UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT FOR SELECTIVE PROSECUTION

Defendant Cortney Merritts ("Merritts"), by and through his undersigned counsel, Justin K. Gelfand and Gregory P. Bailey and the law firm Margulis, Gelfand, DiRuzzo & Lambson, respectfully submits this reply in support of his motion to dismiss the indictment for selective prosecution.

The Government attempts to discredit the parameters that Merritts uses to define the group under which this selective prosecution motion should be evaluated. But these parameters—a PPP defendant with a loss under $30,000 within the jurisdiction of the United States Attorney's Office for the District of Columbia—hew the closest to a similarly situated person for this Court to consider. The Government boldly states that "[h]ad Defendant expanded his parameters to include people prosecuted by the office for loans of under $35,000, instead of $30,000, then presumably his claim of selective prosecution would *crumble*." (Doc. 16) (emphasis added). In support of this assertion, the Government offers two other cases in the past two years that were $35,000 or less.[1] Both of those cases were Metropolitan Police Department ("MPD") officers, not a population that Merritts claims to be similarly situated with, and a population that the United States Attorney's

[1] While two cases brought in two years may be significant in some federal districts, the USAO-DC brought 414 criminal cases in 2023 and 508 criminal cases in 2024. *See* https://www.justice.gov/usao/media/1343726/dl?inline (last visited October 28, 2025); https://www.justice.gov/usao/media/1399686/dl?inline (last visited October 28, 2025).

Office for the District of Columbia would have increased interest in prosecuting wrongdoing within. Regardless, the Government misses the mark. While Merritts set his similarly situated population at $30,000 of loss, his motion mentions the $35,000 loss case involving the MPD officer,[2] and specifically states that the only cases with less than a $150,000 loss located in a search of press releases by the United States Attorney's Office for the District of Columbia ("USAO-DC") was for an MPD officer. Merritts' motion states that, according to the press releases, and with the exception of the MPD, the apparent threshold for charging a PPP-related case is $150,000 for this office. If his motion were to crumble if he selected $35,000, where are the other similarly situated defendants who were prosecuted? They do not exist, and this prosecution was impermissibly selective.

The next parameter the Government attempts to distance itself from is that this consideration of a similarly situated person should be limited to the USAO-DC. (Doc. 16). This position from the Government makes rhetorical sense for this motion, but is antithetical to the normal operations and statutory constraints of the USAO-DC. In plea agreements drafted by the USAO-DC, the language clearly states "this agreement is binding only upon the Criminal and Superior Court Division of the United States Attorney's Office for the District of Columbia." The agreements go on to state that "[t]his agreement does not bind the Civil Division of the United States Attorney's Office for the District of Columbia or *any other United States Attorney's Office*, not does it bind any other state, local, or federal prosecutor."[3] (emphasis added). A screenshot of that paragraph, identical in all cases reviewed in footnote 3, is below:

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[2] Merritts acknowledges failing to locate the only other PPP-related case cited by the Government coming in at under $150,000 of loss, which was also an MPD officer. (Doc. 16).

[3] This is based on a review of ten recent plea agreements entered into by the USAO-DC. The following documents were reviewed on Pacer: 1:24-CR-401 (Doc. 30); 1:24-CR-533 (Doc. 24); 1:24-CR-157 (Doc. 38); 1:24-CR-157 (Doc. 41); 1:25-CR-108 (Doc. 8); 1:25-CR-149 (Doc. 14); 1:24-CR-520 (Doc. 56); 1:24-CR-520 (Doc. 63); 1:24-CR-520 (Doc. 73); 1:24-CR-520 (Doc. 78).

> Your client further understands that this Agreement is binding only upon the Criminal and Superior Court Divisions of the United States Attorney's Office for the District of Columbia. This Agreement does not bind the Civil Division of the United States Attorney's Office for the District of Columbia or any other United States Attorney's Office, nor does it bind any other state, local, or federal prosecutor. It also does not bar or compromise any civil, tax, or administrative claim pending or that may be made against your client.

Further, a federal statute limits the reach of a United States Attorney to offenses "within his district." 28 U.S.C. § 547. While it limits the geographical reach of its plea agreements and is limited by statute in its geographic authority to bring cases, the USAO-DC wants this Court to consider cases outside these parameters in determining similarly situated defendants. The Government cannot have it both ways.

The Government goes on to say that the change in administration is a red herring. (Doc. 16). But this too does not hold water. The Government states, just as Merritts did in his initial motion, that this investigation began under a different administration. But what the Government cannot escape is that the case was not presented to the grand jury until *after* the change in administration, even though it was, according to Government representations at the time, ready to proceed to the grand jury in June of 2024. According to footnote two in the Government's response, Merritts shortened the time from the beginning of this PPP investigation to the presentation of the indictment. (Doc. 16). But, to be clear, this does not help the Government in the way it argues. The Government now admits to having had evidence of this alleged crime longer, and still not bringing charges until after the change in administrations. The lengthening of the investigation timeline only buttresses Merritts' claim. Indeed, entirely missing from the Government's response is the elephant in the room: Merritts is married to a former democratic congresswoman who has always been vocal against President Trump. *That* is the distinction with a difference: he is the only non-Washington, D.C. police officer to have been charged in a two-year period for this crime and a loss amount under $35,000. And he is the *only* person charged in a two-year period for this crime and a loss amount under $30,000. The evidence overwhelmingly reflects that this U.S. Attorney's Office does not prosecute people for this crime with a loss amount under $150,000 unless the defendant is a Washington, D.C. law enforcement officer—and Merritts should not be the subject of this prosecution because he is married to an outspoken Democratic politician.

While Merritts is confident he has established the requirements to grant dismissal under a claim of selective prosecution, he has, at the very least, presented a "colorable claim" that would warrant discovery to be ordered by this Court. (Doc. 16). "The colorable basis standard is met by *some evidence* tending to show the existence of the essential elements of the claim." *Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 16 (D.D.C. 1997) (emphasis in original) (internal quotation omitted). That is analogous to the common idea that where there is smoke, there could be fire. Merritts has demonstrated fire in this motion for dismissal. But, at the very least, Merritts asks this Court to let him sift through the smoke so that this Court can see, undeniably, the fire that is burning. Merritts was initially targeted because of his relationship with, at the time, a sitting United States Representative. The initial investigation failed to yield any evidence of wrongdoing.[4] Then, after having evidence of alleged financial wrongdoing for, according to the Government, over one year, the Government finally gets around to presenting an indictment, after the change of administrations. There is smoke, and this Court, if it chooses not to grant a dismissal, should force the Government to clear away the smoke with more than the broad assertions contained in its response. Merritts, this Court, and the justice system deserve "one tier of justice for all." *See* Attorney General Pam Bondi, Senate Confirmation Hearing, January 15, 2025.

[4] This assertion, made in Merritts' motion, was not refuted by the Government in its response.

Based on the foregoing, and incorporating his original motion, Merritts respectfully requests that this Court dismiss the indictment for selective prosecution. In the alternative, Merritts moves this Court to compel production of discovery related to: (1) the review, approval or declination, and presentation of charges against Merritts; and (2) the review, approval or declination, and presentation of charges of other defendants for PPP or EIDL fraud with losses less than $30,000. Merritts further moves, following production of that discovery, for the Court to set an evidentiary hearing on this motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the Clerk of Court and that all counsel of record received notice.

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