UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL NO. 21-cr-642 (JDB)**
v.	:	
	:	
DARRELL NEELY,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNTS OF THE INFORMATION

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this response to Defendant Darrell Neely's Motion To Dismiss Counts of the Information (the "Motion") (ECF No. 30). In the Motion, Defendant seeks dismissal of Counts Two and Three of the Information, which charge him with Entering and Remaining in a Restricted Building in violation of 18 U.S.C. § 1752(a)(1), and Disorderly and Disruptive Conduct in a Restricted Building in violation of 18 U.S.C. § 1752(a)(2).

Defendant seeks dismissal of these counts contending that Section 1752 is unconstitutionally vague; that the United States Secret Service did not restrict the Capitol or its grounds on January 6, 2021, and that Vice President Pence was not "temporarily visiting" the Capitol on January 6, 2021. These contentions lack merit. "This case is one of many arising out of the events at the United States Capitol on January 6, 2021, and all of the legal challenges [defendant] raises in her motions have been considered and rejected by other courts in this district." *United States v. Williams*, No. CR 21-0618 (ABJ), 2022 WL 2237301, at *1 (D.D.C.

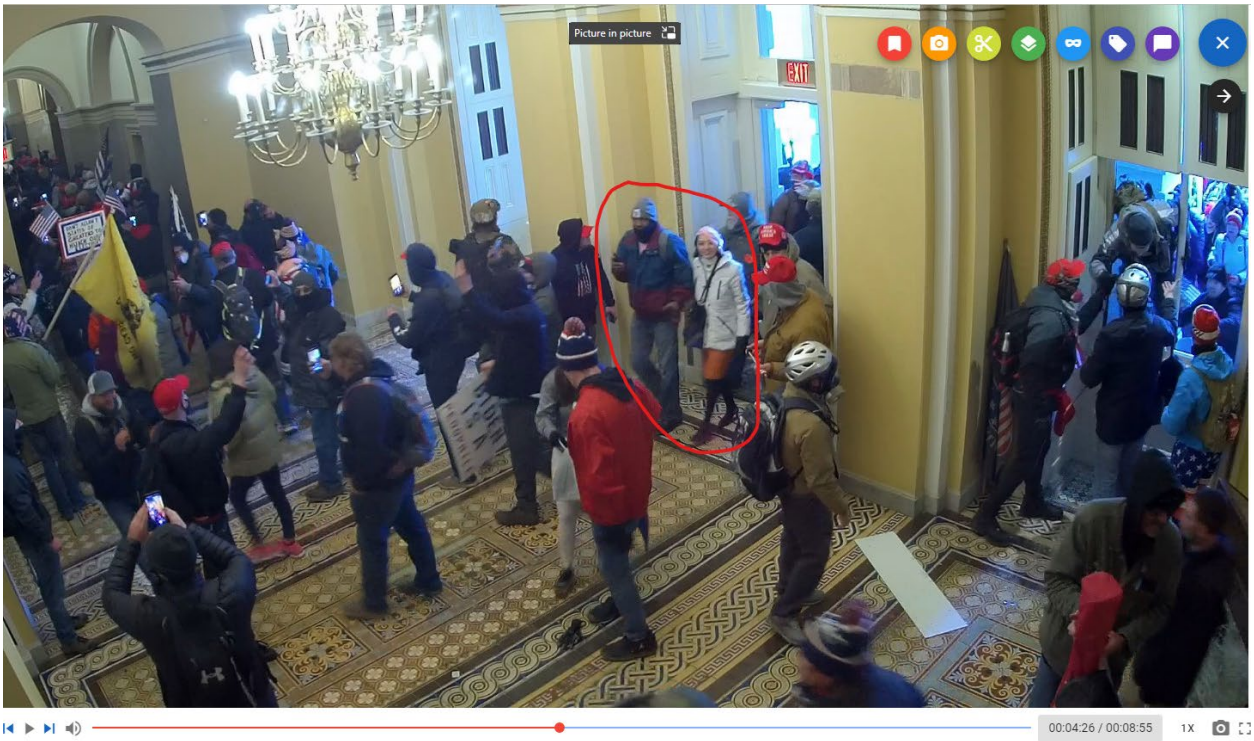
June 22, 2022).[1] This Court has already rejected many of these arguments in *Bozell*. *See United States v. Bozell*, No. 21-CR-216 (JDB), 2022 WL 474144, at *8-9 (D.D.C. Feb. 16, 2022). As explained herein, this Court should deny the Motion for the reasons articulated in *Bozell* and by other courts in this district, which have rejected the same arguments the defendant advances here.

FACTUAL BACKGROUND

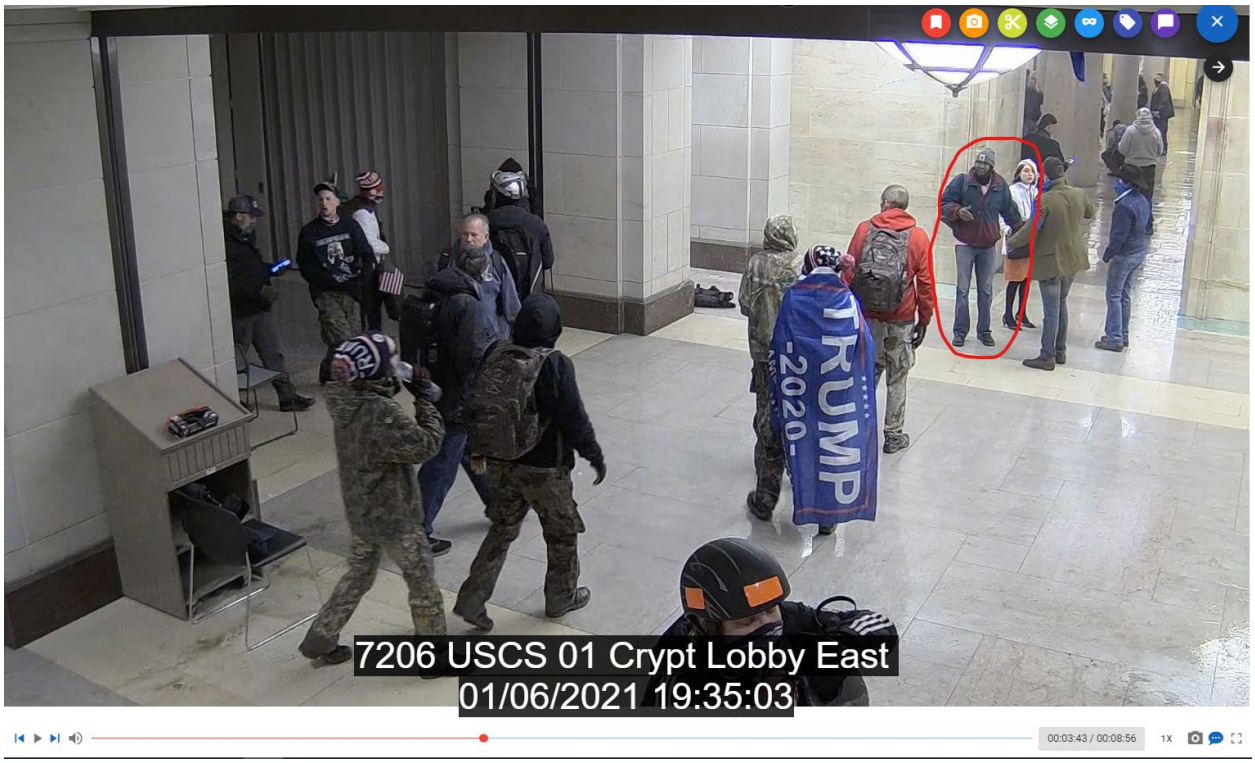
At 1:00 p.m., on January 6, 2021, a Joint Session of the United States Congress convened in the United States Capitol building. The Joint Session assembled to debate and certify the vote of the Electoral College of the 2020 Presidential Election. With the Joint Session underway and with Vice President 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 erected barricades. The crowd, having breached police officer lines, 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. 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.

[1] *See United States v. Griffin*, 549 F. Supp. 3d 49, 52–58 (D.D.C. 2021) (denying motion to dismiss charge of violating 18 U.S.C. § 1752(a)(1)); *United States v. Mostofsky*, 21-cr-138 (JEB), 2021 WL 6049891, at *12–13 (D.D.C. Dec. 21, 2021) (18 U.S.C. § 1752(a)(1)); *United States v. Nordean*, 21-cr-175 (TJK), 2021 WL 6134595, at *18–19 (D.D.C. Dec. 28, 2021) (18 U.S.C. § 1752(a)(1)); *United States v. Andries*, 21-cr-93 (RC), 2022 WL 768684, at *12-16 (D.D.C. Mar. 14, 2022) (18 U.S.C. §§ 1752(a)(1) and (a)(2)); *United States v. Puma*, 21-cr-454 (PLF), 2022 WL 823079, at *13-16 (D.D.C. Mar. 19, 2022) (18 U.S.C. § 1752(a)(1) and (a)(2)); *United States v. Sargent*, No. 21-cr-258 (TFH), 2022 WL 1124817, at *9 (D.D.C. Apr. 14, 2022) *United States v. Bingert*, 21-cr-91 (RCL), 2022 WL 1659163, at *13-15 (D.D.C. May 25, 2022) (18 U.S.C. § 1752(a)(1)).

Defendant Darrell Neely entered the Capitol through the Senate Wing Door at approximately 2:24 PM ET, as shown in the photograph below.



Defendant then proceeded to roam the Capitol for approximately 70 minutes. As shown in the photographs below, he smoked a cigarette, spent time in the Crypt , and exited the Capitol through the Memorial Door at approximately 3:30 PM.


TRUMP
-2020-
7206 USCS 01 Crypt Lobby East
01/06/2021 19:35:03
00:03:43 / 00:08:56
1x


0178 USCH 01 Crypt East
01/06/2021 19:38:43
00:18:42 / 00:19:58

At some point during his time in the Capitol, Defendant found items belonging to a U.S. Capitol Police Officer, including a jacket and hat, and stole those items. The items belonged to an officer who had removed them after being sprayed by an unknown substance. In a post-arrest interview with law enforcement, Defendant acknowledged that he took these items from the Capitol and described them as his "memorabilia."

LEGAL STANDARD

A defendant may move to dismiss an information for failure to state a claim prior to trial. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). An "indictment must be viewed as a whole and the allegations must be accepted as true at this stage in the proceedings." *United States v. Bowdin*, 770 F. Supp. 2d 142, 145 (D.D.C. 2011). The operative question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.* at 146. An information must contain every element of the offense

charged, if any part or element is missing, it is defective and must be dismissed. *See United States v. Hillie*, 227 F. Supp. 3d 57, 70 (D.D.C. 2017).

Federal Rule of Criminal Procedure 7(c)(1) governs the "Nature and Contents" of an indictment. The rule states, in relevant part, that the "information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged," and that "[f]or each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated."

ARGUMENT

I. The Court Should Deny Defendant's Motion to Dismiss Counts Two and Three, Alleging Violations of 18 U.S.C. § 1752

Counts Two and Three of the Information charge violations of Section 1752 of Title 18, which prohibits the unlawful entry into and disruptive or disorderly conduct in a "restricted buildings 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).

Defendant advances three principal arguments in seeking to dismiss Counts Two and Three: (1) only the United States Secret Service, not the Capitol Police, can designate "restricted areas" under the statute, and the Government does not allege that the Secret Service restricted the Capitol Grounds on January 6, 2021 (Mot. at 14-18, 27-28); (2) Section 1752 is unconstitutionally vague as applied to Defendant (Mot. at 18-27); and (3) Section 1752 is not applicable because former Vice President Pence was not "temporarily visiting" the Capitol Building on January 6, 2021 (Mot. at 28-29). Each of these arguments lack merit.

When Defendant entered the U.S. Capitol on January 6, 2021, the Vice President, who was protected by the Secret Service, was present, which is all the statute requires to render the Capitol a restricted area. Defendant's conduct accordingly falls within the Section 1752's plain sweep because he unlawfully entered a restricted building while the Vice President was "temporarily visiting," as alleged in the information.

A. 18 U.S.C. § 1752 does not require the government to prove that the restricted area was restricted at the Secret Service's direction.

Defendant argues that because the Capitol Police, not the Secret Service, barricaded the area around the Capitol, he should not be charged with violating 18 U.S.C. § 1752(a)(1) and (2). Courts in this district have rightly rejected this contention. *See Griffin*, 549 F. Supp. 3d at 52–58 (denying motion to dismiss charge of violating 18 U.S.C. § 1752(a)(1)); *Mostofsky*, 2021 WL 6049891, at *12–13; *Nordean*, 2021 WL 6134595, at *18–19; *Andries*, 2022 WL 768684, at *12-16; *Puma*, 2022 WL 823079, at *13-16; *Sargent*, 2022 WL 1124817, at *9; *Bingert*, 2022 WL 1659163, at *13-15.

Subsection 1752(c) defines the phrase "restricted buildings or grounds" as

> any posted, cordoned off, or otherwise restricted area—
>
> (A) of the White House or its grounds, or the Vice President's official residence or its grounds;
>
> (B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or
>
> (C) of a building or grounds so restricted in conjunction with an event designated as a special event of national significance.

18 U.S.C. § 1752(c)(1). It then defines the term "other person protected by the Secret Service" as "any person whom the United States Secret Service is authorized to protect under section

3056 of this title or by Presidential memorandum, when such person has not declined such protection." 18 U.S.C. § 1752(c)(2).

By its plain terms, then, Section 1752 prohibits the unlawful entry into a restricted or otherwise cordoned off area where "a person protected by the Secret Service is or will be temporarily visiting." *Wilson v. DNC Servs. Corp.*, 417 F. Supp. 3d 86, 98 (D.D.C. 2019). Section 1752, in other words, "focuses on perpetrators who knowingly enter a restricted area around a protectee, not on how it is restricted or who does the restricting." *Griffin*, 549 F. Supp. 3d at 54. That straightforward analysis has a straightforward application here: a protected person (the Vice President) was present inside the Capitol building or on the Capitol grounds, and that some portion of the Capitol building and grounds was posted, cordoned off, or otherwise restricted, making it a "restricted building or grounds" under § 1752(c)(1). By engaging in prohibited conduct on those premises, the defendant violated 18 U.S.C. § 1752.

Defendant nonetheless urges the Court to import an extra-textual requirement that the Secret Service be required to designate the restricted area. That is so, Defendant claims, because it is the Secret Service who protects the President and others, so it is the Secret Service who must make the designation of a restricted area.

That theory, in addition to finding no support in the text, fails for another obvious reason: Section 1752 is directed not at the Secret Service, but at ensuring the protection of the President and the office of the Presidency. *See* S. Rep. 91-1252 (1970); *see also* Elizabeth Craig, *Protecting the President from Protest: Using the Secret Service's Zone of Protection to Prosecute Protesters*, 9 J. Gender Race & Just. 665, 668–69 (2006). "Indeed, the only reference in the statute to the Secret Service is to its protectees. Section 1752 says nothing about who must do the restricting." *Griffin*, 549 F. Supp. 3d at 55; *see also Mostofsky*, 2021 WL 6049891 at *13

("The text plainly does not require that the Secret Service be the entity to restrict or cordon off a particular area."). "If Congress intended a statute designed to safeguard the President and other Secret Service protectees to hinge on who outlined the safety perimeter around the principal, surely it would have said so." *Griffin,* 549 F. Supp. 3d at 57. As this Court has held, Defendant's reading would have the Court create a "potentially massive procedural loophole" from the statute's "silence." *United States v. McHugh,* 21-cr-453, 2022 WL 296304, at *19 (D.D.C. Feb. 1, 2022). The Court should not do so.

The statute's history also undercuts the defendant's argument. *See Griffin,* 549 F. Supp. 3d at 55-56 (explaining how Congress has consistently "*broadened* the scope of the statute and the potential for liability"). While the earlier version of Section 1752 also did not say who must restrict a building or grounds, it did incorporate regulations promulgated by the Department of the Treasury (which at the time housed the Secret Service) governing restricted areas. *Id*. Defendant erroneously conflates the Treasury's Department's authority to promulgate certain regulations with a requirement that the Secret Service cordon off areas. Even so, Congress subsequently struck subsection (d) and did not replace it with language limiting the law enforcement agencies allowed to designate a restricted area. Pub. L. 109-177, Title VI, Sec. 602, 120 Stat. 192 (Mar. 9, 2006). Eliminating reference to the Treasury Department (without replacing it with the Department of Homeland Security, which currently houses the Secret Service) indicates that the statute no longer depends (if it ever did) on whether the Secret Service has defined an area as "restricted." Moreover, Defendant's reading of the statute, which would require the Secret Service to "cordon off" a private residence, "no matter how secure the location or how imposing the preexisting walls," leads to "pressing absurdities." *Griffin*, 549 F. Supp. 3d at 57.

B. 18 U.S.C. § 1752 Is Not Unconstitutionally Vague.

Defendant argues that, if the Court adopts the government's interpretation of Section 1752, then Section 1752 is unconstitutionally vague as applied to him, and that both the rule of lenity and novel construction principle require dismissal of Counts Two and Three. The defendant is wrong, and his argument borders on the frivolous. *See United States v. Caputo*, 201 F. Supp. 3d 65, 68 (D.D.C. 2016) (argument that Section 1752(a)(1) is void for vagueness "border[s] on the frivolous" because "the unlawfulness of entering the White House grounds without permission is unambiguous to the average citizen").

A statute is vague where it (1) fails to give ordinary people fair notice of the conduct it punishes or (2) is so standardless that it invites arbitrary enforcement. *Johnson v. United States*, 576 U.S. 591, 595 (2015). Neither applies to Section 1752.

As described above, Section 1752 prohibits the defendant from knowingly engaging in certain conduct in "any posted, cordoned off, or otherwise restricted area, of…grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." § 1752(a), (c)(1)(B). As this Court has held, "§ 1752 is clear, gives fair notice of the conduct it punishes, and does not invite arbitrary enforcement." *United States v. Bozell*, No. 21-CR-216 (JDB), 2022 WL 474144, at *9 (D.D.C. Feb. 16, 2022) (cleaned up). Likewise, prosecuting Defendant for entering the U.S. Capitol Building with a mob of rioters, smoking a cigarette in the Capitol, and stealing items belonging to the U.S. Capitol Police, does not unexpectedly broaden the statute. *See id.*

Defendant relatedly contends that the government is relying on an ambiguous phrase—"within such proximity to"—in Section 1752(a)(2). That contention misunderstands the charged crime. Defendant is not alleged to have engaged in unlawful disruption because he was within

proximity to the Capitol building. Instead, the Defendant was squarely within the Capitol building itself.

Defendant invokes the rule lenity. The rule of lenity "only applies 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." *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (internal quotation omitted). There is no grievous ambiguity here. As noted above, Section 1752 prohibits certain conduct within restricted zone established to ensure the protection of certain individuals such as the Vice President. No guess work is required. *See Bozell*, 2022 WL 474144, at *9 (rejecting argument that the rule of lenity justifies dismissal of 1752 charges).

Finally, Defendant asserts that the "novel construction principle" requires dismissal of the Information. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). As with the Defendant's other arguments, this claim is rooted in the faulty premise that the statute requires that the USSS designate the restricted area. Because Section 1752's plain language includes no such requirement—and encompasses the precise conduct that the Defendant is alleged to have committed—the novel construction principle has no application here. *Bozell*, 2022 WL 474144, at *9 (rejecting argument that the rule of novel construction justifies dismissal of 1752 charges).

C. The Vice President can "temporarily visit" the U.S. Capitol

Contrary to Section 1752's plain terms, purpose, and structure, Defendant argues that Vice President Pence could not have "temporarily visited" the U.S. Capitol on January 6, 2021,

because he had an office there on that day. He is wrong. In *United States v. Griffin,* 21-cr-92 (D.D.C. Mar. 22, 2022), Judge McFadden denied a motion for judgment of acquittal where a defendant claimed that the Vice President was not temporarily visiting the Capitol on January 6, 2021. And at least five other judges in this district, including this Court, have now concluded that the Vice President was temporarily visiting the Capitol that day. *See Puma*, 2022 WL 823079, at *16-19 (Friedman, J.); *Andries*, 2022 WL 768684, at *16-*17 (Contreras, J.); *McHugh*, 2022 WL 296304, at *20-*22 (Bates, J.); *Bingert*, 2022 WL 1659163, at *15 (Lamberth, J.); *United States v. Williams*, 21-cr-168, 2022 WL 2237301, at *19-20 (Jackson, J.) (D.D.C. June 22, 2022).

The "ordinary meaning" of "temporarily visit" unambiguously includes a trip to one's office. *Andries*, 2022 WL 768684, at *16 (it is "quite natural to say that a person 'temporarily visits' a place where she has an office."). The term "temporary" means "[l]asting for a time only; existing or continuing for a limited time; transitory." *Temporary*, Black's Law Dictionary (11th ed. 2019). 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." *See* https://www.merriam-webster.com/dictionary/visit. Putting these definitions together, "someone is 'temporarily visiting' a location if they have gone there for a particular purpose, be it 'business, pleasure, or sight-seeing,' and for a limited time, which could be 'brief' or 'extended' while nonetheless remaining 'temporary.'" *McHugh*, 2022 WL 296304, at *20. People commonly go to their offices for one particular purpose (business), and for a limited time, often returning home at the end of the day. They may return the following day, but there is no reason why one cannot repeatedly "temporarily visit" the same location. One can "temporarily visit" a place where one has an office.

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. Furthermore, as President of the Senate, Vice President Pence oversaw the vote certification. Given 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).

Defendant emphasizes Section 1752's use of the term "temporarily" and cites cases where either the President or Vice President were "traveling *outside* of the District of Columbia 'visiting' that area for a 'temporary' purpose." (Mot. at 28-29.) Section 1752, however, does not impose a requirement that the location being temporarily visited be outside of the District of Columbia. Second, the visit to the U.S. Capitol *was* temporary: Vice President Pence (and his family) had traveled to the U.S. Capitol to oversee and attend the Joint Session of Congress, a proceeding of limited duration. At the close of the proceeding, they left, confirming the "temporary" nature of their visit. *See McHugh*, 2022 WL 296304, at *20-21 (citing various dictionary definitions of "temporary" as "for a limited time" and finding that the Vice President can "temporarily visit" the U.S. Capitol).

Defendant offers two further observations, both irrelevant. First, he notes that Vice President Pence "lived and worked" in the District of Columbia. (Mot. at 28.) But Section 1752(c)(1)(B) defines the restricted area by reference to "buildings or grounds," not municipal borders. That Vice President Pence lived and worked in Washington, D.C. does not detract from

the fact that he "temporarily visit[ed]" the U.S. Capitol on January 6. "Simply being in the visitor's hometown does not mean a place cannot be 'visited.'" *McHugh*, 2022 WL 296304, at *22.

Second, Defendant stresses that Vice President Pence had a permanent U.S. Capitol office. (Mot. at 28.). Section 1752(c)(1)(B), however, defines the restricted area by reference to the location of the protectee, not his office. 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]." Moreover, the U.S. Capitol is not the Vice President's regular workplace; "[e]ven if there is some carveout in § 1752 for where a protectee normally lives or works, it does not apply to Vice President Pence's trip to the Capitol on January 6, 2021." *McHugh*, 2022 WL 296304, at *22.

Such a "carveout," taken to its logical end, would undermine the government's ability to protect the President and Vice President by deterring and punishing individuals who seek unauthorized access to the President's or Vice President's location. It would restrict Section 1752(c)(1)(B)'s application to only locations outside the District of Columbia—on the view that any visit by the President or Vice President to a location within municipal limits cannot be "temporary" because they reside in the District of Columbia. Second, under Defendant's construction, Section 1752(c)(1)(B) would not apply where the President or Vice President temporarily stayed at their permanent residences in Delaware or California—on the view that such a trip would not qualify as "visiting." Nor would it apply to Camp David, where there is a presidential cabin and office. In another strange scenario, a restricted area could exist when, as here, the Vice President's family visits the Capitol (because they are Secret Service protectees

without an office there), but not when the Vice President does, affording a higher level of protection for the family of the elected official than to the elected official himself (or herself). No support exists for Defendant's effort to insert such large and irrational exceptions into the statute's sweep. *See Lovitky v. Trump*, 949 F.3d 753, 760 (D.C. Cir. 2020) (courts will avoid a "statutory outcome … if it defies rationality by rendering a statute nonsensical").

Defendant's position also defies Section 1752's clear purpose. In drafting Section 1752, Congress sought to protect "not merely the safety of one man, but also the ability of the executive branch to function in an orderly fashion and the capacity of the United States to respond to threats and crises affecting the entire free world." *United States v. Caputo*, 201 F. Supp. 3d 65, 70 (D.D.C. 2016) (quoting *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1528 (D.C. Cir. 1984)). To that end, the statute comprehensively deters and punishes individuals who seek unauthorized access to the White House grounds and the Vice President's residence—fixed locations where the President and Vice President live and work, 18 U.S.C. 1752(c)(1)(A); and also any other "building or grounds" where they (or other protectees) happen to be "temporarily visiting," 18 U.S.C. 1752(c)(1)(B). Reading Sections 1752(c)(1)(A) and 1752(c)(1)(B) together protects the President and Vice President in their official homes and wherever else they go. Interpreting the statute as Defendant suggests would create a gap in Section 1752's coverage by removing areas, such as the U.S. Capitol, from protection. It could expose the leaders of the Executive Branch even as they perform their official duties. That gap is both illogical and contrary to the statutory history of Section 1752, where, "at every turn," Congress has "*broadened* the scope of the statute and the potential for liability." *Griffin,* 2021 WL 2778557, at *5 (D.D.C. July 2, 2021).

All the relevant metrics—plain language, statutory structure, and congressional purpose—foreclose the defendant's crabbed reading of Section 1752(c)(1)(B). This Court should reject it. Defendant's cited cases, involving either an arrest or conviction under Section 1752, do not discuss the "temporarily visiting" language. (Mot. at 28-29 (citing *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005); *United States v. Junot,* 1990 WL 66533 (9th Cir. May 18, 1990) (unpublished); *Blair v. City of Evansville, Ind.,* 361 F. Supp.2d 846 (S.D. Ind. 2005)).

CONCLUSION

For the foregoing reasons, the motion to dismiss Counts Two and Three of the Information should be denied.

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CERTIFICATE OF SERVICE

I certify that a copy of the Government's Response was served on all counsel of record via the Court's electronic filing service.

/s/ Joseph McFarlane
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Trial Attorney

Date: August 21, 2022