UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Case No. 1:21-cr-175
ETHAN NORDEAN, et al.,	)	**Judge Timothy J. Kelly**
Defendants.	)	

DEFENDANT NORDEAN'S MOTION FOR LEAVE TO FILE SUR-REPLY IN RESPONSE TO THE GOVERNMENT'S MOTION TO REVOKE RELEASE ORDER

Defendant Ethan Nordean, through his counsel, files this motion for leave to file a sur-reply in response to the following three legal arguments raised for the first time in the government's reply in support of its third motion to detain Nordean pretrial (ECF No. 45): (1) that Nordean may be detained pretrial under the dangerousness factor of 18 U.S.C. § 3142(g)(4) even if the government has not satisfied 18 U.S.C. § 3142(f), Gov't Reply, pp. 9-11; (2) that the superseding indictment properly alleges Nordean's vicarious liability under the *Pinkerton* standard for property destruction by individuals not charged in this case, Gov't Reply, pp. 6-7; and (3) that Nordean's "commitment to his [political] cause" satisfies the standard of "clear and convincing evidence of an identified and articulable threat to any individual or the community" set in *United States v. Munchel*, 2021 U.S. App. LEXIS 8810 (D.C. Cir. Mar. 26, 2021).

Nordean's proposed sur-reply brief is attached to this motion for leave as Exhibit 1. *See Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.D.C. 2003) ("The district court routinely grants [sur-reply] motions when a party is 'unable to contest matters presented to the court for the first time' in the last scheduled [briefing].") (quoting *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001)).

Dated: April 5, 2021

Respectfully submitted.
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Certificate of Service

I hereby certify that on the 5th day of April, 2021, I filed the foregoing brief with the Clerk of Court using the CM/ECF system and the Case Administrator Brittany Bryant, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

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And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

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DEFENDANT NORDEAN'S SUR-REPLY IN RESPONSE TO THE GOVERNMENT'S MOTION TO REVOKE RELEASE ORDER

Defendant Ethan Nordean, through his counsel, files this brief sur-reply in response to legal arguments raised for the first time in the government's reply in support of its third motion to detain Nordean pretrial. ECF No. 45.

A. Pretrial detention is barred unless the government establishes a felony offense listed in 18 U.S.C. § 3142(f)

Section 3142(f) sets out a list of five categories of offenses that may justify a pretrial detention hearing. 18 U.S.C. § 3142(f)(1). All are felony offenses. *Id.* And not all felony offenses appear there: most of the federal criminal code is not included. Separately, § 3142(f) provides that a pretrial detention hearing may also be held in a case that involves "(A) a serious risk that such person will flee; or (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror." 18 U.S.C. § 3142(f)(2). "Absent one of these circumstances [in § 3142(f)], detention is not an option." *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999). *See also United States v. Salerno*, 481 U.S. 739, 747 (1987) (Congress limited pretrial detention

of presumptively innocent persons to defendants charged with crimes that are "the most serious" compared to other federal offenses).

The government's third detention motion rests almost exclusively on Telegram messages—from individuals other than Nordean—that it says constitute a conspiracy. Gov't Reply, pp. 2-6. However, the government does not argue that its conspiracy charge, or the two criminal objects of the alleged conspiracy—obstruction of an official proceeding, 18 U.S.C. § 1512(c)(2), and interference with law enforcement during a civil disorder, 18 U.S.C. § 231(a)(3)—constitute detainable offenses listed in § 3142(f)(1). Instead, the government's exclusive basis for detention under § 3142(f) is the superseding indictment's charge that Nordean and others destroyed federal property, an offense under 18 U.S.C. § 1361, which the government asserts is a detainable "crime of violence" under § 3142(f)(1)(A). ECF No. 30, p. 3.

In his opposition to the government's third detention motion, Nordean showed that the superseding indictment does not allege a single instance of the destruction of federal property on the part of Nordean. Instead, it alleges that Nordean and Defendant Biggs "shook a barricade" and that they and "others in the crowd were able to knock it down." First Superseding Indictment, ¶ 58. An offense under § 1361 constitutes a felony, punishable by up to 10 years in prison, only if the "damage to such property exceeds the sum of $1,000 . . ." 18 U.S.C. § 1361. The superseding indictment does not allege $1,000 in damage from Nordean's alleged barricade shaking. First Superseding Indictment, ¶ 58. The government has not proffered such evidence. Section 3142(f) provides that the Court may detain a person pretrial, "in a case that involves—(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed." 18 U.S.C. § 3142(f)(1)(A). Nordean showed that because the government has failed to allege

property destruction, much less damage exceeding $1,000, attributable to him, there is no basis for Bail Reform Act detention in this case—even before one reaches the question of conditions of release, for which the government similarly articulates no cognizable legal argument. ECF No. 32, pp. 12-13, 21.

The government's reply fails to dispute the $1,000 point. ECF No. 45.[1] The argument is therefore forfeited. *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) (party's failure to respond to a conspicuous, nonfrivolous argument in opponent's brief ordinarily constitutes an argument forfeiture). However, the government inserts a new legal argument into its reply: that the Court may simply detain Nordean under the "dangerousness" standard of 18 U.S.C. § 3142(g)(4), without regard to whether § 3142(f) is satisfied. Gov't Reply, pp. 9-11 ("The Court Is Not Limited to Consideration of Destruction of Federal Property When Evaluating The Bail Reform Act Factors").

The government writes, "Section 3142(g)'s language articulates no link between the rationale for a detention hearing under either §§ 3142(e) or 3142(f) and the factors a court considers under § 3142(g)." Gov't Reply, p. 10. That misses the point. As the D.C. Circuit held in *Singleton*, "[a]bsent one of th[e] [§ 3142(f) factors], *detention is not an option*." 182 F.3d at 9 (emphasis added).[2]

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[1] The same pleading and proof failure concerning over $1,000 in damage defeats the government's contention that a rebuttable presumption of detention exists under 18 U.S.C. § 3142(e), which also requires "an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, *for which a maximum term of imprisonment of 10 year or more is prescribed*." 18 U.S.C. § 3142(e)(3)(C) (emphasis added).

[2] The cases cited by the government stand for the distinct point that *if* the government has satisfied § 3142(f)(1) or (f)(2), then the Court's consideration of release factors under § 3142(g) need not directly correspond to the distinct detention predicates under (f)(1) (list of serious felony offenses) or (f)(2) (risk of flight or obstruction). Gov't Reply, p. 10 (citing cases). Even here, however, the government does not cite any precedent in support of its point from this

Detention is appropriate under 3142(f)(1), "in a case that involves—

(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code . . .

18 U.S.C. § 3142(f)(1).

The Court will notice that all of the offenses listed in § 3142(f)(1) are felony offenses. That is in keeping with the Supreme Court's holding in *Salerno* that Congress intended that the Bail Reform Act limit detention of presumptively innocent persons to "the most serious" of federal offenses. 481 U.S. at 747. The Court will also notice that conspiracy, 18 U.S.C. § 371; obstruction of official proceedings, 18 U.S.C. § 1512(c)(2)[3]; and interference with law enforcement during a civil disorder, 18 U.S.C. § 231(a)(3), do not satisfy § 3142(f)(1).

Circuit. Although the government cites *Singleton*, the D.C. Circuit in that case explicitly held, "The § 3142(g) factors are not at issue in this appeal." 182 F.3d at 10.

[3] Nordean conspicuously argued in opposition that the superseding indictment does not plead an offense under § 1512(c)(2). ECF No. 32, pp. 17-18. The government did not contest the point in reply. ECF No. 45. Accordingly, the argument is forfeited. *Alvarez*, 828 F.3d at 295.

Similarly, because the offenses listed in that subsection are felonies, if depredation of federal property, 18 U.S.C. § 1361, is to satisfy § 3142(f)(1) it must be an offense "for which a maximum term of imprisonment of 10 years or more is prescribed." § 3142(f)(1)(A). *See*, *e.g.*, *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 965-66 (E.D. Wisc. 2008) (§ 3142(f)(1)(A) satisfied where "crime of violence" offense carries "maximum term of imprisonment of 10 years or more"); *United States v. Hefner*, 2019 U.S. Dist. LEXIS 23432, *6 (E.D. Tenn. Feb. 13, 2019) (same).

The superseding indictment does not plead a felony offense under § 1361 because it does not identify destruction of federal property exceeding $1,000. Nor has the government proffered such evidence, even though in other Capitol intrusion cases, the government's indictments plainly plead that fact, and adduce evidence to support it, where it exists. *See*, *e.g.*, *United States v. Mostofsky*, 21-cr-138, ECF No. 5 (D.D.C. 2021) (Capitol defendant charged with theft of property exceeding $1,000 in value, pleading exact alleged value of property, supported by quote from federal contractor (obtained the day before defendant's arrest)). So, the government's new argument that the Court may detain Nordean under Section 3142(g) alone is wrong.

B. The superseding indictment does not allege Nordean's *Pinkerton* vicarious liability for a non-defendant's § 1361 offense

Indirectly acknowledging its § 1361 failure, the government newly argues that it has still satisfied § 3142(f)(1)(A) because a non-defendant to this case, Dominic Pezzola, smashed a window of Congress on January 6 and that individual is alleged to be a member of the Proud Boys, like Nordean. Gov't Reply, pp. 6-7. This bootstrapping fails for several reasons.

First, vicarious liability under the *Pinkerton* standard attaches to a defendant from his *co-conspirators*' crimes. And it is black letter law that it is "essential to determine what kind of agreement or understanding existed *as to each defendant*." *United States v. Tabron*, 437 F.3d 63,

66 (D.C. Cir. 2006) (emphasis added) (citing *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964) (Friendly, J.)). Here, the superseding indictment does not allege that Pezzola was a party to the conspiracy alleged in this case. It simply contends he was a member of the Proud Boys and that he smashed a window. First Superseding Indictment, ¶ 62. The government does not allege a conspiracy to commit a specific federal offense between individuals simply by contending they are members of the same political or fraternal organization. The perverse implications of such a theory of criminal liability need no elaboration. *See*, *e.g.*, *Yates v. United States*, 354 U.S. 298, 324-25 (1957) (abstract principles of political organization to which defendant belonged do not knit together Smith Act conspiracy to overthrow the government).

Second, the government premises its argument on the assumption that Pezzola *is* a Proud Boys member. But it offers no evidence in support of that contention and it is factually disputed. Gov't Reply, pp. 6-7; First Superseding Indictment, ¶ 62.

Third, even if the government had properly alleged Nordean's *Pinkerton* vicarious liability for non-defendant Pezzola's actions, it still has not alleged or proffered over $1,000 in property destruction from Pezzola's crime. Gov't Reply, pp. 6-7; First Superseding Indictment, ¶ 62.

Fourth, the government separately contends that it satisfies § 3142(f)(1)(A) because it alleges that Nordean aided and abetted Pezzola's window-smashing. Gov't Reply, p. 7. Here, the government is repeating the exact same argument it presented to the Chief Judge in its second attempt to detain Nordean pretrial. In response, the Chief Judge found:

> There is no allegation that [Nordean] caused injury to any person or that he even personally caused damage to any particular property. . . He was a leader of a march down to the Capitol. Once they got there it's not clear what leadership role [Nordean] took at all to the people inside the Capitol or – **even the evidence about [Nordean] directing people to break windows to get into the Capitol is weak, to say the least**. . .

> [T]he weight of the evidence against [Nordean] for aiding and abetting the injury and depredation of Government property, under 18 U.S.C. section 1361, in an amount exceeding $1,000 when he personally didn't do anything – and **there is no evidence of *specific directions* by [Nordean] to tell his fellow Proud Boys [to] carve some vulgar thing on a door or to – any other specific information about him giving those kinds of *precise orders*** is not as strong and overwhelming to say that the weight of the evidence favors pretrial detention . . .

3/3/21 Hr'g Trans., pp. 79-80 (emboldening and italics added).

The Chief Judge's finding, which is the law of the case, was consistent with the Supreme Court's last word on abetting and abetting liability. *Rosemond v. United States*, 572 U.S. 65, 76 (2014) ("[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate *that* offense's commission . . . An intent to advance some different or lesser offense is not, or at least not usually, sufficient. Instead, the intent must go to *the specific and entire crime charged*.") (emphasis added).

C. The government does not satisfy the *Munchel* dangerousness standard by saying that Nordean "remains committed to his [political] cause"

As the Court knows, the D.C. Circuit recently reversed a district court's decision to detain pretrial the "zip-tie Capitol defendant." *United States v. Munchel*, 2021 U.S. App. LEXIS 8810 (D.C. Cir. Mar. 26, 2021). The court of appeals stressed that, assuming the government has already satisfied § 3142(f), it also "must prove by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any other person and the community," under the § 3142(g) factors. *Id.*, *13 (internal quotation marks omitted).

Munchel was seen carrying zip-ties and a taser in the Capitol Building. *Id.*, *2. Walking into the seat of Congress, he announced, "we're not playing fucking nice no god damn more" and that he was "fucking ready to fuck shit up." *Id.*, *4. The district court had based its dangerousness determination under § 3142(g)(4) on the finding that "Munchel's alleged conduct indicates that he is willing to use force to promote his political ends." *Id.*, *22. The court of

appeals found this finding "clearly erroneous" because, among other things, the record was absent "evidence that either Munchel or [the co-defendant] committed any violence on January 6[;] [t]hat Munchel or [the co-defendant] assaulted [a person] on January 6 . . . If, in light of the lack of evidence that Munchel or [the co-defendant] committed violence on January 6, the District Court finds that they do not in fact pose a threat of committing violence in the future, the District Court should consider this finding in making its dangerousness determination." *Id.*, *22.

Judge Katsas, in partial dissent, would have "reverse[d] outright," not "remanded for a do-over." *Id.*, *26. Specifically, the Judge addressed the exact argument the government makes for Nordean's pretrial detention: that "rhetorical bravado . . . invoking the American Revolution" and "would-be martyr[dom]" somehow satisfy the dangerousness standard of § 3142(g). *Id.*, *32. Judge Katsas found this argument misplaced for two reasons: "During the chaos of the Capitol riot, Munchel and [the co-defendant] had ample opportunity to fight, yet neither of them did. Munchel lawfully possessed several firearms in his home, but he took none to the Capitol." *Id.*, *33-34. Second, the government's contention that Munchel had a desire to "stop or delay the peaceful transfer of power" is not an "identified and articulable threat to any individual or the community" because:

> [T]he transition has come and gone, and that threat has long passed. In the district court, the government warned of an upcoming protest scheduled for March 4. But that protest never materialized, and the government produced no evidence that Munchel . . . had been involved in its planning before [his] arrest.

Id., *34.

In reply, the government falls short of proffering clear and convincing evidence of dangerousness—even on a par with that in *Munchel*. Unlike Munchel, Nordean did not carry zip-ties or tasers in the Capitol. He did not have any weapon at all, though, as in *Munchel*, he could have brought one. He did not commit any violence. The government's argument is simply

that Nordean is "committed to his cause," was a leader of a political group, claimed to "represent the spirit of 1776," and that cherry-picked messages from random members of a 60-person Telegram chat thread unknown to Nordean made reference to the videogame "Minecraft" which the government claims, without evidence, is an esoteric allusion to crimes generally. Gov't Reply, pp 7-8. But, as Judge Katsas concluded, "the transition has come and gone, and that threat has long passed" and "rhetorical bravado" about patriotism is not sufficient. *Munchel*, 2021 U.S. App. LEXIS 8810, *34.

A recent detention decision in another Capitol case underscores *Munchel*. The government sought pretrial detention of a Capitol defendant who made the following inflammatory public remarks, before and after January 6:

- "The only good Democrat is a dead Democrat";
- "You want to say that was a mob? You want to say that was violence? No sir. No Ma'am. No, we could have a 2nd Amendment rally on those same steps that we had that rally yesterday. You know, and if we do, then it's gonna be a sad day, because there's gonna be blood runnin' out of that building. But at the end of the day, you mark my word, we will plant our flag on the desk of Nancy Pelosi and Chuck Schumer and Donald J. Trump if it boils down to it";
- Explaining his plans for President Biden's inauguration, the defendant said: "I am going to leave either tonight or tomorrow. I've got a .357 Henry Big Boy rifle . . . that I got in the trunk of my car, and I've got a .357 single action revolver . . . that I will have underneath the front seat on my right side. And I will embrace my Second Amendment, I will keep my right to bear arms, my vehicle is an extension of my home in regard to the constitutional law, and I have a right to have those firearms in my car."

United States v. Couy Griffin, 21-cr-92 (D.D.C. 2021).

Plainly, these are statements potentially indicative of dangerousness far beyond anything the government has proffered with respect to Nordean. Yet the Chief Judge rejected the government's detention argument. The Chief Judge found that "the defendant's statements are highly inflammatory, deeply disconcerting . . .—particularly . . . suggesting that the blood of

elected officials will be spilled because he is unhappy with the outcome of a presidential election, and also that he would subsequently return to Washington, D.C., with firearms. . ." 2/5/21 Hr'g Trans., pp. 41-42, Exh. 2. Nevertheless, the Court determined that these comments had been selectively presented by the government and that the defendant's law-abiding history and behavior outweighed them. *Id.* The Court was right. Griffin has complied with his standard conditions of release flawlessly for months.

So has Nordean, as his Probation Officer reports. The government's inability to articulate how Nordean poses a threat to the community when he has successfully complied for over a month with home confinement with GPS location monitoring and is not permitted to leave the Western District of Washington, does not come close to "clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any other person and the community." *Munchel*, 2021 U.S. App. LEXIS 8810, *13.

Dated: April 5, 2021

Respectfully submitted.
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. MJ 21-92
vs.	)	
	)	
COUY GRIFFIN,	)	February 5, 2021
	)	3:31 p.m.
Defendant.	)	Washington, D.C.
	)	

* * * * * * * * * * * * * * * * * *

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JUDGE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

(Counsel and defendant appearing via videoteleconference)

APPEARANCES:

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ALSO PRESENT: CHRISTINE SCHUCK, Pretrial Services
(Appearing telephonically)

Court Reporter: Elizabeth SaintLoth, RPR, FCRR
Official Court Reporter

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY: Matter before the Court, Magistrate Case No. 21-92, United States of America versus Couy Griffin.

Your Honor, for the record, the pretrial agent, Ms. Christine Schuck, is participating via telephone.

THE COURT: Thank you.

THE DEPUTY: Counsel, please state your names for the record, starting with the Government.

MS. IYENGAR: Yes, Your Honor.

Good afternoon. Janani Iyengar for the United States.

THE COURT: Good afternoon.

For the defendant.

MR. D. SMITH: Good afternoon, Your Honor. David Smith and Nicholas Smith for the defendant, Mr. Griffin.

THE COURT: All right.

Mr. Griffin, do you have any difficulty hearing what's going on?

THE DEFENDANT: No, ma'am. I can hear you fine.

THE COURT: All right. And do you agree to participate in this teleconference via video teleconference after consultation with your counsel rather than being physically present in the courtroom?

You have to speak, Mr. Griffin.

THE DEFENDANT: Yes, ma'am. Yes, ma'am.

THE COURT: All right. So we're here on the defendant's motion to revoke the pretrial detention order that was entered by the magistrate judge.

Let me just begin by stating the documents that I have reviewed in connection with this motion. I have reviewed the Government's oppos -- certainly the motion itself, docketed at ECF 9; the Government's opposition memorandum, and the defendant's reply.

I have reviewed the entire record in the case, including the complaint; the magistrate judge's detention order; the transcript of the detention hearing; and order. And I have also reviewed the original motion filed by the Government in support of its oral motion for pretrial detention, and the defendant's opposition to that motion.

I do appreciate that it is -- the defendant's motion is the one that's pending in front of me right now, and usually we start with the moving party. But given the fact that it is the Government's burden to show the need for pretrial detention, I am going to begin with my questions to the Government.

So I will hear first from the Government, if there is anything that you would like to highlight. As I said, I have already reviewed the papers in connection with the

case; but if there is something that you'd like to highlight for me, please feel free to go ahead.

MS. IYENGAR: Yes, Your Honor.

I think the, sort of, core of the Government's position is just as Magistrate Judge Faruqui said in his decision; that one of the issues that the Court has to look at when determining if a defendant is going to abide by conditions that the Court sets for him if he is released is, you know, his willingness to trust in this process and to trust in the Government and the Court, and the legitimacy of the Government and the Court.

Mr. Griffin has made multiple statements that are outlined in the papers that the Government submitted to the Court illustrating that he does not trust in the legitimacy of the Government. And not only does he not trust in the legitimacy of the Government, he has advocated a violent overthrow of the Government on multiple occasions.

And so I think -- you know, the findings that Magistrate Judge Faruqui made were based on issues that the Court had, for the right to examine when determining if Mr. Griffin would abide by what the Court says and, therefore, I don't think that there is any reason to disturb the ruling that he made.

THE COURT: So let me just say at the outset, Mr. Griffin is charged only with a misdemeanor case. So he

is not charged with some of the more serious conspiracy or felony charges that I have seen brought against people involved or charged due to the events arising on January 6th.

So isn't it fairly unusual in a misdemeanor case of any type to have pretrial detention?

MS. IYENGAR: Yes. And I think if this was -- as I am sure the Court is aware, the Government has not asked for detention in the majority of the misdemeanor offenses arising out of the incident at the Capitol Building.

The reason that Mr. Griffin's case, I think, is set apart is not just because of the statements that he made regarding, you know, there being blood running out of the Capitol Building and holding a second rally at the Capitol; but also the fact that he stated, you know, at this county council meeting that he was going to return to the District for inauguration and that he was going to bring firearms with him when he returned to the District, and that he then actually acted on that. These were not just empty statements that he was making.

When he was arrested on January 17th, he was arrested in very close proximity to the Capitol Building, and that was just three days before Inauguration Day --

THE COURT: But at the time he did not have any firearms; is that correct?

MS. IYENGAR: He did not have any firearms in his possession at that time. What he told FBI agents was that he had brought firearms with him on the trip and had left them at a friend's home along the way --

THE COURT: And has the FBI conducted any search either of his home or any other location associated with Mr. Griffin where they have recovered the firearms?

MS. IYENGAR: No. They have not conducted a search that has recovered any firearms, no.

THE COURT: All right. And so -- I want to be clear about the basis for the Government's seeking pretrial detention here because, certainly, none of the factors set out in 18 U.S.C. Section 3142(f)(1) apply; I think everybody would agree with that.

So you are really just seeking detention based on the factors in (f)(2), which is that the defendant presents a serious risk of flight or is otherwise threatening to -- poses a serious risk of obstructing justice.

So it would -- if I'm understanding the Government's position correctly, you think that Mr. Griffin presents a serious risk of flight because of his statements which the Government's interpreting as basically being anarchist, not believing in the Government at all; do I have that pretty much right?

MS. IYENGAR: Yes. That's pretty much correct,

yes.

THE COURT: All right. So is the Government -- I mean, the Government has, in some of its papers, not just referred to (f)(2)(A), serious risk of flight, but also (f)(2)(B), which is a serious risk of obstructing justice by threatening, injuring, or attempting to threaten or injure a juror or a witness. Are you really not relying on (f)(2)(B) but only on (f)(2)(A), the serious risk of flight?

MS. IYENGAR: Yes. At this point I think we're relying primarily on (f)(2)(A).

THE COURT: Well, "primarily," or altogether? Because I haven't seen anything in here about -- what has he done to obstruct justice that you are relying on (f)(2)(B)?

MS. IYENGAR: Yes. I think we are relying solely on (f)(2)(A), Your Honor.

THE COURT: Okay. I wanted to isolate what we're talking about here, and it's not (f)(2)(B), the obstruction of justice; just the serious risk of flight.

MS. IYENGAR: That is correct.

THE COURT: And one of the things that -- you know, I appreciate the concern about the defendant's comments about carrying a gun, I guess a rifle and various other things -- guns, types of guns, to the inauguration -- very provocative -- very provocative statements; and in the wake of the January 6th assault on the Capitol, clearly,

deeply disturbing to the citizens of the District of Columbia, as well as everybody who works on Capitol Hill not wanting to have another traumatic event as the one on January 6th was.

But other than that statement, I take it -- given the fact that no guns have been recovered from the defendant, that not only did he not have a gun or weapon of any kind, even a stun gun, a stun stick -- any kind of weapon on him on January 6th, he didn't on the date of his arrest either, just short of the inauguration; is that correct?

MS. IYENGAR: Yes. That's correct.

THE COURT: And there is also no allegation or suspicion -- although I presume your investigation is continuing. But, right now, no proffer from the Government that he damaged any federal property, that he injured or risked injuring another person because of his conduct on January 6th, and certainly didn't have a weapon to do so on January 6th; is that right?

MS. IYENGAR: Yes. That's correct.

THE COURT: And it's also the Government's proffer that, when he was actually approached and interviewed by the FBI on January 11th, he appeared to be cooperative; is that correct?

Am I putting a word in the Government's mouth? Or

is that a generally -- is that a general description of how he was when he talked to the FBI?

MS. IYENGAR: Yes. I think that's a fair description of how he was.

THE COURT: And he even told the FBI then about his plan to return to D.C. to protest again at the inauguration when he was interviewed by the FBI, which --

MS. IYENGAR: Yes.

THE COURT: -- which was very helpful to the FBI because that's where he was arrested, right, when he came up here?

MS. IYENGAR: That's correct.

THE COURT: Saving the Government and taxpayers the cost of transporting him up here. But he gave that information to the FBI.

MS. IYENGAR: Yes. That's correct.

THE COURT: And, in any way, has the defendant engaged in any conduct that the Government's been aware of about trying to evade law enforcement or being evasive in his answers to law enforcement, having a safe house to go to to hide his whereabouts from law enforcement? Has he done any of that?

MS. IYENGAR: No, Your Honor.

THE COURT: Has he engaged in any effort to cover his tracks, like avoiding using his credit card, avoiding

using his cell phone, in an effort to frustrate law enforcement from tracking him down which would be very indicative of a risk of flight? But has he engaged in any of that conduct?

MS. IYENGAR: No, Your Honor. He has not engaged in any of that conduct.

THE COURT: All right. And I think the Government doesn't dispute that he does have strong ties to New Mexico; is that right?

MS. IYENGAR: Yes.

THE COURT: I mean, because the Government does mention that he lived in France for a while, but doesn't give me dates of when he lived in France. So I am just trying to pin down the Government's position here.

MS. IYENGAR: Yes, Your Honor.

Our understanding, anyway, is that he does have strong ties to New Mexico; he is an elected official there.

THE COURT: But despite his -- and he is an elected official? I have heard he has a position as commissioner, something like that --

MS. IYENGAR: Yes.

THE COURT: But is that an elected position?

MS. IYENGAR: I believe it is an elected position, yes.

THE COURT: All right. Is it a paid elected

position?

I will just note, for the record, that Mr. Griffin is shaking his head up and down to say yes, it is. But if the Government doesn't have any information about that, I will ask his counsel later.

Does the Government have information about that?

MS. IYENGAR: No. We don't have any information about that.

THE COURT: Okay. But given his ties to the New Mexico community, it's, nonetheless, the Government's position that there are no conditions or combination of conditions that could assure or mitigate any risk of flight he might present?

MS. IYENGAR: Well, I think, you know -- I don't think it's so much that there is no condition or combination of conditions; it's that the rhetoric that he has engaged in just leads us to believe that he just will not abide by any conditions that the Court sets.

THE COURT: Okay. And, I mean, I have looked at all of his comments. I mean, he clearly views fellow Americans who live here, who have grown up here and work here, who vote here, who -- just because they may not share his political views as some kind of "other," but I haven't seen anything that actually talks about the federal judiciary or judges, have you -- or lawful court orders, or

anything like that.

Am I missing anything on that?

MS. IYENGAR: No. I haven't seen anything with respect to the judiciary. I think all of his comments have been that the President is not legitimately elected, and things of that nature.

THE COURT: So it's been focused more on high-level executive branch officials?

MS. IYENGAR: Yes.

THE COURT: That's been my sense. But, of course, I haven't lived with this case like the Government has and looked at all of the evidence the way the Government has; but that's been my sense.

MS. IYENGAR: Yes, Your Honor. It's been mostly, I think, executive branch, and some members of Congress as well.

THE COURT: Right. All right. He did make comments about planting a flag on the Speaker of the House's desk and minority or majority leader's desk.

Okay. But, so to be clear, the Government is also not arguing that there is clear and convincing evidence that this defendant presents a danger to the safety of other persons or the community; is that right? You are not arguing that?

MS. IYENGAR: No. Well, I think we are arguing it

to the extent that he has made the comments that he has made that, you know, I think, sort of, are comments of a threatening nature.

THE COURT: But there are some statutes that you can charge people for making threats; but he is not charged with any of those, right?

MS. IYENGAR: Yes, Your Honor.

And I don't think -- we did have a discussion about this. At this point I don't think that the statements he made are threats under the statute. But I think, you know, they still are clearly statements that are of a threatening nature; and I think the Court can still consider them for that purpose --

THE COURT: Of course. And I will get to that.

But I do think it's an important distinction that troubling statements, obnoxious statements, repugnant statements of a deeply disturbing nature -- even if all of those adjectives applied to Mr. Griffin's statements, it would not amount to sufficiently disturbing statements or threats to even constitute criminal conduct under potentially available federal law; is that right?

MS. IYENGAR: Yes. That's our position at this point, yes.

THE COURT: All right. Well, I mean -- when I looked at the magistrate judge's order, he does not appear

to base his detention order regarding anything having to do with dangerousness to the community because he said at the hearing: Although normally we look at dangerousness to the community, here that's not something we're considering because of the charges that have been brought.

His detention order is also quiet, as far as I could read it, on danger, but rests on the defendant being a serious risk of flight, such that no combination of conditions can reasonably assure his appearance at a future proceeding.

So I just wanted to make sure I understood the role that dangerousness was playing in the Government's position here. And it's not -- the only dangerousness here is posed by the troubling nature of some of Mr. Griffin's comments publicly; is that right?

MS. IYENGAR: Yes, Your Honor. That's correct.

THE COURT: Okay. So now -- one of the arguments that the defense makes is that, you know, the charge under 18 U.S.C. 1752(a)(1) with which Mr. Griffin is charged, you know, does require more than simply having -- simply presenting proof of the fact that Mr. Griffin jumped over some fences or barriers, you know, to get onto the Capitol grounds and, you know, that can be troubling in itself. But that fact alone doesn't constitute a crime under Section 1752(a)(1); and, instead, the Government has to prove, in

addition to breaching barriers of a restricted space, the Government also has to prove that the defendant knowingly entered this restricted building without lawful authority knowing that in 1752(c)(1)(B) -- that the restricted space was for the President or other person protected by the Secret Service, is or will be temporarily visiting or, in (C), the grounds were so restricted in conjunction with an event designated as a special event of national significance.

So is the Government relying on both (B) -- you know, both of those provisions, (c)(1)(B) and (c)(1)(C)?

MS. IYENGAR: Yes. We are relying on both, I guess, (B) and (C).

With respect to the first provision, the evidence that we have is that Mr. Griffin attended the rally that President Trump had held prior to when the Capitol riot took place, and all the news reports have shown there was a significant discussion at that rally that Vice President Pence would be present at the U.S. Capitol on the stage overseeing the Electoral College certification.

And I think, with respect to the second provision, the whole purpose of people being at the Capitol that day was because there was this Electoral College certification going on; and I think, arguably, that is an event of national significance per the statute. And so I think those

two, taken in combination, we can make out a charge based on that.

THE COURT: Well, I haven't -- in all of the public statements Mr. Griffin has made, I haven't seen him -- and he certainly publicly announced that he was there on January 6th. He is fairly proud of the fact that he marched on the Capitol. Now, that, many people would view as a very unpatriotic thing to do -- to stop a constitutionally mandated process -- but he is very proud of that.

But in the comments that I have seen in the record so far, I haven't seen him also proudly talk about how he was at this rally with the President. Is that part of the Government's proffer, that he was at the rally with the President and therefore knew that Vice President Pence was in the Capitol?

MS. IYENGAR: Yes, Your Honor.

The evidence that we have is that Mr. Griffin had attended the rally prior to when the riot at the Capitol took place. And President Trump made statements regarding --

THE COURT: I have seen those statements, right.

MS. IYENGAR: -- his being at the Capitol.

THE COURT: Okay. So one of the points that the defendant makes is he intends to exercise his right to a

jury trial and that, you know, due to the pandemic -- as everybody -- all the prosecutors in town know, all of the trials have been delayed.

You know, the defense papers make the point that he may not be able to have a trial within a year of his arrest, which means he would be sitting in pretrial detention longer than the maximum period of time he could be sentenced under this misdemeanor charge.

Does the Government countenance the possibility of subjecting the defendant to pretrial detention longer than the full period of the maximum term of imprisonment that he could be subjected to were he convicted?

MS. IYENGAR: Well, obviously, that's a situation that we would like to avoid. I understand that the scheduling situation with COVID is sort of fluid at this point --

THE COURT: Well, it's not really fluid, I would say.

I mean, I -- as the Chief Judge, I have issued a standing order; we are not having trials before March 15th. And given the situation, I think that March 15th date might be postponed longer, depending on the vaccination rate, the variant rate, the positivity rate, the number of people who agree to wear their masks -- and Mr. Griffin, I understand, has trouble with wearing masks; but that is -- those are all

factors that will go into it.

I mean, I guess you can say it's -- you know, it might be a form of rough justice for people who don't want to wear masks contributing to the spread of the virus sitting in jail on pretrial detention. But, on the other hand, shouldn't the Court be concerned about the fairness of that kind of result?

MS. IYENGAR: Well, Your Honor, I mean -- like I said before, we -- one of the reasons we have not been asking for detention in most of these misdemeanor cases is partially for that reason. We are not trying --

THE COURT: Exactly.

MS. IYENGAR: -- to increase the prison population -- increase the jail population over misdemeanor offenses.

But because this is, I think, a separate type of case from, sort of, the run-of-the-mill misdemeanors we have seen arising from the Capitol riot, that's the reason that we're asking for the hold here.

I certainly understand the Court's concern 100 percent; we are not trying to expose anybody to COVID --

THE COURT: Well, you can get exposed to COVID within the jail or outside the jail.

MS. IYENGAR: Yes.

THE COURT: I mean, it's not a matter of exposure

to COVID that I am concerned about.

I am concerned about somebody in pretrial detention for longer than the maximum term of imprisonment if convicted; that's the point I am trying to make, and that's part of the reason that the prosecutors -- particularly given the backlog and the delay in having trials due to health and safety concerns -- have not asked for pretrial detention in misdemeanor cases.

And, you know, I also look at this case and I see that this is not one of the individuals who banged down doors, sprayed with pepper spray or bear spray law enforcement officials, injured law enforcement officials, poked out the eyes of police in the building.

He was with all of those people; I guess he really likes those people; he marched with those people. He was cheering them on with a bullhorn, but he wasn't actually one of the people who did the banging on the doors, the poking out of eyes of police officers, the spraying -- pepper spraying of officers. He wasn't one of the people who entered the building, which is part of the reason he's charged with a misdemeanor.

So I have been a little puzzled about the request for detention, pretrial detention in this case and -- while understanding the troubling nature of the comments this defendant made.

Is there anything else you want to add?

MS. IYENGAR: No, Your Honor.

There is nothing else from the Government.

THE COURT: All right. Let's turn to Mr. Smith.

Am I going to be speaking to -- which Smith?

MR. N. SMITH: Nicholas.

THE COURT: Nicholas.

Okay. Mr. Nicholas Smith, how are you today?

MR. N. SMITH: I am well. Thank you, Your Honor.

THE COURT: All right.

So the complaint in the case includes several -- maybe more than that -- screenshots of a person who appears to be the defendant at the January 6th assault on the Capitol; and he appears to be standing on the top of the west steps of the Capitol.

Is there any dispute that it's the defendant in those screenshots?

MR. N. SMITH: No, Your Honor.

THE COURT: All right. And did he also attend that rally by President Trump where the President did talk about Vice President Pence?

MR. N. SMITH: Your Honor, I think it was -- Your Honor was right to point out that this is alleged in the case, that he attended the rally, where he participated; if he did attend the rally, what he heard, who he was with --

that's not in the charge, in the instrument. I haven't seen it in the discovery that's also been produced and, because of that absence, it hasn't even come up as a subject in the detention hearing so far --

THE COURT: Okay. I appreciate that. I am not going to put you on the spot. Although, I might. I am not sure. But I appreciate your response.

Okay. So, I mean, I would say that given the defendant's apparent appreciation, for want of a better word, of President Trump, it would surprise me if he came all the way to D.C. on January 6th and decided to skip a rally that the President -- that the President was speaking at just for people like him, like Mr. Griffin, who have bought -- hook, line, and sinker -- the story that this is not a fair election; but I appreciate that you're pointing to the absence in the record to date that Mr. Griffin was actually there. Although, given the people that the FBI has spoken to, they may have that information someplace in the record already, it's just not in the record for this detention hearing.

So it's clear from something that is in the record that a person named Matt Struck [sic], who was Mr. Griffin's companion on January 6th, did tell the FBI that both of them had committed some minor trespassing at the Capitol.

Would the defendant dispute that characterization?

MR. N. SMITH: Your Honor, we would say that the characterization of "minor trespassing" is not -- is not very informative, it doesn't move the needle very far because the statute that the Government has charged Mr. Griffin with is not an all-purpose, Swiss Army Knife, type statute for federal property. It's a much more narrow statute about Secret Service protection for special people; and there are mens rea requirements for this statute that are, as Your Honor said, more involved than simply jumping over a barricade.

The Government has to prove, among other things, that Mr. Griffin knew that the area he entered, barricade or not, was an area in which a Secret Service protectee will -- quote, Will be temporarily visiting or is visiting. That's 1752(c)(1)(B) --

THE COURT: Well, one of the things that the defendant -- excuse me.

(Unintelligible, simultaneous speaking.)

THE COURT: One of the things the defendant proudly proclaimed at a public hearing, I guess, on January 14th, is that when he and this mob of people got to the U.S. Capitol, he stated, There was some fencing up; and they were saying that you could not go any further because this was being reserved for Joe Biden and his inauguration.

So this statement certainly suggests that

Mr. Griffin was fully aware that the places where he was going he was not supposed to be; it was restricted because of the impending inauguration.

Is there some other lens with which to interpret that statement that Mr. Griffin made?

MR. N. SMITH: So, Your Honor, on the 6th, the Court knows that the Vice President was presiding in the Capitol -- inside the Capitol at the time.

The statute, 1752, requires the Government to show that a defendant crossed any posted, cordoned off, or otherwise restricted area of a building or grounds where a Secret Service protectee is -- is or will be temporarily visiting.

The Government alleges that Mr. Griffin did not enter the building where the Vice President was presiding; that's the area under the statute where the Vice President was presiding.

The Government alleges that he entered in the area on the west steps of the front Capitol. The Government does not allege that the Vice President was or will be on the west front steps of the Capitol when Mr. Griffin entered that space.

THE COURT: All right. So the defendant apparently founded this organization "Cowboys For Trump."

I am sort of curious. What makes Mr. Griffin a

cowboy; do you know?

MR. N. SMITH: Your Honor should direct that question to Mr. Griffin. I am sure he would be able to answer it better than I would.

THE COURT: All right. Is there any other information you want to bring to my attention?

MR. N. SMITH: Yes. There is, Your Honor.

Thank you for this opportunity.

There is not much we would add to what Your Honor has already noted, except that there is no record evidence about distrust in the Government or at large on Mr. Griffin's part, although the Government keeps saying there is in its papers. The Government has represented many times in its --

THE COURT: You would characterize his comments, Mr. Smith, as just hatred of anybody in the Democratic Party, or dislike, disrespect, disregard -- I don't know what you would call it; but certainly the language he has used is just about people in the Democratic Party and elected officials who happen to be members of the Democratic Party. Is that how you would characterize his animus or the focus of his animus?

MR. N. SMITH: Your Honor, I wouldn't go that far.

What I would say is that when the Government feels the need to quote sound bytes from people's speeches taken

out of context that are five seconds long, and it doesn't feel the need to even tell the Court that the next very statement Mr. Griffin makes, which completely reverses your reflection of that statement, I would say no, I don't feel comfortable saying -- representing Mr. Griffin's political opinions about the Government or at large because there is a five-second sound byte on Facebook that the Government doesn't even do the liberty of quoting for Your Honor.

Let me give Your Honor another example of this.

So in many of its papers to date, the Government has said that, at a January 14th meeting of the Otero County Commission that Mr. Griffin is a part of, he said that he would bring firearms to the Capitol; they quote the types of firearms. They say Mr. Griffin says it's going to be in my car, I am going to bring it to the Capitol; and then the Government's quote ends there, Your Honor.

When the Government put this paper in front of Your Honor, there is a publicly available video that shows Mr. Griffin making this comment. And one second in the video, after the Government ends its quote, Mr. Griffin explains why he said he would have firearms. It has nothing to do with threatening people in Washington, D.C., with threatening to kill people -- although that's the insinuation the Government is trying to place in the Court's mind.

Mr. Griffin says: I have been subject to death threats repeatedly as a public official in New Mexico. People have taken pictures of my son, my young child, and put crosshairs over my family's -- over their heads; these are real threats. So Mr. Griffin takes the threats, goes to the FBI, reports them. Says: If you want any more information about these threats, please go to my office in New Mexico. Ask me for my emails, I will make all of this available to you.

So why is -- Your Honor asked the question. Your Honor is going in the right direction with some of the questions you ask.

But, further, why is the Government insinuating that Mr. Griffin is trying to harm people, which is what it's doing, when there is no evidence of that?

Why was it selectively quoting these comments he's made to make it look like he's going after people and harming them when the very next comment in a publicly available statement shows that's not true? Why is it doing this?

THE COURT: All right. Does the Government want to respond? And then I will issue my ruling.

MS. IYENGAR: So, I guess, just with respect to the argument about the statements, Your Honor, I believe we did quote what he said accurately in the papers that we

submitted to the Court, including -- I think there is a statement he made about: The only good Democrat is a dead Democrat. We did state in the papers that we submitted that, after he made that statement, he said: I didn't mean that physically, I meant that politically. So I don't think there is any inaccuracy in anything that was submitted to the Court.

THE COURT: All right. I am prepared to rule.

At the outset, I am just going to review the applicable law. The Bail Reform Act requires release of a defendant prior to trial unless a judicial officer determines after a hearing that, quote: No condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person in the community. See 18 U.S.C. Section 3142(e)(1).

The Government bears the burden to establish by a preponderance of the evidence that the defendant poses a serious risk of flight to -- really, in order to trigger a detention hearing and ultimately detention; and that is what the Government is alleging here.

To order detention after a hearing, the Court must determine that no condition or combination of conditions will mitigate those risks of flight.

And in determining whether any conditions of

release will reasonably assure the appearance of a person as required, the Court must take into account the available information concerning four factors that are set out in 18 U.S.C. Section 3142(g).

Those factors are: One, nature and circumstances of the offense charged; two, the weight of the evidence against the person; three, the history and characteristics of the person including the person's character, physical, and mental condition, family ties, employment, financial resorts, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings. And then, finally, four: The nature and seriousness to the danger to any person or the community that would be posed by the person's release.

On an appeal from a magistrate judge's order of pretrial release, the District Court must conduct a *de novo* review. In conducting this review, the Court examines the available information that touches upon the four statutory factors just listed.

Before addressing those statutory factors, I will address a threshold procedural argument raised by the defendant that there was no lawful basis for the magistrate judge to actually conduct a pretrial detention hearing in the first place; this argument is wrong. The magistrate

judge made no error in holding a detention hearing.

The law requires that a judicial officer hold a hearing to determine whether any condition or combination of conditions will reasonably assure the appearance of the defendant in 18 U.S.C. Section 3142(f); and that must be done upon motion of the attorney for the Government in a case that involves one of the seven factors listed in 18 U.S.C. Section 3142(f).

The Government doesn't argue that any of the five factors in 3142(f)(1) apply here and, plainly, none of them does; that leaves the two factors outlined in the next statutory paragraph, 3142(f)(2), as possible bases for a detention hearing.

Under that section, a judicial officer may hold a detention hearing if there is a serious risk that the defendant will flee, that is, 3142(f)(2)(A), or if there is a serious risk the defendant will obstruct or attempt to obstruct justice in various ways in Section 3142(f)(2)(B).

If one of these factors is not met, a pretrial detention hearing may not be conducted and the defendant must be released.

The defendant criticizes the Government and the magistrate judge for conducting the hearing on the basis that the defendant presents a serious risk of flight because the Government did not meet its burden to present any

evidence about those factors. The defendant conflates, however, the burden that the Government bears to show a serious risk of flight in order to detain a defendant with the burden the Government bears to obtain a hearing pursuant to 3142(f)(2).

Certainly, the defendant is correct that a defendant may be detained only if the record supports a finding by a preponderance of the evidence that he presents a serious risk of flight. See *U.S. v Himler,* a Third Circuit case from 1986 which is part of the defendant's motion at 8.

The defendant errs in claiming that 3142(f)(2) requires a judicial finding about whether the case involves, in fact, a serious risk of flight before even conducting a detention hearing. To the contrary, the language of 3142 directs that a judicial officer -- and I quote, Shall hold a detention hearing upon motion of the attorney for the Government or upon the judicial officer's own motion in a case that involves the 3142(f)(2) factors, and such a hearing must be held immediately upon the person's first appearance before the judicial officer unless a continuance is sought.

The Government's burden to prove by a preponderance of the evidence that the defendant presents a risk of flight and no combination of conditions will suffice

to ensure his appearance concerns the merits of whether he may be detained, not the preliminary issue of whether the judicial officer must hold a detention hearing.

The magistrate judge here fully complied with the procedural requirement of Section 3142. Before the magistrate judge, the Government moved that the defendant be detained pending trial pursuant to Section 3142(f)(2)(A) and (f)(2)(B) of the federal bail statute -- see the defendant's -- the Government's motion at 1 -- and urged the Court to hold a hearing to determine whether the defendant should be detained because of the serious risk the defendant will flee and because there is a serious risk the defendant will obstruct or attempt to obstruct justice, et cetera.

The Government has since then dropped the (f)(2)(B) basis for detention, and it is relying now solely on the serious risk of flight.

Citing the fact that the defendant lacks ties to the Washington, D.C. metropolitan area, the Government posed that -- and his other lack -- his disregard for the law, the Government posited he posed a serious risk of flight and moved for the hearing. The magistrate judge then acted as required by the mandatory language of 3142(f), and promptly held such a hearing. Thus, both the Government and the magistrate judge acted entirely properly in moving for and promptly conducting a detention hearing.

So having established the detention hearing pursuant to Section 3142(f) is proper and, indeed, required in this case on the part of the magistrate judge, given the Government's motion and basis for it, I will now proceed to consider the four 3142(g) factors.

Although the magistrate judge properly determined that he was required to hold a hearing and consider those factors, I do respectfully disagree with the magistrate judge's application of the factors here.

I will start with the nature and circumstances of the offenses charged -- or the offense charged because it is a single misdemeanor charge.

Based upon the Government's investigation to date, the defendant's conduct in this case amounted to marching to the Capitol Building with hundreds or even thousands of other people, many of whom then assaulted the Capitol by breaking windows, violently pushing past police, injuring police officers in the course of that conduct, and damaging the Capitol Building in the course of that; and, then, those mobsters marauded through the hallways, into private offices, even onto the floor of the Senate Chamber, right outside the House of Representatives Chamber. But the defendant was not one of those people who broke into the Capitol; he stayed outside, albeit in areas cordoned off and restricted where he was not supposed to be.

The Government has proffered no evidence that this defendant used a weapon, brandished a weapon, carried a weapon on January 6th, or used any violence that day either against the police or the Capitol Building.

Consequently, the defendant has been charged with a misdemeanor offense of knowingly entering or remaining in any restricted building or grounds without lawful authority, in violation of 18 U.S.C. Section 1752(a)(1), for entering the Capitol grounds, an offense that carries a penalty of up to one-year imprisonment, rather than more serious felony charges even under that statute of ten years if there is property damage or bodily injury that results.

If proven, there is no question that the defendant's conduct was criminal. And for many Americans, his conduct in marching on the Capitol to protest the democratic and constitutionally mandated process of counting the Electoral College certificates was grossly unpatriotic; but, nonetheless, the nature and circumstances of this defendant's particular conduct on January 6th, 2021, weigh in favor of release.

As I have said before, what happened on January 6, 2021, was not a peaceful protest but, in fact, did result in the disruption, as intended, for hours of the Congress being able to perform its constitutionally mandated task, as well as resulting in the death of five people, and so many more

both injured and traumatized.

But by contrast to those who entered the building and committed those acts inside the building, the defendant was charged with entering the restricted area of the steps of the west front of the Capitol, and the patio at the top of these steps that was cordoned off with temporary barriers on January 6th.

While there, the defendant allegedly borrowed a bullhorn to address a group of protesters and rioters and remained on the steps approximately an hour and a half, according to one of his companions that day; and they left once they smelled the pepper spray.

But in contrast to most of the brazen rioters, he was not armed, and he left the Capitol grounds peacefully, although it doesn't diminish the seriousness of the assault or the seriousness of the offense with which the defendant is charged here. He was not a participant in the violent break-in of the Capitol or the marauding mobs roaming the hallways of our legislative branch of government on January 6th, and the charge he now faces reflects that fact.

The Government does point to the defendant's public statements as cause for concern, and they are. In a video the defendant filmed himself and apparently posted himself, he referenced that: There is going to be blood running out of that building. But at the end of the day,

you mark my word, we will plant our flag on the desk of Nancy Pelosi and Chuck Schumer, and Donald J. Trump if it boils down to it.

On January 6, he was filmed on the west Capitol steps threatening: We are not going anywhere. We are not going to take no for an answer. We are not going to get our election stolen from us by China. We are not going to allow it. There will never be a Biden presidency.

Later, when he was back in New Mexico, he spoke publicly of his participation in the January 6th riot, and further his plan to return to Washington, D.C. for the inauguration of then President-Elect Biden with guns in the trunk of his car, a revolver, a rifle, et cetera.

He has also said: The only good Democrat is a dead Democrat and, shortly after that, saying he did not intend that physically, only politically; that his -- the briefing papers acknowledge that caveat might fall short ethically.

He also told the FBI, on January 11th, he hoped the demonstration at the inauguration would be peaceful, that a change in leadership can be accomplished without a single shot being fired; but he also seemingly threatened: No option is off the table for the sake of freedom. These are all words that are deeply disturbing, especially when considered in conjunction with the defendant's decision to

return with firearms to D.C. shortly before the President's inauguration on January 20th.

His words certainly reflect strong convictions that many in this country would consider unpatriotic, obnoxious, repugnant to the democratic process, certainly harmful to the American body politic when he's talking about fellow Americans.

The defendant has argued these words are simply an exercise of the defendant's First Amendment rights, and that the Government erred and the magistrate judge erred in using them to analyze whether pretrial detention is appropriate. He contends that inflammatory though defendant's statements may be, they are patently within the bounds of constitutionally protected speech and, as such, the Court may not deny the defendant pretrial release on account of it.

And he suggests that reliance on his statements is appropriate only if they do not comprise constitutionally protected speech, namely, if they are directed to inciting imminent lawless action within the meaning of *Brandenburg v Ohio*, which is the Supreme Court case from 1969; not so.

The defendant is correct that a criminal defendant may not be punished, for instance, through a greater sentence or even through pretrial detention solely because of his abstract beliefs. See *Wisconsin v Mitchell*, a 1993 Supreme Court case citing *Dawson v Delaware*, a Supreme Court

case from 1992, and *United States v Lemon*, the D.C. Circuit case from 1983.

But, at the same time, the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment; that's a quote from *Mitchell*, the Supreme Court case from 1993.

Crucially, *Mitchell* again says: The First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.

Likewise, in the pretrial detention context, it is entirely proper to examine and rely upon a defendant's statements if those statements shed any light on the four factors the courts are directed to consider under Section 3142(g). See, for example, *U.S. v Daniels*, Northern District of Texas case from January 30th, 2018, which was collecting cases in which courts relied upon defendants' statements in assessing risk of flight for pretrial detention purposes. This is so long as the Court does not seek merely to punish the defendant for his beliefs or statements about his beliefs. See, also, *U.S. v Ervin*, 818 F. Supp. 2d 1314, a Middle District of Alabama case from 2011.

Also, when a defendant has made specific

statements that call into question whether he will abide by a Court's order to appear at trial, it is his conduct and possible conduct that is ultimately an issue, and his statements are relevant only to the extent they reflect on that conduct; that was the use that the Government and the magistrate judge were considering in these statements here.

The defendant relies heavily on *U.S. v Lemon*, a 1983 D.C. Circuit case, for the proposition that it is improper to consider a defendant's statements in evaluating pretrial detention, and this is a misreading of that D.C. Circuit case.

Lemon was a case concerning a sentencing, not pretrial detention, of a defendant who was allegedly a member of the Black Hebrew group; and the sentencing judge assumed the defendant had intended to further the illegal aims of the Black Hebrews on the basis of the defendant's association with some Black Hebrew members.

The Government had urged the sentencing judge to impose a harsher sentence for the check fraud conviction on the ground that the defendant's alleged membership in the Black Hebrews, and that group's criminal activities, together suggested that the defendant had committed the check fraud as part of a criminal conspiracy.

The sentencing judge didn't explain whether he adopted this theory; but the D.C. Circuit concluded that he

appeared to have relied on the information about the defendant's alleged associations with the Black Hebrews in imposing an unusually severe sentence for a first-time offender.

After holding that a sentence based to any degree on activity or beliefs protected by the First Amendment is constitutionally invalid, the Circuit went on to determine that the Black Hebrew group is protected by the First Amendment and that mere membership would be an impermissible factor at sentencing.

The Court further explained that there must be: Sufficiently reliable evidence of the defendant's connection to illegal activity within the Black Hebrews to insure that he was not being given a harsher sentence for mere association with the group and its illegitimate aims and activities, noting that his membership in the Black Hebrews may be evidence of his knowledge of the group's illegal activities and, thus, may be considered for that limited purpose.

In a footnote, the Circuit observed, by way of analogy, that similar principles govern the determination of bail status; appellate courts have seriously limited the extent to which protected political speech and association may be the basis for revoking or denying bail, which is the language on this footnote that the defendant relies on.

But *Lemon* is wholly consistent with and, in fact, reenforces the principle that a defendant may not be punished, whether through a greater sentence or pretrial detention, solely because of his opinions, beliefs, statements, or associations; but that certainly those views, statements, and associations may be relied upon for purposes of proving, for example, intent or motive.

Similarly, with *Williamson v United States*, a Second Circuit case from 1950 on which the defendant relies, you know, also demonstrates this position. *Williamson* stands for the proposition that political speech that is protected by the First Amendment cannot, standing alone, suffice to show danger to the community warranting pretrial or preappeal detention; but *Williamson* does not conflict at all with the holding of *Mitchell*, a Supreme Court case decided 40 years later, that a defendant's speech may be considered to establish the elements of a crime or to prove intent or motive.

Here, questions of motive and intent are clearly central to the analysis of the 3142(g) factors. The Government moved for the defendant to be detained pending trial on the grounds that he is a flight risk; and, in evaluating that issue, his intent and state of mind is paramount to determining whether he is a flight risk. The Government -- the Court must decide essentially whether the

defendant intends to flee if he is released pretrial.

This is precisely the category of situation in which reliance upon a defendant's statement is countenanced by *Mitchell*. As the magistrate judge rightly noted, for instance, during the defendant's initial appearance: Speech here motivates my understanding of what his intent was; see hearing transcript.

In short, the magistrate judge acted entirely appropriately in reviewing the defendant's statements for appropriate inferences in evaluating the necessary factors under Section 3142(g). There is absolutely nothing unconstitutional, as the defendant suggests, about the magistrate judge's analysis and reliance on his statements.

I do part ways with the magistrate judge, however, in finding that the defendant's statements considered in conjunction with his conduct do not -- because I find that they do not suggest that he intends to flee, or that detaining him pending trial is the only way to ensure his appearance at trial.

I agree with the magistrate judge and the Government's interpretation that the defendant's statements are highly inflammatory, deeply disconcerting -- particularly for a person who is an elected repre -- elected person in a community and feels comfortable publicly suggesting that the blood of elected officials will be

spilled because he is unhappy with the outcome of a presidential election, and also that he would subsequently return to Washington, D.C., with firearms with the intention of, again, being present and armed at the Capitol on January 20th -- I mean, those are sort of outrageous comments; but he proudly said them at a public meeting.

But other parts of the defendant's comments and his behavior suggest a more law-abiding view on his part. He did prove, after the January 6th assault on the Capitol, largely cooperative with the FBI. He was forthright with the FBI about his plans to return to D.C. for the inauguration. He cooperated with the FBI in investigating threats that the defendant and his family received once his presence and his role at the January 6 riot were made public.

But taken together, his conduct and his statements do not suggest that he presents a serious risk of flight or that because -- in part because his statements reflect a dislike, to put it mildly, of some duly elected federal officials; but he hasn't expressed such a disdain for the judiciary or for court orders, and he does present some respect for law enforcement and some rules.

I appreciate that the charge here is that he disregarded signage about restricted areas at the Capitol on January 6th; but his subsequent cooperation with law

enforcement shows that he is not a person who has a categorical disdain and disregard for any and every government actor or authority figure and rule, or it doesn't suggest that he has a similar disregard for the Court and can't be trusted to respect release conditions imposed by the Court when so directed.

In sum, notwithstanding his inflammatory remarks, the troubling circumstances of his return to D.C., the defendant's charged conduct was largely peaceful; his contemporaneous and subsequent statements, while provocative, do not suggest that there are no combination of release conditions that can assure his appearance in court.

As to the second factor, the weight of the evidence against the defendant, the evidence consists of videos, screenshots, his own statements about him being where he wasn't supposed to be on January 6th, and then his subsequent discussions about that; and putting aside some dissection of the statute, the weight of the evidence against this defendant does appear strong, but that evidence has to be calibrated against the charge itself which is, here, a misdemeanor carrying no more than one-year imprisonment.

Given the fact that we're in the midst of a global pandemic, and that trials have been delayed due to health and safety concerns, pretrial detention may put the

defendant in a position of waiting for a trial as long as he may be required to serve a prison term if he is convicted; this strongly counsels against pretrial detention here.

As to the third factor, the history and characteristics of the defendant, those clearly weigh in favor of release. He is employed; apparently, he has been for 30 years. He's also engaged with his community, involved in local government, apparently is an elected county commissioner. He also has other political activities, such as his Cowboys For Trump. He has a limited criminal history, with only one conviction for a DUI that occurred nearly 25 years ago.

And although the Government is correct that he apparently has no ties to the D.C. area, he certainly has strong ties to where he lives in New Mexico. He has lived there almost most of his life; he has got his family there; he works there, including as a public servant. He has child support obligations in New Mexico. So all of these factors weigh heavily in favor of release.

As to the last factor, about the nature and seriousness of the danger to any person or the community, because of the nature of the crime he's charged with and the fact that the Government asked that he be detained basically only because he presents a flight risk, this factor doesn't appear to play much of a role at all, and really needn't be

considered to the extent that some of his comments are targeted at the top federal officials and were made about things that are occurring in Washington, D.C. There doesn't seem to be any evidence that he poses a risk of danger to the community in New Mexico where he lives and will reside if released pending trial.

To the extent that he presents a danger in Washington, D.C., I think that can be effectively mitigated by a release condition prohibiting him from entering this city except when required to do so for court hearings.

So, accordingly, to the extent this factor -- this last factor of the danger to any person or the community is considered at all, it weighs in favor of release with that condition of release.

So my order is: Upon consideration of the proffered evidence presented, the factors set forth in 18 U.S.C. Section 3142(g), the possible release conditions set forth in Section 3142(c), the Court finds that the statutory factors weigh in favor of pretrial release and that the Government has not met its burden of establishing by a preponderance of the evidence that no condition or combination of conditions will reasonably assure the appearance of the defendant.

The defendant's motion is, therefore, granted. The magistrate judge's pretrial detention ruling is

reversed.

The defendant will be released pending trial subject to the following conditions:

He must report to pretrial services by telephone today -- if that's possible, given the lateness of the hour; and, thereafter, report to pretrial services weekly by telephone. He must verify his address with pretrial services. He must notify pretrial services in advance of all travel within the continental United States; any other travel must be approved in advance by the Court.

The defendant must not possess a firearm, destructive device, or other weapon. The defendant must report to pretrial services by phone about any contact he has with law enforcement within 24 hours of such contact, including arrests, questioning, and traffic stops.

The defendant must surrender any passports to pretrial services agency for the District of Columbia and not obtain another passport or other international travel document.

The defendant must stay out of the District of Columbia except for court or pretrial business, or meetings with his attorney.

The defendant must not possess or use a narcotic drug or other controlled substance, unless prescribed by a licensed medical practitioner.

The Court is to be notified of any violations of this order.

Mr. Griffin, I want to remind you that your presence is required in court, at least remotely for the time being, and that you will be advised when next to appear. So you should stay in close touch with your counsel to make sure you know when that is.

I am also required to caution you about your conduct during your release pending trial and of certain penalties that could apply to you.

Failing to appear in court as required is a crime for which you can be sentenced to imprisonment.

If you violate any condition of release, a warrant for your arrest may be issued, and you may be jailed until trial, and you may also be prosecuted for contempt of Court.

Committing a crime while on release may lead to more severe punishment than you would receive for committing that same crime at any other time.

It is also a crime to try to influence a juror, to threaten or attempt to bribe a witness or other person who may have information about this case, to retaliate against anyone for providing information about the case, or to otherwise obstruct the administration of justice.

Do you understand those cautions, Mr. Griffin?

THE DEFENDANT: I do.

THE COURT: All right. Is there anything further today from the Government?

MS. IYENGAR: No, Your Honor. Nothing further from us.

THE COURT: Anything further from defense counsel?

MR. N. SMITH: No, Your Honor. Thank you.

THE COURT: I can't hear you. Speak up, please.

MR. D. SMITH: This is David Smith.

Can you hear me?

THE COURT: Yes.

MR. D. SMITH: When he was arrested, Your Honor, the FBI took his car into custody -- not to forfeit it or anything, but just because there was -- they have to take the car into custody if he's arrested, and he is not with someone who can remove the car.

Could the Court direct the Government to see to it that his car is given back to him so he can drive home to New Mexico in it?

THE COURT: I will so direct the Government.

I expect, Ms. Iyengar, that you will talk to the FBI agents on the case and get that car back to the defendant. I am sure capable counsel can make those arrangements without the Court's intervention.

MS. IYENGAR: Yes, Your Honor.

THE COURT: All right. If there is nothing

further, you are all excused.

MS. SCHUCK: Your Honor.

THE COURT: Who is talking?

THE DEPUTY: Pretrial.

THE COURT: Pretrial. Yes?

MS. SCHUCK: Christine Schuck with pretrial services.

THE COURT: Yes. Ms. Schuck, how are you?

MS. SCHUCK: Good. How are you, Your Honor?

THE COURT: I am good.

MS. SCHUCK: Pretrial would just respectfully request an additional condition that he contact pretrial services by -- on Tuesday, February 9th to have an interview conducted because -- so we can gather some information regarding his residence, his employment, et cetera, because we did not have that information at the time our report was prepared.

THE COURT: Yes, Ms. Schuck. I will so direct.

Is there a specific time on Tuesday that you would like?

MS. SCHUCK: Just between normal business hours which, for us, is 8:30 a.m. to 4:30 p.m., eastern time.

THE COURT: All right. Mr. Smith. One of the Mr. Smiths -- excuse me.

Do you need the phone number to call?

MR. N. SMITH: Yes, please.

THE COURT: Ms. Schuck, what is the telephone number that should be called by Tuesday, February 9th by Mr. Griffin?

MS. SCHUCK: Sure.

The main number is 202-442-1000. And at that time he would be advised who his case manager is and be directed to the case manager who will conduct the interview.

THE COURT: All right. Okay. Don't miss that call, Mr. Griffin, because if there is any violation of your release conditions I will be immediately informed.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: All right.

Okay. If there is nothing further, you all are excused. Thank you.

MR. D. SMITH: Thank you so much, Your Honor.

It was really a pleasure to hear your opinion which I hope you will publish. It sounds like a publishable decision to me.

THE COURT: I am probably not going to publish it, but thank you.

You are all excused.

MR. D. SMITH: Thank you.

(Whereupon, the proceeding concludes, 4:43 p.m.)

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

PLEASE NOTE: This hearing was held telephonically in compliance with the COVID-19 pandemic stay-safer-at-home orders and is therefore subject to the limitations associated with the use of technology, including but not limited to telephone signal interference, static, signal interruptions, and other restrictions and limitations associated with remote court reporting via telephone, speakerphone, and/or videoconferencing capabilities.

This certificate shall be considered null and void if the transcript is disassembled in any manner by any party without authorization of the signatory below.

Dated this 6th day of February, 2021.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter