun 8, 2022). At least five other district judges of this Court have reached the same conclusion. *See McHugh*, 2022 WL 296304, at *20-21; *Andries*, 2022 WL 768684, at *16-17; *Puma*, 2022 WL 823079, at *16-18; *Bingert*, 2022 WL 1659163, at *15; *Riley Williams*, No. 21-cr-618, ECF No. 55, at 39-43. And nothing in Mels' motion, which mostly just rehashes the flawed arguments raised by other January 6 defendants, warrants a different result.

1. To determine the meaning of a statute, the Court "look[s] first to its language, giving the words used their ordinary meaning." *Levin v. United States*, 568 U.S. 503, 513 (2013) (internal quotation omitted) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). As noted, subsection 1752(c)(1)(B) defines "restricted buildings or grounds," in relevant part, as "any posted, cordoned off, or otherwise restricted area … of a building or grounds where the President or other person protected by the Secret Service is or will be *temporarily visiting*." (Emphasis added). In turn, the verb "visit" means, *inter alia*, "to go to see or stay at (a place) for a particular purpose (such as business or sightseeing)" or "to go or come officially to inspect or oversee."[2] And the adverb "temporarily" adds that the protectee's visit must occur "during a limited time."[3]

As a textual matter, then, either definition of "visit" plainly describes the Secret Service protectee's activities on January 6. Vice President Pence was physically present at the U.S. Capitol for a particular purpose: he presided over Congress's certification of the 2020 Presidential Election, first in the joint session, and then in the Senate chamber. While not specifically alleged in the information, two other Secret Service protectees (members of the Vice President's immediate family), also came to the U.S. Capitol that day for a particular purpose: to observe these proceedings while they were ongoing and Vice President Pence was present. Furthermore, as

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2 https://www.merriam-webster.com/dictionary/visit (last visited June 21, 2022).

3 https://www.merriam-webster.com/dictionary/temporarily (last visited June 21, 2022).

President of the Senate, Vice President Pence oversaw the vote certification. And all three protectees visited the Capitol temporarily – *i.e.*, during a limited time. Given the nature of the presence of the Vice President (and his family members), the U.S. Capitol plainly qualified as a building where "[a] person protected by the Secret Service [was] … temporarily visiting," 18 U.S.C. § 1752(c)(1)(B). *See Williams*, No. 1:21-cr-377, ECF No. 88, at 5-6 (adopting the "plain reading of the words" in subsection 1752(c)(1)(B) urged by the government); *McHugh*, 2022 WL 296304, at *21 (reaching "a commonsense conclusion: the Vice President was 'temporarily visiting' the Capitol"); *Andries*, 2022 WL 768684, at *16 ("Vice President Pence was 'temporarily visiting' the Capitol on January 6, 2021 if he went to the Capitol for a particular purpose, including a business purpose, and for a limited time only. Plainly he did. He went to the Capitol for the business purpose of carrying out his constitutionally assigned role in the electoral count proceeding; he intended to and did stay there only for a limited time."); *Puma*, 2022 WL 823079, at *17 (under the plain language of Section 1752, the Vice President "was temporarily visiting the Capitol on January 6, 2021: he was there for a limited time only in order to preside over and participate in the Electoral College vote certification."); *Riley Williams*, No. 21-cr-618, ECF No. 55, at 40-41 ("Taken together then, as was plain even before the dictionary was consulted, the phrase "temporarily visiting" means being somewhere for a limited period of time, and there is no linguistic reason why the phrase could not include being there for a business purpose.").

2. Mels' contrary contentions lack merit. First, Mels insists that the phrase "temporarily visiting" requires more than "physical[] presen[ce]" and must "include[] an implicit normally-lives-or-works carveout" – a carveout that, in Mels's view, is dispositive here because "[t]he Constitution obligates the Vice President to be physically present in the Senate with some frequency." (ECF No. 43, at 8-10). But this Court already rejected an analogous argument in *Williams*, and for good reason. "Despite having a limited role as President of and tiebreaker for

the Senate, the Vice President is generally regarded as an executive branch officer, and generally works in locations other than the Capitol." *Williams*, No. 21-cr-377, ECF No. 88, at 5 (citing U.S. Const. art. II, § 1, cl. 1). Moreover, "a government official can clearly appear somewhere temporarily and still be doing official work in the process." *Id.* at 6. It follows from these uncontroversial principles that "the Vice President's presence for official duties by presiding over a session of Congress" on January 6 did not "make him any less of a temporary visitor" at the Capitol on that day. *Id.*

Second, Mels observes that Vice Presidents have long had "a dedicated, permanent office reserved for their use in the Senate." (ECF No. 43, at 3-4, 11). That is true but irrelevant.[4] Section 1752(c)(1)(B) defines the restricted area by reference to the location of the protectee, not the location of his or her physical offices. When Vice President Pence traveled to the U.S. Capitol on January 6 to oversee the Joint Session of Congress, he was "visiting" the building. And because Vice President Pence intended to leave at the close of the session, this visit was "temporar[y]." Or, as this Court put it in *Williams*, "[t]he fact that he has a space set aside for his occasional use – notably, not the location where he was working inside the Capitol on January 6, 2021 – makes [the Vice Preidence] no less a 'visitor' and no less 'temporary' when he makes an appearance on the premises of the Capitol." *Williams*, No. 21-cr-377, ECF No. 88, at 5-6. Nor does it matter that Vice President Pence ordinarily resided in the District of Columbia. Section 1752(c)(1)(B) defines the restricted area by reference to "buildings or grounds," not municipal borders. As this Court

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[4] To be clear, Mels' suggestion that "when Congress enacted § 1752 in 1971," the Vice President had an office in the Senate but "did not even have an office in the West Wing" (ECF No. 43, at 4, 9-10 (emphasis omitted)) is misleading. While Vice President Walter Mondale was the first to have an office in the West Wing, Vice Presidents had used offices in the Eisenhower Executive Office Building since 1960. *See, e.g.*, The Vice President's Residence and Office, https://www.whitehouse.gov/about-the-white-house/the-grounds/the-vice-presidents-residence-office/#:~:text=The%20Vice%20President's%20Ceremonial%20Office,on%20the%20White%20House%20premises (last visited June 21, 2022).

explained in *Williams*, the fact that Vice President Pence lived and worked in Washington, D.C. does not detract, in logic or law, from the fact that he "temporarily visit[ed]" the U.S. Capitol on January 6. *Id.* at 5 ("[T]he Vice President's ordinary residence in the District of Columbia cannot carry the repercussions that defendant suggests: namely, that the Vice President cannot be deemed to 'temporarily visit' any place within the District of Columbia."). To the extent Mels means to raise that argument, this Court should reject it in this case as it did in *Williams*.

Third, Mels cites cases where either the President or Vice President were "traveling outside of the District of Columbia 'visiting' that area for a 'temporary' purpose." (ECF No. 43, at 11 (citing *United States v. Bursey,* 416 F.3d 301 (4th Cir. 2005) (airport hangar); *United States v. Junot*, 902 F.2d 1580 (9th Cir. 1990) (unpublished) (park)). But this Court's recent ruling in *Williams* correctly rejected that argument as well: "the fact that those situations clearly qualify does not mean that the relevant situation on January 6 cannot count as well." No. 21-cr-377, ECF No. 88, at 6. The last case Mels cites, *United States v. Jabr*, No. 18-cr-105, 2019 WL 13110682, at *7 (D.D.C. May 16, 2019) (Friedman, J.), is even further afield. There, another judge of this District ruled that a *different* prong of 18 U.S.C. § 1752(c)(1) – subparagraph (A), which defines "restricted building or ground" to specifically include "any posted, cordoned off, or otherwise restricted area … of the White House or its grounds" – did not cover the U.S. Treasury Building or its grounds. *Id.* at *6-10. Nothing in that ruling or its reasoning supports Mels' position in this case.

Fourth, Mels asserts (ECF No. 43, at 12-13) that the common-sense interpretation adopted by this Court in *Williams*, by every judge of this District to have considered the question, and by the government "creates fair notice problems." That is so, Mels argues, because, under that reading, "the statute's reach expands and contracts based on fluid, unidentified factors" such as "the frequency with which the Vice President casts a tie-breaking vote, their personal preference

for working in their Senate office, their travel schedule, etc." *Id.* at 13. But Mels' argument overlooks Section 1752(c)(1)'s overall structure. Once again, this Court's recent decision in *Williams* explains why:

> Under § 1752, certain conduct is criminalized in certain sensitive areas around both the President and the Vice President. The residences of both, whether the occupant is present or not, are covered at all times. 18 U.S.C. § 1752(c)(1)(A). When either official is "temporarily visiting" some other location, a *de facto* bubble follows him or her and affords similar protection. *Id.* § 1752(c)(1)(B). All of this makes sense.

Williams, No. 21-cr-377, ECF No. 88, at 6. Not only does this structure "make[] sense"; it removes *all* uncertainty as well: a person violates Section 1752(a)(1) and (2), at a minimum, whenever, with the requisite *mens rea*, he enters or remains in (or engages in disorderly or disruptive conduct in) a posted, cordoned off, or otherwise restricted area around the President or Vice President. The government's reading, in other words, ensures that Section 1752 supplies a predictable, uniform basis for prosecution whenever a suspect breaches the "*de facto* bubble" following the President and Vice President. It is Mels' own reading that, in contrast, "would produce absurd results" – by "inexplicably pop[ping] that bubble for an ill-defined set of destinations where the President or Vice President's presence is sufficiently 'frequent' or the reason for their presence sufficiently 'official.'" *Williams*, No. 21-cr-377, ECF No. 88, at 6 ("The Court declines to introduce such needless ambiguity into a simple statutory phrase."). *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Finally, Mels asserts (ECF No. 43, at 14-17) that that his interpretation is supported by the rule of lenity. But that claim is also unavailing. The Supreme Court has made clear that the rule applies only if, "'after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress

intended.'" *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)). No such ambiguity exists here. As explained above, Section 1752's text, structure, and purpose yield a clear meaning. The rule of lenity should, therefore, play no role in this case.[5]

CONCLUSION

For these reasons, the defendant's motion to dismiss Counts One and Two of the Information should be denied.

Dated: June 23, 2022.

Respectfully submitted,

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[5] Citing Justice Gorsuch's concurrence in the judgment in *Wooden v. United States*, 142 S. Ct. 1063 (2022), Mels suggests that there is "ambiguity in the case law over the level of ambiguity required to trigger the rule of lenity." (ECF No. 43, at 15 n.12). He is again incorrect. First, Justice Gorsuch's concurrence in *Wooden*, which only one other Justice joined, is not – and does not reflect – binding precedent. Under Supreme Court precedent, "the rule of lenity does not apply when a law merely contains some ambiguity or is difficult to decipher." *Id.* at 1075 (Kavanaugh, J., concurring). It applies only when the ambiguity is "grievous[]"– *i.e.*, "'at the end of the process of construing what Congress has expressed.'" *Ibid.* (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)). Justice Gorsuch's concurrence itself recognizes that the Supreme Court has set the bar for lenity at grievous ambiguity. *Id.* at 1084. This Court should apply the controlling grievous ambiguity standard, leaving it to the Supreme Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). Second, even under Justice Gorsuch's view, lenity comes into play only "[w]here the traditional tools of statutory interpretation yield no clear answer." *Wooden*, 142 S. Ct. at 1085-1086. As explained above, with respect to the meaning of "restricted buildings or grounds," those traditional tools of interpretation do yield a clear answer.

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