**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLUMBIA**

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| **UNITED STATES OF AMERICA** | : | |
| | : | **Case No. 21-CR-35 (EGS)** |
| **v.** | : | |
| | : | |
| **MICHAEL JOHN LOPATIC, SR.,** | : | |
| | : | |
| **Defendant.** | : | |
| | : | |

**DEFENDANT'S APPEAL OF DETENTION ORDER**

Defendant Michael J. Lopatic, Sr. ("Mr. Lopatic"), by and through undersigned counsel, respectfully moves this Court to review the decision by the Magistrate Judge from the Eastern District of Pennsylvania to grant the Government's motion for pre-trial detention. In support thereof, Mr. Lopatic states the following:

## I. BACKGROUND

### A. Procedural Posture

On February 3, 2021, Mr. Lopatic was arrested in his home in Lancaster County, Pennsylvania, on an arrest warrant issued from the United States District Court for the Eastern District of Pennsylvania in connection with an Indictment charging Mr. Lopatic with one count of assaulting, resisting, or impeding certain officers, in violation of 18 U.S.C. § 111(a)(1); two counts of Civil disorder, in violation of 18 U.S.C. § 231(a)(3); one count of entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); one count of disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2); one count of engaging in physical violence in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(4); and one count of violent entry and disorderly conduct in a Capitol building, in violation of 40 U.SC. § 5104(e)(2)(F).

On February 5, 2021, Mr. Lopatic had his initial appearance in the Eastern District of Pennsylvania, and the Government moved for detention. Following a detention hearing on February 9, 2021, Magistrate Judge Henry S. Perkin granted the Government's motion for Mr. Lopatic's detention pending removal to the District of Columbia. Mr. Lopatic was committed to the District of Columbia and transferred to the District of Columbia. On March 29, 2021, at Mr. Lopatic's initial appearance in the District of Columbia, the United States moved again for Mr. Lopatic to be detained pending trial pursuant to 18 U.S.C. §§ 3142(e) and (f)(2).

On April 5 and April 6, 2021, a detention hearing was held before Magistrate Judge G. Michael Harvey. Close to the conclusion of the second day of the hearing, the government, for the first time, asserted that the hearing in the Eastern District of Pennsylvania was a "final hearing" and that Mr. Lopatic needed to appeal Judge Perkin's Order. A review of the transcript of said hearing seems to suggest that Judge Perkin merely issued a temporary detention order pending removal to the District of Columbia. The transcript from Mr. Lopatic's detention hearing is attached hereto as Exhibit "A". In further support of this conclusion, Judge Perkin's noted during the hearing that Mr. Lopatic may raise arguments related to his custody again before this Court. *Id*. at 17:8-13, 18:5-12. As such, the United States filed another motion for pretrial detention before this Court upon Mr. Lopatic's transfer to the District of Columbia.

In any event, since Judge Harvey has ruled that he is without jurisdiction, Mr. Lopatic seeks review of his detention before this Honorable Court.

**B. Statement of Facts**

On January 6, 2021, Mr. Lopatic travelled to the District of Columbia in order to attend a rally in support of former U.S. President Donald J. Trump. During these demonstrations, President Trump asked his supporters to march towards the U.S. Capitol Building in protest of

the 2020 presidential elections and "fight" on his behalf. Alongside thousands of other members of the crowd, Mr. Lopatic walked to the U.S. Capitol Building and joined in the ensuing attacks on the U.S. Capitol and Capitol Police officers.

During these attacks, the evidence suggests that Mr. Lopatic participated in physical altercations with Metropolitan Police Department ("MPD") Officers C.M. and B.M.—two MPD officers who were directed to report to the U.S. Capitol to assist the U.S. Capitol Police in their duties to maintain the security of the U.S. Capitol. Mr. Lopatic's conduct was captured by MPD body worn cameras and can be seen in one video posted by Storyful to the online video-sharing platform, YouTube. As evidenced by the video recordings, Mr. Lopatic engaged in a confrontation with C.M. and removed B.M.'s body worn camera, but he did not cause any injuries to any of the MPD officers. He also did not cause any property damage or injuries to other individuals.

## II. ARGUMENT

In its initial briefing in the case in the District of Columbia, the government seemed to suggest that Mr. Lopatic should be detailed because he had engaged in a crime of violence. Indeed, the sole evidence adduced from the government consisted of a couple video clips of Mr. Lopatic on the steps of the Capitol and some Facebook posts of some pheasants he had shot, or, as the government stated during its argument "brought about the violent end of birds". When questioned by Judge Harvey, the government stated that Mr. Lopatic was not charged with a crime of violence but that he should be detained because he is a "flight risk" or there is a "risk that he would "obstruct justice". No evidence was presented, however, to support any of these arguments.

The case is nearly identical in all respects to the case of *United States v. Clayton Ray Mullins* (1:21-mj-233) where Chief Judge Beryl A. Howell addressed the very issues raised by the government and ordered the release of Mr. Mullins. A copy of the transcript is attached hereto as Exhibit "B". In relying upon *United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999), Chief Judge Howell noted that if the crime charged is not a crime of violence, then 18 U.S.C. 3142(f) cannot be employed to detail a defendant pre-trial. Chief Judge Howell rejected the government's attempt to do an end-run around 18 U.S.C. 3142.

Under the Bail Reform Act, 18 U.S.C. § 3141 *et seq*., a person awaiting trial on a federal offense may either be released on personal recognizance or bond, conditionally released, or detained. *See* 18 U.S.C. § 3142(a). The Act establishes procedures for each form of release, as well as for temporary and pretrial detention. Detention until trial may be imposed when a judicial officer finds one of six circumstances triggering a detention hearing. *See* 18 U.S.C. § 3142(f). Absent one of these circumstances, detention is not an option. *See, e.g., United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988). Further, assuming a hearing is appropriate, the judicial officer must consider several enumerated factors to determine whether conditions short of detention will "reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(g). The judicial officer may order detention if these factors weigh against release.

**A. 18 U.S.C. § 111(a)(1) does Not Constitute a Crime of Violence.**

In its Supplemental Motion for Pretrial Detention, the Government concedes that 18 U.S.C. § 111(a)(1) does not constitute a crime of violence because 18 U.S.C. § 111(a)(1) does not require the use of violent force. *Id*., at 2; *see also United States v. Fernandez*, 37 F.2d 1031, 1033 (11th Cir. 1988). Nevertheless, the Government argues that the Court must review the factors under § 3142(g) although it is not seeking a hold pursuant to 18 U.S.C. § 3142(f)(a)(A)

(Crime of Violence). *See* ECF 40, at 2-3. In other words, the Government argues that there is a serious risk that Mr. Lopatic will flee because he poses a danger to his community. This argument is conceptually flawed and should be denied by the Court.

In the case of Mr. Lopatic's co-defendant, Mr. Mullins, the Government advanced a similar argument in support of their motion for pretrial detention. In that case, Chief Judge Howell rejected the Government's argument and found that the Government did not prove the defendant's flight risk by a preponderance of the evidence and that obstruction was not established under § 3142(f)(2). In that case, Mr. Mullins was charged with the same criminal offenses as Mr. Lopatic after he was captured by video dragging B.M. down the steps of the U.S. Capitol by his foot.

It is clear that Mr. Lopatic's alleged assault is the only basis in support of the Government's efforts to detain Mr. Lopatic, and that the Government is attempting to embed arguments related to Mr. Lopatic's alleged violence in its request to detain Mr. Lopatic under § 3142(f)(2)(A). As Chief Judge Howell has previously noted and the Government has conceded, the Government is inexplicably seeking to conflate characteristics that go to dangerousness with characteristics that go to the defendant's risk of flight. *See* Ex. B, at 17:1-6. There is no precedent to support a finding in support of the Government's contention. In fact, in *U.S. v. Watkins*, the Second Circuit was confronted with a similar argument in which the Government argued that the charged offense bore a significant factual nexus to a crime of violence and, as such, qualified under §3142(f)(1)(E) because the underlying conduct "involve[d]the possession or use of a firearm." 940 F.3d 152, 157 (2nd Cir. 2019). The Second Circuit stated:

> We reject this interpretation of the word "involves" in § 3142(f)(1) as permitting consideration of related, but uncharged, conduct. Not

> only would this interpretation produce absurd results, but it is also demonstrably at odds with Congress' intent.

*Id*. at 164. When Congress enacted the Bail Reform Act, it intended to limit the availability of detention hearings to individuals who are actually charged with certain enumerated offenses:

> The committee has determined that whenever a person is *charged* with one of these offenses and the attorney for the Government elects to seek pretrial detention, a hearing should be held so that the judicial officer will focus on the issue of whether, in light of the seriousness of the *offense charged*, and the other factors to be considered under subsection (g), any form of conditional release will be adequate to address the potential danger the defendant may pose to others if released pending trial.

S. Rep. No. 98-225, at 21 (emphasis added); *see also U.S. v. Salerno*, 481 U.S., 739, 750 (1987) ("The [Bail Reform] Act operates only on individuals who have been arrested for a specific category of extremely serious offenses.").

Since Mr. Lopatic has not been charged with a violent offense no consideration should be given to his purported dangerousness to the community.

**B. There is No Serious Risk that Michael Lopatic Will Flee or Obstruct Justice.**

The Government's proposition for detention is based on 18 U.S.C. § 3142(f)(2)(A) (serious risk that such person will flee) or 18 U.S.C. § 3142(f)(2)(B) (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). *See* ECF 40, at 1. There is not a shred of evidence to support either of those arguments.

Mr. Lopatic is not a serious flight risk and there is no serious risk that he will obstruct or attempt to obstruct justice. 18 U.S.C. §§ 3142(f)(2). Mr. Lopatic is 57 years old, a retired U.S. Marine Corps veteran, and a lifelong resident of Lancaster County. Mr. Lopatic served as a Marine in combat in Grenada and in Lebanon, and, as a result, received a 100% disabled retirement from the U.S. Marine Corps. After his retirement, he returned to Lancaster County

Pennsylvania, where he has led a peaceful and law-abiding life ever since. Mr. Lopatic has no connections to any foreign country, and no ability to flee. In fact, even after the offense occurred, he remained at his home in Lancaster, Pennsylvania, until his arrest.

Mr. Lopatic has been married to his wife for 34 years and has four children in the Pennsylvania area. He has lived in his current home for more than 30 years. He has no prior criminal record, and aside from shooting some pheasants during hunting season, has no history of violence. Moreover, Mr. Lopatic has several serious physical and mental health issues, including an inoperable Pituitary Macroprolactinomas, muscular dystrophy, rheumatoid arthritis, high blood pressure, a thyroid condition and Post Traumatic Stress Disorder as a result of his deployment to Lebanon, where he was severely injured during a motor explosion, all of which tie him to his community in Lancaster County where his medical providers are located and where he obtains his necessary prescription medication.[1] The numerous letters in support of his release from pre-trial detention, attached hereto as Exhibit "C", further demonstrate Mr. Lopatic's strong ties to his community where he is active in his church and frequently provides volunteer services to those in need.

On January 6, 2021, Mr. Lopatic made the unfortunate and uncalculated decision to remove B.M.'s body worn camera, which he later discarded during his travels back to Lancaster County. Mr. Lopatic has not taken any steps to obstruct justice and there is no basis to assert that he will make any such efforts if this Court orders his release from detention pending trial.

[1] The Center for Disease Control ("CDC") has confirmed that these conditions might expose Mr. Lopatic to a risk of serious injury should he be infected by SARS-CoV-2. *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html. During the COVID-19 Pandemic, this Court has released dozens of previously detained defendants due to their vulnerability to the virus. Further, in *Banks v. Booth*, No. 20-cv-849-CKK, the Court has previously found that the D.C. Jail facilities have not provided adequate care for pretrial detainees during the pandemic.

None of this is to suggest that the attack on the Capitol or attempts to obstruct the election of 2020 are excusable; they are not. However, as the United States Court of Appeals for the D.C. Circuit recently noted: "the specific circumstances that made it possible, on January 6th, for Munchel and Eisenhart to threaten peaceful transfer of power" no longer exist. In short, the circumstances leading up to January 6th no longer exist. This fact alone weighs in favor of release. *United States v. Munchel*, Case No. 21-3010 (D.C. Circuit March 26, 2021) (appended hereto as Exhibit "D").[2]

## III. CONCLUSION

For the foregoing reasons, Defendant Michael J. Lopatic, Sr., respectfully requests that this Honorable Court convene a hearing to review the decision to detain Mr. Lopatic and order his release.

Respectfully Submitted,

*/s/ Dennis E. Boyle*

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[2] In many ways, the conduct of Mr. Munchel and his mother, Ms. Eisenhart, was more serious than the conduct engaged in by Mr. Lopatic. As the government concedes, Mr. Lopatic did not commit a crime of violence, and he left the altercation within seconds. He never entered the Capitol. Mr. Munchel, by contrast, actually entered the Capitol with a taser, and his mother possessed zip-ties. If they were ordered released, then Mr. Lopatic should be released as well.

# EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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| UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL JOHN LOPATIC, SR., Defendant. | Case No. 2:21-MJ-00220<br>James A. Byrne U.S. Courthouse<br>601 Market Street<br>Philadelphia, PA 19106<br>February 9, 2021<br>12:25 p.m. |

TRANSCRIPT OF BAIL STATUS HEARING
BEFORE HONORABLE HENRY S. PERKIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

| | |
|---|---|
| For The United States Of America: | TIMOTHY STENGEL, ESQ.<br>Assistant United States Attorney<br>U.S. ATTORNEY'S OFFICE<br>615 Chestnut St. Suite 1250<br>Philadelphia, DR. PATEL: 19106 |
| For Michael John Lopatic, Sr.: | MYTHRI JAYARAMAN, ESQ.<br>FEDERAL COMMUNITY DEFENDER<br>601 Walnut Street, Suite 540<br>Philadelphia, PA 19106 |
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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE CLERK: This is one of the Rule 5's.

THE COURT: All right, bear with me one second. Labetti?

THE CLERK: Lopatic, L-O-P-A-T-I-C.

THE COURT: Okay, sorry. That's what I thought. All right, bear with me one second.

THE CLERK: He had his initial appearance already.

THE COURT: Yes, I see there was a temporary detention order. I think the only thing before me is detention. Is there also a probable cause issue?

MR. TIM STENGEL: Your Honor, good afternoon, it's Tim Stengel on behalf of the United States. I understand that we have a stipulation as to identity and there is no probable cause issue because Mr. Lopatic was indicted in the District of Columbia.

MS. MYTHRI JAYARAMAN: And Your Honor, just to clarify, with the stipulation to identity, it goes without saying, the stipulation is to identity for purposes of this hearing. (inaudible) is not willing--

THE COURT: --My screen totally went blank, and Mr. Stengel was in the middle of explaining to me that I think this is by indictment, did you say? That there's no issue of probable cause?

MR. STENGEL: Yes, Your Honor. Mr. Lopatic was indicted in the District of Columbia. We are stipulating to

identity for purposes of this hearing only, so the only issue before Your Honor is the issue of detention.

THE COURT: How can you only stipulate--wait a minute. How can you only stipulate to identity for this hearing? If you stipulate to identity, I'm going to grant your motion for removal, and then he's in the District of Columbia. You mean he's going to then say he's not who he is in the District of Columbia? Is that what he's reserving the right to do?

MS. JAYARAMAN: Your Honor, if I--

THE CLERK: Hold on. He hasn't even put this on the record yet, so you guys are getting--

THE COURT: --Yeah, you're right.

THE CLERK: --into it, aren't you? So he hasn't even put the action on or anything, so.

THE COURT: Hold on, all right. Bear with me, everybody here. I just got--all right, let--and then I'll announce the case. Okay. All right, this is the matter of United States of America vs. Michael John Lopatic, Sr. and it is #21-MJ-00220 in this district. In the District of Columbia it bears #21-CR-00035. The matter before me is the Government's motion for removal to the District of Columbia, and that gives rise to a hearing or determination of identity. The other matter is if I grant removal, then the question is whether or not he shall be detained or may appear in the

District of Columbia at liberty. Has counsel been appointed for--or does counsel have--do we have counsel for Mr.--

REPORTER: I think you froze for a second.

THE COURT: Has counsel been appointed for Mr. Lopatic?

MS. JAYARAMAN: Good afternoon, Your Honor. Mythri Jayaraman for the Federal Defenders on behalf of Mr. Lopatic.

THE COURT: Oh, okay. Just wanted to make sure that that took place. All right, Mr. Stengel, before I identified the case and went on the record, you indicated that there is a stipulation to identity in this district only. First of all, is that correct?

MR. STENGEL: Your Honor, it's a stipulation to identity. If the defense is going to preserve it for this hearing only, I understand that's their position.

THE COURT: Well, all right. Just so I understand, let's get the record correct. He admits that today that he is Michael John Lopatic, Sr., the same individual who was charged by indictment in the United States District Court for the District of Columbia, and that's at #21-CR-0035. On that basis, I will grant--he shall appear in the--

REPORTER: Judge--

THE COURT: Okay, now just so we're clear for the record, Ms. Jayaraman, you're only admitting identity for the proceedings today to remove him to the District of Columbia, is

that what you're telling me?

MS. JAYARAMAN: Your Honor, we're stipulating to his identity, and we're stipulating that he is in fact the same Michael John Lopatic who was indicted out of D.C., that he is that same person. I just want to make the record that he is not stipulating as to that he is the same person who may appear in various photographs, videos, et cetera, from the actual incident.

THE COURT: Oh, okay, all right, that's fine, because he--once he agrees he is who is with regard to the indictment here today, he--I guess he could try, but he's--this has been a judicial determination that's been made. But I understand your point. Your point is an evidentiary one, and I'm not deciding the evidentiary today. Okay. That brings us to the question of pretrial detention. The United States is--which I believe all parties have received as well, am I correct?

MR. STENGEL: Yes, Your Honor, we did file a detention motion and it was served on counsel.

MS. JAYARAMAN: That's correct.

THE COURT: All right. Mr.--

REPORTER: Uh-oh.

FEMALE VOICE: Please enter your area code and phone number, followed by pound. Welcome to a Cisco meeting. You are entering the meeting now.

REPORTER: Excuse me, hold on. Hold on, time out.

This is Jimmy Cruz, the Court Reporter. We need to go back. I lost the feed here. The last thing I had here was the judge found probable cause, grant Government pretrial--oh, no, wait a minute. Hold on. It was evidentiary pretrial detention AUSA Stengel filed, and that was the last I got. That was Mythri Jayaraman that was speaking. Mythri Jayaraman was speaking.

THE COURT: All right, so the record is clear, that's our court reporter, Jimmy Cruz, in this matter. The United States of America is represented by Assistant United States Attorney Timothy Stengel, and the Defendant is represented by attorney Mythri Jayaraman. Okay, let's go back. We're going to start the detention motion filed by the United States, and Mr. Stengel will begin with his proffer and argument.

MR. STENGEL: Thank you, Your Honor. As you know, the Defendant, Michael Lopatic, has been indicted for his role in the riot at the United States Capitol on January 6th, 2021. But to start a couple months prior to that, however, shortly after the November presidential election, Mr. Lopatic posted to social media the phrase "a call to arms". In the days following the election, he posted several images to his Facebook account showing dead birds that he himself had shot and named those birds after elected leaders in Washington, D.C. Fast forward a few weeks. Shortly before the events at the Capitol, he posted the message, "Assemble at the capitol on January 6th, 2021. United we stand forth and we fight." And

that's exactly what Mr. Lopatic did. In a day full of harrowing scenes, one of the most harrowing was the scene in which a D.C. metro police officer was dragged from an archway and engulfed by a violent mob. Mr. Lopatic was right in the middle of that. In fact, when a second officer went to render aid to the first officer, Mr. Lopatic charged him, gripped him up and started punching him. He then made his way down the steps and stole the body camera from the first officer, but at this point was being protected by a human shield of protesters. Mr. Lopatic then left Capitol area and destroyed the body-worn camera, or at least disposed it on his way home, and we know that because when he was arrested on February 3rd at his home in Lancaster, Pennsylvania, he acknowledged such to the agents from the FBI. He has demonstrated violent and obstructionist behavior, Your Honor. He has shown that he harbors ill-will and has violent feelings toward elected officials in Washington, and he is now being asked to be released on his own recognizance to travel to Washington, to the scene of the crime, to appear on the charges in this case. Given--although Mr. Lopatic has no criminal history, he is facing a substantial sentence and I submit to you that given the fact that he has not served time in jail before, any prison sentence is going to give him a compelling reason to flee. He has no ties to the District of Columbia, and he has no recent work history. For all of these reasons, Your Honor, and those that we included in

our detention motion, which included still shots from body camera footage taken from the day of the riot at the Capitol, the Government submits that Mr. Lopatic is a danger to the community and a risk of flight, and he should be detained pending his removal to the District of Columbia to answer the charges against him.

THE COURT: I've reviewed the motion as well as the photographs you've included in the motion. Can I ask you, how did you identify--how do we know that even though it's not necessarily--I'm not ruling upon this as if it was a trial, but I'm curious as how you identified Mr. Lopatic as the individual in the photos.

MR. STENGEL: My understanding, Your Honor, it not being my investigation, an AUSA out of the District of Columbia charged it, but my understanding is that the FBI released images that were not just from body camera footage, because frankly, the body camera footage, at least the stills that we included in the motion, are a little grainy. There are much clearer pictures from surveillance cameras at the Capitol, and the FBI released a BOLO of Mr. Lopatic, and they received information that he was the Michael John Lopatic living in Lancaster, Pennsylvania. To corroborate that, Your Honor, when he was arrested, I don't believe there was any--when he was talking to the officers, he certainly acknowledged disposing of the body camera on that day. So there's certainly evidence

beyond the detention motion that the gentleman you see in the body camera footage is Mr. Lopatic.

THE COURT: And my determination is not beyond a reasonable doubt today, so--

MR. STENGEL: Understood.

THE COURT: --I understand. Ms. Jayaraman, would you like to respond, please?

MS. JAYARAMAN: Yes, thank you, Your Honor. If I can sort of start with one of the Government's last points. The Government said he has no recent work history. Frankly, Your Honor, this is not because this is a man who is unwilling to work. He has no recent work history because this is an individual who has stopped work to serve our country and is receiving disability. He was injured severely during a motor explosion in Beirut. He served overseas in the 1980s. He was a member of the Marine Corps. He was stationed in Beirut. I believe he was there for about--in Beirut itself, about a year. In fact, he was one of the last individuals who was there, Your Honor, so even after the other marines and everyone else had left, he was one of the last individuals who was still tasked with staying there and sort of readying for the handover. He lost his hearing, he now uses hearing aids. He's able to hear in certain situations and not in others. So to say he has no recent work history, as if he--and that there is no tie to the community, I think misses the point that the reason he can't

work is because of his significant ties and love for the community. If I may--

THE COURT: Ms. Jayaraman, let me--may I say that I am aware of that and I accept what you say because that was what Mr. Stengel placed, actually, in his detention motion.

MS. JAYARAMAN: Yes, Your Honor.

THE COURT: On the disability. So I understand that's why he doesn't have a work history. And I understand that he has ties to the Eastern District of Pennsylvania. I understand all of that.

MS. JAYARAMAN: Correct.

THE COURT: And quite frankly, from what I've seen so far, I could probably fashion conditions to deal with his ability--you know, the risk of flight. I think I probably could do that. That's not what my concern is. My concern is the danger. And if you don't mind, I would suggest that--ask that you address that. And I do also find that Mr. Lopatic's--focus on what occurred on January 6th of 2021.

MS. JAYARAMAN: Your Honor--

THE COURT: --would you please proceed with. I indicated that while I acknowledge and admire his service to the United States, there's no way you can take that away from him, I am going to focus in on the issue of danger as it arises from--the facts that Mr. Stengel proffered from before January 6th, 2021, as well as what occurred at the Capitol on 2021--

January 6th, 2021. So if you want to address that, I'd appreciate it. Thank you.

MS. JAYARAMAN: Thank you, Your Honor. I'll take them exactly as Your Honor sort of refers to them. So the things that Mr. Stengel refers to from before January 6th refer to posts that Mr. Lopatic made. And I'll point out, yes, they are absolutely distasteful. There are photographs of dead birds who he then named after members of Congress. Clearly 1) that's not illegal; and 2) that is very different, very different from had he in fact had something--Your Honor, I don't want to sort of do a comparison of The Horribles, but this isn't--it's not as if he had photographs of actual people or effigies of actual people, much less the individuals in Congress, and then had done some sort of--something disgusting like (inaudible) or anything like that. So birds, which is legal, yes, he then named the dead animals after members of Congress who he clearly has a distaste for. That's not a great thing. 1) That's not illegal. And I would say, in fact, the proof that he wasn't doing anything violent is that the extent of his violence is what he was bragging about online, which is killing birds and using his dog to also go and kill and hunt birds. So there is no--it's not only that he didn't do anything dangerous beforehand, there is no suggestion that he wasn't even trying. It's not as if he was trying to do something dangerous beforehand and was also unsuccessful. So

what we know is he legally possessed weapons, he legally hunted, he used his dog as part of that hunting time. He killed animals that I believe he was--I assume he was legally permitted to kill, and then he posted that--all of those images online, and then, yes, he named the already-dead animals after people he didn't like in Congress. But we know that if he had wanted to do something dangerous, he certainly could have, and he did not. Moving now to January 6th, which I understand, and the Government rightfully points to as the more salient argument. Your Honor, 1) obviously these are allegations. 2) Even with these allegations, there is a reason that the legislature has sort of determined certain things to be presumption cases and certain things not to be presumption cases. And so of course I don't believe, and obviously please correct me if I'm wrong, I don't believe this is a presumption case because again, we're not here--Mr. Stengel is shaking his head at me. (inaudible). But regardless--

THE COURT: I don't think--when I looked at the act, I don't think it's a presumption of detention case either.

MS. JAYARAMAN: I don't--

MR. STENGEL: --It's not a presumption case, Your Honor.

MS. JAYARMAN: Okay, good.

THE COURT: It's not, yeah, okay.

MS. JAYARAMAN: I wanted to make a--

THE COURT: When he shook his head, he was agreeing with you.

MS. JAYARAMAN: Right. I always like having Mr. Stengel in agreement on my side. It's not a presumption case, not because the presumption is--obviously everybody is choosing innocence, but the presumption on certain cases is that because of either the penalty that person is facing of the conduct that that person is alleged to have done, the presumption that that individual will either be a danger to the community or a flight risk weighs in favor of detention. The legislature itself has determined that the penalty that Mr. Lopatic is looking at and/or the conduct that he's alleged to have done is not meritorious of sort of presumed detention, unless there's some extra reason. The conduct described by the Government is exactly what--

THE COURT: Well, let me help you. Congress says I should release him unless I find there is a danger to the community and I can't impose a condition or a combination of conditions to satisfy that, if it's not a presumption case, and it's not a presumption case.

MS. JAYARAMAN: He missed--

THE COURT: I mean, that's the basic framework of the Act.

MS. JAYARAMAN: Right. He missed--he has a massive brain tumor. I'm sure the Court is aware he was--

THE COURT: I was aware of that.

MS. JAYARAMAN: He was in Marine Corps based in Camp Lejeune when there were terrible incidents with the contaminated water. I think they had those issues from 1953 to 1987. He in fact missed an appointment--he had an appointment last Monday. He takes medications. I know he arrived at the prison with (inaudible) pack of some medications. At this point the tumor is inoperable but they're keeping the swelling down. Every Friday he and his wife of 34 years were doing these community meals. If anything, January 6th was a terrible glitch, but it is not indicative of his dangerousness, either in the past or in the future. It's not indicative of any kind of future dangerousness. As Your Honor says, there are certainly conditions that can be fashioned to try and ensure his presence, but if the Court wishes, perhaps the Court could impose detention, some sort of heightened supervision, just to make sure that there are closer tabs placed on him. Certainly he could be required to--I'm sure he's already required to give up any weapons that may be in the house and could have conditions--I have had clients where there are conditions limiting their ability to be online. So if the Court is concerned about, perhaps, any online comments, that can be restricted as well, Your Honor.

THE COURT: Thank you. Are you--do you have anything further?

MS. JAYARAMAN: I don't, Your Honor. I believe the Court is aware of everything else.

THE COURT: Okay. First of all, the birds, I think, are effigies, okay, but that's not illegal. I agree with you. Disliking members of Congress is not only not illegal, but it happens to be sport in this country. So that itself isn't illegal. But I don't--but it is relevant to what occurred on January 6th of 2021. This was a breach of the Capitol for a purpose of impeding a democratic and constitutional function that must take place. Okay, so let's look at what the evidence is against Mr. Lopatic. If he was just entering or was in the crowd, I wouldn't be so concerned. But here's what concerns me. The assault on a police officer. The assault on a police officer under any conditions is something that brings a danger to the community and puts--gives me pause as to whether or not there should be release. In this case, the attack on the officers was for the purpose of getting into the Capitol and stopping a democratic function that's constitutional and necessary in order to elect a president of the United States. That's serious stuff. And in fact, the assault itself was dangerous; it injured a police officer. And the things that led up to January 6th that Mr. Stengel has referred to aren't simply his right to speech, which he has, but also an indication of what his intention was on January 6th. I find that's a danger to the community, it was a danger to democracy,

it was a danger to the Capitol and the people that serve in that Capitol, including the Capitol officers. Now I'm going to look to see whether or not there are conditions or a combination of conditions that I can impose to solve that. I don't think there are, to be candid with you. House arrest, house incarceration will not do it because he can't be supervised 24/7. He has expressed his desires in the past--to grant him to the custody of the United States Marshal Service pending removal to the District of Columbia. Mr. Lopatic can raise this argument again before his (inaudible).

MR. JOHN LOPATIC: Judge, may I speak?

THE COURT: That's up to your counsel.

MS. JAYARAMAN: Mr. Lopatic, I would strongly recommend that you don't speak. I would strongly recommend that you exercise your right to remain silent. My recommendation.

MR. LOPATIC: Well, I see the Judge seems to have already made his mind up.

THE COURT: So I've listened to the entire case. I haven't made my mind up without listening to the case. Yes, I've made my mind up at this point, that's correct.

MR. LOPATIC: But if I may speak to you, please. The--we weren't--when the Capitol was being breached, we weren't there. My wife and I took a walk in a different direction. If you can find a timeline of things that happened-

-

MS. JAYARAMAN: Mr. Lopatic, Mr. Lopatic, listen. When the Judge says he's made up his mind, he's not talking about whether you're guilty or innocent. He's literally just saying he's made up his mind to keep you in custody until your case is sent to D.C., all right? I would not talk about the facts of the case itself at the moment.

THE COURT: Well, let me make it very clear. Once you are before the Court in the District of Columbia, you may raise this issue again with the court there, the one that is prosecuting you. The court--or not the court that's prosecuting you, but the court in which you are being prosecuted. But with the evidence in front of me, I believe you should be kept in custody and I'm ordering that. I also want to make sure that you have all the medical treatment that you need, and I'm going to ask Ms. Jayaraman to check and report to me if in that's a problem, because I will take care of that.

MS. LOPATIC: Attorney Stengel made points about the social media and so forth. What he doesn't point out is the fact that I saw his point as that I'm a very--like a pro-life activist. That's the only reason I--

MS. JAYARAMAN: Ah, ah, Mr. Lopatic.

MR. LOPATIC: It just seemed like--

MS. JAYARAMAN: (inaudible) all of this.

(inaudible).

MR. LOPATIC: I just feel like I don't have a chance here.

THE COURT: I have not determined guilt. You still have the presumption of innocence. The statute says that. This is a very limited function that I'm dealing with right now and that's whether or not you should be kept in custody pending your removal to the District of Columbia, and I'm specifically telling you, you can raise this issue again when you get to the District of Columbia. Hopefully that will be sooner than later. I don't know what the schedule is with regard to that Court.

MR. LOPATIC: Well, I haven't been able to contact my wife or anyone since I've been in custody.

THE COURT: I don't know why that is. That would be the policy of the detention center, but Ms. Jayaraman, maybe you can look into that, because I certainly think he should be able to do that.

MS. JAYARAMAN: I will, Your Honor.

THE COURT: And if there's an issue, you may bring it to me. Is there anything further with regard to this matter this afternoon?

MR. STENGEL: Not from the Government, Your Honor.

THE COURT: All right.

MS. JAYARAMAN: No.

THE COURT: This matter is concluded, and all those involved in this issue are excused. Thank you very much.

MS. JAYARAMAN: (inaudible) in the interest of that. Thank you, Your Honor.

THE COURT: You're welcome. Well argued by both sides.

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**C E R T I F I C A T I O N**

I, Julie Davids, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

Julie Davids

DATE: February 25, 2021

# EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES OF AMERICA, | ) | Criminal Action |
| | ) | No. 21-MJ-233 |
| vs. | ) | |
| | ) | |
| CLAYTON RAY MULLINS, | ) | March 2, 2021 |
| | ) | 1:12 p.m. |
| Defendant. | ) | Washington, D.C. |
| | ) | |

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

**APPEARANCES:**

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ALSO PRESENT: ANDRE SIDBURY, Pretrial Services

Court Reporter:
Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

***This hearing was held via videoconference and telephonically in compliance with the COVID-19 pandemic stay-safer-at-home recommendations and is therefore subject to the limitations associated with the use of technology.***

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

**P R O C E E D I N G S**

THE COURT: The United States District Court for the District of Columbia is now in session. Chief Judge Beryl A. Howell presiding.

Matter before the Court, Magistrate Judge Case No. 21-233, United States of America versus Clayton Ray Mullins.

Your Honor, for the record, pretrial agent Andre Sidbury is joining us via telephone.

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

MS. KUKOWSKI: Good afternoon, Your Honor. This is AUSA Colleen Kukowski for the United States.

THE COURT: Good afternoon.

MR. WOODWARD: Good afternoon, Your Honor. Pat Woodward for Mr. Mullins who is joining us from McCracken County Jail in Paducah, Kentucky via Zoom.

THE COURT: All right. Thank you.

So we just got in chambers some of the videotape evidence that the government had submitted, I guess, today. Sorry I'm a little late. I wanted to make sure that I had seen what the government had submitted for purposes of the hearing today which did delay me a little bit.

Let me begin, Mr. Mullins, by asking you whether you agree, after consultation with counsel, to participate

in this hearing remotely without being physically present in the courtroom in D.C. today?

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

THE COURT: Could you speak up, please?

THE DEFENDANT: Yes. Yes, ma'am.

THE COURT: All right. Thank you.

You may be seated.

All right. I would like to remind anyone listening to this hearing over the public teleconference line that, under my standing order 20-20, recording and rebroadcasting of court proceedings including those held by videoconference, as today's hearing is being done, is strictly prohibited. Violation of these prohibitions may result in sanctions, including removal of court-issued media credentials, restricted or denial of entry to future hearings, or other sanctions that the presiding judge believes is necessary.

All right. So pending before me is the government's motion for review and appeal of the magistrate judge's release order in this case. And I have reviewed the complaint in the case, the defendant's response, the government's motion for review, the government's supplemental motion that was filed today, and videos; both those cited by the defendant in his briefing, and also those submitted by the government to chambers today.

All right. So let me just start -- because it's the government's motion, let me just start by posing a few questions to the government here starting with the fact that the government's -- I guess its original brief asking for review, I can't remember which one; but it describes the defendant as follows -- stating: The defendant was not a protester swept up in the swagger of a violent mob; he was a violent instigator.

The government uses the word "violent" to describe the defendant's conduct multiple times in the complaint in its motion for review of the magistrate judge's release order and in its supplemental filing submitted today.

But despite this frequent use of the word "violent," nowhere does the government seek pretrial detention because the defendant is charged with a crime of violence, as defined in 3156(a)(4) of the Bail Reform Act. I am a little puzzled by that absence.

When I got your supplemental filing today I expected to see that, but I did not. Why is that? What's going on here?

MS. KUKOWSKI: Yes, Your Honor.

So the government's primary charge in this -- I want say there are two primary felonies, but the one that we would look at first is 18 U.S.C. 111.

18 U.S.C. 111 is divisible statute with three

separate categories of conduct within it. And if the Court were to take a categorical approach, I think two things are clear. I think the first level of conduct -- because the statute does criminalize simple assault-type conduct would not be a crime of violence.

The statute and the courts have also been clear that violations of 111(a)(1) and 111(b), where there is a use of a dangerous weapon, is -- categorically falls within the crime of violence definition.

There is a gray, murky area to be frank, Your Honor, I would submit, with respect to the felony conduct that is in the middle of those two outer charges. The --

THE COURT: So why don't we start with are you -- this is -- 111 is a statute that has both felony and misdemeanor penalties. Are you charging this defendant under 111 as a misdemeanor or a felony?

MS. KUKOWSKI: As a felony, Your Honor.

THE COURT: All right. And so you are -- which provision are you charging him under?

I thought it was -- I thought you were charging him under 111(a)(1), for forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with a law enforcement officer while engaged in or on account of the performance of official duties.

MS. KUKOWSKI: Yes, Your Honor.

THE COURT: So that is an act that involves the physical contact with the victim of the assault or the intent to commit another felony; here it would be the interference with an official proceeding making it a felony.

So are you saying that under the categorical approach that that is not a crime of violence?

MS. KUKOWSKI: Your Honor, to be frank, I would ask the Court -- if the Court wants further information -- for the opportunity to brief it a little bit more. We are looking at this and have received some conflicting guidance on it. I can cite to --

THE COURT: Conflicting guidance on it from whom?

MS. KUKOWSKI: Internal, within the Department of Justice.

THE COURT: Well, let me -- let me just put it to you this way: The government's relied solely -- despite the use of violence and dangerousness in your briefing -- you've only relied on 3142(f)(2), risk of flight or obstruction --

MS. KUKOWSKI: Yes.

THE COURT: -- for the detention hearing here, and for detention at all.

So if I find that either one of those grounds is not proven by a preponderance, then the Court's hands are tied because the Court is not allowed under the Bail Reform Act to invoke sua sponte -- like I can for risk of flight or

obstruction -- I can't invoke sua sponte the grounds listed under 3142(f)(1) which would include a crime of violence to trigger a detention hearing or detention at all, only the government can move for detention on those grounds.

I mean, as the D.C. Circuit held in *U.S. v Singleton*: In order to detain the defendant pending trial, first, a judicial officer must find one of six circumstances triggering a detention hearing; that is a circumstance listed in 3142(f), and that absent one of these circumstances detention is not an option.

So just so the record is absolutely clear here -- and what you have confirmed is that the government is not seeking detention here because this case involves a crime of violence under 3142(f)(1)(A), but only -- and only the government can make a motion under 3142(f)(1)(A) -- but only under 3142(f)(2), correct?

MS. KUKOWSKI: That is correct, Your Honor.

THE COURT: All right. So I -- and the government is not willing to take the position here that the charge in this case under 18 U.S.C. Section 111(a) which provides penalties for forcibly -- forcibly -- that's a statutory term: Forcibly assaulting, impeding, and interfering with a law enforcement officer -- meets the elements clause of the crime of violence definition in the Bail Reform Act, correct?

MS. KUKOWSKI: Correct.

THE COURT: And it's also the view that not only does Section 111(a)(1) not satisfy the elements prong of the crime of violence, but -- despite the statutory term "forcibly" in it -- it's the government's view that, or the government is not relying or even urging this Court to consider whether Section 111(a) satisfies the residual clause of the crime of violence definition in 3156(a)(4)(B); is that correct?

MS. KUKOWSKI: Yes, Your Honor.

THE COURT: And is that because of the cloud -- constitutional cloud that the Bail Reform Act -- or that residual clause in the crime of violence has because of recent Supreme Court jurisprudence?

MS. KUKOWSKI: Your Honor, frankly, this one I don't feel fully able to respond to that; and I can follow up with supplemental briefing.

THE COURT: Well, supplemental briefing -- excuse me -- I have a defendant who is sitting in jail; he doesn't want to wait for more supplemental briefing.

I take it, Mr. Woodward, you would object to that.

MR. WOODWARD: Yes, I would, Your Honor. Thank you.

THE COURT: All right. I mean, how long has Mr. Mullins now been incarcerated waiting for this review?

MR. WOODWARD: Almost a week. He was arrested last Wednesday, Your Honor.

THE COURT: That's plenty of time for the government to have figured this out, particularly since January 6th. Let me just say it's pretty surprising to me that the government hasn't figured this one out.

I know that the Supreme Court cases, you know, on residual clause in *Johnson*, *Dimaya*, even *Davis* -- I mean, it's all certainly made clear that the residual clause is unconstitutionally vague under the due process clause in certain contexts.

The Supreme Court also made clear that the residual clause is not unconstitutional in every context. I mean, if we just look at *Beckles* where the Supreme Court concluded that use of a residual clause in a crime of violence posed no constitutional problem in advisory guidelines, and specifically said that the residual clause was unconstitutional for vagueness in two contexts when it defined criminal offenses or when it fixed the permissible sentence for criminal offenses. The guidelines did neither.

The Supreme Court said that residual clause in a crime of violence under the advisory guidelines therefore was not unconstitutional.

And the Second Circuit in *U.S. v Watkins* made it clear that the residual clause for crimes of violence in the

Bail Reform Act under 3142(f)(1) is not one of the two contexts where the residual clause is unconstitutional.

Is the government prepared to talk about *Watkins* today?

MS. KUKOWSKI: No, Your Honor. Not at this time.

THE COURT: All right. So that makes my job fairly easy, doesn't it, Ms. Kukowski?

Because if I find that the defendant's risk of flight here is not proven by a preponderance, and I find that obstruction is not established under 3142(f)(2), then I don't know what your grounds would be even to have a detention hearing; am I correct in that conclusion, Ms. Kukowski?

MS. KUKOWSKI: Yes, Your Honor. Yes, Your Honor.

THE COURT: All right. Is there anything else you would like to add?

MS. KUKOWSKI: Nothing further beyond our briefings.

I can proffer a slight -- a bit more information regarding the defendant's conduct immediately preceding the events of January 6th, particularly with regard to some unusual financial activity that he had which I was finishing -- confirming the information, which is why it was not included in the briefings --

(Simultaneous speaking.)

THE COURT: Sure. Go ahead.

MS. KUKOWSKI: The government did receive financial records for the defendant from FND Bank which indicated that, on several days leading up to the defendant's travel to the D.C. area, he traveled here on January 5th with his wife.

Leading up to December 28th, December 30th, December 31st, he made several large cash deposits in his bank accounts in rapid succession; one on the 28th for 9,500; one on the 30th for 4,000; another one on the 30th for $1600; one on the 31st for $3,980; and, then, one on the 31st for $6,000. And, then, several days after he would have returned from the D.C. area, he made two additional cash deposits on January 13th: One for $2500, one for $3500.

And I would just submit to the Court that these cash deposits were atypical and unusual for his normal banking habits and call into question the fact that he may or leads to the inference he was indeed planning for something, particularly for his travel to the Washington, D.C. area, and that --

(Simultaneous speaking.)

THE COURT: But you have proffered no evidence that Mr. Mullins is involved with any of the gangs who have been involved in some of these January 6th events --

violently involved; is that correct?

MS. KUKOWSKI: That is correct, Your Honor.

The defendant -- as far as we know, we have been looking to -- has no public facing statements or social media accounts by which to determine his -- if he is either affiliated, loosely or otherwise or formerly, with any of the more organized factions that we saw active on January 6th.

THE COURT: All right. Well, let me just make sure the record is clear on some points with the government.

You have pointed to a lot of video evidence; and I have looked at all of it, both presented by the defendant and by the government.

And in none of -- none of the footage that I have seen -- and I don't see it anywhere in the government's proffer -- that even though this defendant may have been trying to get into the Capitol, you don't have any evidence that he ever successfully entered the Capitol; is that correct?

MS. KUKOWSKI: That's correct, Your Honor.

We have evidence -- which was part of what was submitted -- showing the defendant expelled as part of a crowd out of a tunnel in the archway of the lower western terrace. The actual entrance to the Capitol that bars the doors there are several feet back into that tunnel, so we

could not confirm whether or not he actually went in and have not seen anything to indicate that he was able to successfully enter inside of the building.

THE COURT: Okay. So let me just now turn to some of the bases that the government points to for why I should consider Mr. Mullins a flight risk and the government has met its preponderance of the evidence standard to establish that he is a fight risk.

So one reason you say he is a flight risk is that when he was arrested he was driving a car registered to his own dealership -- not to himself personally -- and he had a firearm in the car. And I am not sure what inference you are asking the Court to draw from the fact that the car was registered to his own dealership.

MS. KUKOWSKI: It is saying, Your Honor, that using the dealership vehicle for his own purposes is inconsistent with the dealership licensing; and it would enable him -- it is part and parcel of the conduct that we have seen, including his traffic records, where he is skirting a lot of rules and regulations requiring him to register his vehicles and to generally abide by rules about driving vehicles, and the like; and it just allows him to further operate outside of regulatory requirements and, frankly, to live off the grid, so to speak --

THE COURT: I'm sorry. I've always thought it

might be a real perk of working at a car dealership that you might get to drive a different car home every night. I mean, I really -- I find that inference that you are trying to draw just not persuasive.

Also -- you also said that there was a firearm found in his car, but it was legally owned and registered to him; is that right?

MS. KUKOWSKI: That is correct.

THE COURT: So he was clearly complying with gun registration laws, right?

MS. KUKOWSKI: To the extent that he -- yes, Your Honor -- did have a weapon that he was -- had a permit to carry with him; so, yes, he was complying with the Kentucky laws of firearm --

THE COURT: Okay. And the government also points, as part of its serious risk of flight, to the fact that the defendant is self-employed. I am sorry, but I really don't understand why self-employment points to a risk of flight. Why would that be?

MS. KUKOWSKI: I would say it is in conjunction with everything else, Your Honor; where the defendant leads a lifestyle where he is not beholden to anyone else and has no accountability to anyone outside of himself or perhaps his wife who we know did, in fact, travel with him to Washington, D.C. for the events of January 6th. And it is

part of this further removed world that he lives in where it is extremely difficult to locate him.

THE COURT: One could say that if you are self-employed you really have to be at your place of business and it ties you more to a particular location. So I think that's -- might I use -- might I say a clever argument; but, really, I don't find that particularly persuasive on the risk of flight.

You also say, on the risk of flight, that he doesn't have any ties to the District of Columbia. But really, you know, in reviewing a motion for pretrial detention, isn't the issue whether the defendant has ties not to the charging jurisdiction necessarily, but the strength of the defendant's ties to the community in which he resides and where the defendant will be released pending trial.

And this defendant appears to have lived in Kentucky his entire life; he has a spouse of 20 years. He owns a business; he is active in his church. Wouldn't the government agree those are pretty strong ties to the district where he resides?

MS. KUKOWSKI: Yes, Your Honor. We would agree those are his ties to the community in Kentucky.

THE COURT: All right. And then your last point to show a serious risk of flight is that this defendant now

faces a significant term of imprisonment. But every defendant charged -- almost every defendant I have seen charged with offenses stemming from January 6th, if not everyone -- many of them are charged with significant prison terms. When does that pose a serious risk of flight?

And particularly with respect to the January 6th defendants who are the most similarly situated as a general matter, the government hasn't sought pretrial detention in every one of those cases even though many of them face serious felony charges. So how is that a serious risk of flight just because he faces some serious jail time if convicted?

MS. KUKOWSKI: We -- the Court is correct in that we have not been seeking detention in every case or, in fact, in probably the majority of cases.

But I would submit that in this case, the defendant -- because he is looking at multiple counts and multiple charges of 111, and other felony offenses against multiple different officer victims -- his exposure is more significant than many others that we would see.

And I think it is his overall -- what we would submit -- various distinguishing characteristics about the way he went about his behavior on January 6th that distinguishes him from others who have come to --

(Simultaneous speaking.)

THE COURT: Yes. But those distinguishing characteristics are ones that go to dangerousness, right, not ones that go to his risk of flight? You are conflating the two there, aren't you?

MS. KUKOWSKI: Yes.

THE COURT: Yes.

All right. In addition to the risk of flight, which you can tell I am not finding -- and I have tried to tease out every single reason you have presented -- the government has presented for serious risk of flight; I am just not seeing that here.

So let's turn to the next and only other grounds the government has asserted for detention here, and that is that the defendant presents a serious risk that he will obstruct or attempt to obstruct justice; and your primary basis for that argument is that the defendant's underlying conduct was obstructive on January 6th.

But isn't obstruction, in the context of 3142(f)(2), generally understood to refer to obstruction in the case against the defendant by intimidating witnesses, interfering with evidence in connection with the case now before the Court? It doesn't -- it doesn't refer to the actual offense conduct, does it?

MS. KUKOWSKI: That is correct, Your Honor; it is with respect to the case before the Court and those involved

in the court.

But, here, I think the issue is that the case and those involved in this matter are, in fact, law enforcement. And it is circular; but we see from his conduct that his conduct is assaulting law enforcement in trying to stop them from going about their duties and their actions. So I think it does actually bear on his conduct that day on obstruction going forward with this case itself when the Court thinks about the witnesses and those -- the evidence and what would be presented as a part of prosecuting this case.

THE COURT: So is the government seeking detention of every defendant charged under Section 231 or other statutes for interference with certification of the electoral votes by impeding law enforcement or creating civil disorder? I don't think it is because --

MS. KUKOWSKI: I don't believe so, Your Honor.

THE COURT: No.

So how is it that the government's position here is that the obstructive conduct underlying the charged offenses is sufficient to trigger a 3142(f)(2) obstruction basis for detention when that same basis is not being uniformly applied by the government at all?

MS. KUKOWSKI: Again, I think it goes back to the nature of his conduct that day.

His obstructive conduct wasn't simply pushing

aside one officer or pushing aside one barrier; but it was a protracted course of conduct starting from just after 2 p.m. through at least 4:30 p.m., and it's conduct that escalated as he progressed forward in the day --

THE COURT: Escalated violently. Escalated violently, and escalated to the point where, you know, danger to the community is a real concern here; but that's different from obstructive conduct, isn't it?

MS. KUKOWSKI: Yes, Your Honor.

But again, like I said, I think what our concern is is the fact that the violence and the danger there was targeted at law enforcement amongst others who are part and parcel of the case that would be prosecuted.

THE COURT: All right. The government, to support its basis for detention of obstruction, also says that even though the defendant has no adult criminal record he has a history of traffic violations. And it really is a stretch, to my mind, how a speeding ticket or a parking offense translates into clear and convincing evidence at all that -- or even a preponderance that the defendant is likely to obstruct justice in this case.

Do you want an opportunity to persuade me otherwise? Parking tickets, really?

MS. KUKOWSKI: Let me just submit -- what I would submit, Your Honor, is they aren't parking tickets. They

are multiple violations for things bearing from not wearing seat belts to inappropriate reg- -- not having current registration, to multiple tickets regarding speeding in excess of 15 miles per hour.

And so the reason why I think it is notable is because -- if the Court were to release the defendant, one of the things he would have to agree to do is follow the conditions that the Court sets for him. But here we can see he is not following and has a lengthy -- very lengthy -- a long record of not following simple conditions for things such as driving which is a quintessential part of every day life.

So if he can't be expected to follow those conditions -- which are in place not just for his own safety but for those around him and on the road, I think there are questions about whether or not he would abide by any conditions that the Court would set for the safety of others.

THE COURT: Well, you're going back to dangerousness and safety again, Ms. Kukowski. And, remember, that's different from obstruction, right, of this case?

MS. KUKOWSKI: Yes, Your Honor.

THE COURT: All right. Do you want to add anything else before I turn to Mr. Woodward?

MS. KUKOWSKI: Nothing further, Your Honor.

THE COURT: Okay. Mr. Woodward, would you like to respond?

MR. WOODWARD: I do not, Your Honor.

Thank you for making our argument. I appreciate it.

THE COURT: All right. As I said, the government's decision to rest its entire detention motion on risk of flight and obstruction of justice in this case makes this decision fairly easy.

The Court is ready to rule on the government's motion to review the Western District of Kentucky magistrate judge's decision to release the defendant pending trial.

On an appeal from a magistrate judge's order of pretrial release, the district court must conduct a *de novo* review, must do so promptly. Under 18 U.S.C. Section 3145(a), the Bail Reform Act requires release of a defendant prior to trial unless a judicial officer determines after a hearing that no condition or combination of conditions will reasonably assure the safety of any other person and the community and the appearance of the defendant as required.

The government has the burden to establish that the defendant poses a risk of flight or a risk of obstruction by a preponderance of the evidence.

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 the four factors that are set out in 18 U.S.C. Section 3142(g).

But, in some ways, the Court only gets to these 3142(g) factors if the government has established the basis for a detention hearing and detention under one of the grounds listed in 3142(f)(1), which the government has not here; and only the government is permitted to make a motion and assert one of those bases for detention including the fact that the case involves a crime of violence, or the government has to show that the defendant presents a serious risk of flight or obstruction of justice.

So it's not really clear if the Court finds that neither risk of flight or obstruction of justice by this defendant is satisfied by the government -- whether I really need to even go through the 3142(g) factors because I can tell you -- as you can tell from the questioning, I really don't think that this defendant meets the requirements of a risk of flight or obstruction of justice.

As to the risk of flight, as I have already pointed out, this defendant has no criminal history aside from traffic violations. He has very strong ties to the area in which he resides. He has lived in Kentucky his whole life, where his wife of 20 years lives. He owns a car dealership in the community, is an active member of his

church. All of these factors suggest the defendant is not a serious flight risk, despite the government's efforts to show that he is, such that there is any reason for detention here or to believe that certain reasonable conditions of release wouldn't assure that he doesn't flee somewhere. And so -- you know, the government also really doesn't point to the defendant's conduct on January 6th, like discarding or concealing evidence, hiding his firearms -- nothing that suggests that he poses a serious risk of obstructing justice in this case.

While his conduct on January 6th was, to put it mildly, obstructive with respect to the police -- it was terribly troubling and dangerous to the police -- that, by itself, doesn't meet the government's burden to show that the defendant poses a serious risk of obstruction of justice in this case or that he would attempt to threaten a prospective witness or juror in this case.

So those factors not only weigh in favor of release, if considered as part of the 3142(g) factors, but because they haven't even been met here, and there is no other basis on which this Court could even consider detention because the government has made no motion for consideration of the fact that he is charged with a crime of violence, the Court finds that even though his conduct -- based on what I have seen -- shows a clear disregard for the

safety of others and, in particular, the two police officers that were involved in the assault that he made by pulling one of them by a leg down stairs where he was being beaten until some of the rioters or good samaritans tried to move him back up the stairs to the police line where the defendant is pointing his hands saying -- as if to say: Don't move him back to the police line, get him back to the mob -- pushing that particular policeman by the head so he wouldn't get back to the police line. And the other police officer -- oh my goodness -- who was flat on his back being beaten, and this defendant was holding his leg so he couldn't get up and couldn't get back to the police line -- I mean, it is frightening footage; but that's -- that's not the basis for the government's detention here. So the government simply has not carried its burden to show by a preponderance of the evidence the defendant poses either a serious risk of flight or a serious risk of obstructing or attempting to obstruct justice or threatening witnesses in this case.

If the government had moved under 3142(f)(1), relying on the defendant's being charged with a crime of violence, under 18 U.S.C. Section 111(a)(1) and his dangerousness to the community, pretrial detention would likely be warranted; but only the government can so move, and the government has not so moved.

In the absence of both that motion and an adequate showing by the government that the defendant poses a risk either of flight or of obstructing justice, the Court's hands are tied. This defendant cannot be detained pending trial.

So upon consideration of the proffered evidence, the statutory factors, the Court finds 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 and, therefore, the government's motion is denied.

The magistrate judge's pretrial detention ruling is affirmed. The defendant will be released pending trial subject to the same conditions that the magistrate judge originally imposed.

Ms. Kukowski, what were those conditions; do you know?

MS. KUKOWSKI: Your Honor, I believe it included GPS and home confinement.

I don't believe there is a written order, but I can consult very quickly with a colleague.

MR. WOODWARD: If I may, Your Honor, there is a $100,000 unsecured bond, home curfew with work release --

THE COURT: I will tell you that with respect to the bond -- we actually don't do bonds in D.C.; it's just

too unfair. So I will not impose a $100,000 bond; we don't do that.

So what are the other conditions, Mr. Woodward?

MR. WOODWARD: Thank you.

Location monitoring with GPS.

THE COURT: And location monitoring so that he is on -- does he have a curfew or is he on home detention?

MR. WOODWARD: It is a home curfew but with work release and the ability to go to church and medical and legal visits.

THE COURT: All right. Well, let me just dictate then what the conditions are going to be which are fairly standard conditions.

I am glad, Mr. Woodward, you alerted me that there was a bail bond condition because we don't do that; that will not be imposed.

So the defendant must report to pretrial services weekly by phone. He must verify his address with pretrial services.

He must surrender any passport and not obtain a passport or other international travel document. His travel is restricted to the western district of Kentucky and the District of Columbia for court purposes only.

He must avoid all contact, directly or indirectly, with any person who is or may be a victim or witness in the

investigation or prosecution, with the exception of his wife of course, who apparently was also in D.C. as part of the mob on January 6th.

The defendant must not possess a firearm, destructive device, or other weapon. So I know he has firearms; he is going to have to put those in safekeeping someplace else. I will not have him retain firearms in his possession nor his wife; no firearms in the home, period, or in his place of business.

The defendant must not use or unlawfully possess a narcotic drug or other controlled substance defined in 21 U.S.C. Section 802 unless prescribed by a licensed medical practitioner.

He will be restricted to his residence on a curfew -- well, no. Does he have a curfew, Mr. Woodward, or is he on home detention, period, with exceptions?

MR. WOODWARD: Might I say curfew, Your Honor. I don't have a specific time; but they were allowing for him to obviously work and go to church. And --

THE COURT: All right. So that's not a curfew. He is going to be restricted to his residence at all times, except for employment, education, religious services, medical, substance abuse or mental health treatment, attorney visits, court appearances, and court-ordered obligations, or other preapproved activities by pretrial

services.

He must submit to location monitoring as directed by the pretrial services office or supervising officer, and comply with all program requirements and instructions provided and must pay all or part of the cost of the program based on his ability to pay.

As I've said, the defendant must report to pretrial services by phone on a weekly basis. He must also report to pretrial services by phone any contact he has with law enforcement as soon as possible after such contact, and that includes arrests, questioning, and traffic stops.

He must report as soon as possible to pretrial services any change in address, telephone, or employment status. The Court is to be notified of any violations of this order.

Mr. Mullins, I want to remind you that your presence is as required in court, and you will be advised when next to appear; so please keep 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.

First, 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.

And, finally, it is 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 that, Mr. Mullins?

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

THE COURT: All right. You may be seated.

All right. Is there anything further to address today from the government?

MS. KUKOWSKI: Nothing further, Your Honor.

THE COURT: And Mr. Woodward?

MR. WOODWARD: No, Your Honor. Thank you.

MR. SIDBURY: Your Honor, this is Andre Sidbury from pretrial services.

THE COURT: Yes.

MR. SIDBURY: So any conditions that you provided to the defendant, he would have to be under the supervision of the Western District of Kentucky; so you would have to indicate that the defendant will be supervised there under

courtesy supervision.

In addition to -- you had indicated that you wanted the defendant to call once a week; we have been leaving that release condition up to the supervising jurisdiction which we will -- we've indicated the defendant would contact that agency as directed by the agency.

THE COURT: All right. I will make those changes.

Thank you very much.

MS. SIDBURY: Thank you, Your Honor.

THE COURT: All right.

All right. With that, you are all excused. Thank you.

MR. WOODWARD: Thank you.

(Whereupon, the proceeding concludes, 1:58 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 via videoconference and telephonically in compliance with the COVID-19 pandemic stay-safer-at-home recommendations 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 April, 2021.

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

# EXHIBIT C

March 31, 2021

The Honorable G. Michael Harvey
U.S. District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Harvey:

I write for and on behalf of Michael J. Lopatic.

I live at 41 Hershey Lane in Lancaster, PA and have been a resident of Lancaster County for the past 18 years. For all of them, I have known Michael Lopatic and his wife, Chinh, along with watching their children grow up, through our mutual church, Historic St. Mary's in Lancaster City.

Your honor, I fully recognize the seriousness of the charges Michael faces and do not condone any crime he is alleged to have committed. However, I think it is important you should know, from someone who has spent a lot of time with him and his wife over these years that I was shocked at the allegations. Quite simply, it does not reflect the temperament and the man that I am familiar with.

Michael is quite active in our faith community. My wife and I have gotten to know him and Chinh well as we both participate in St. Mary's "I Still Do" ministry, a group of married couples who get together once a month to share a meal and discuss ways in which we can strengthen our marriage through faith, communication and good works. Michael is an active usher in the church and even taught religious education to grade school aged children for years.

There is another example that I would also like to share that demonstrates Michael's good will towards others in his community. One of the families in our parish went through a very difficult time several years ago. The father was (and remains) incarcerated due to some truly awful crimes. This particular family, now led by a single mother, had adopted several children and were fostering several more – all of whom were minorities that came from impoverished, troubled backgrounds. Michael took it upon himself to spend time with these young children to take them fishing, to speak to them and to be a father figure to them during this difficult time. He did not broadcast doing so and was not seeking credit, but I believe these actions of charity speak to his character and concern for those less fortunate in the community.

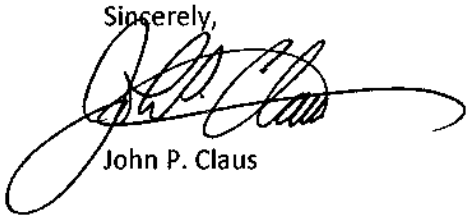
Michael holds passionate political and religious views, of that there is no doubt. A staunch supporter of the pro-life cause, I have personally attended the March for Life with him during the event in 2019 and again in 2020. This March is always peaceful and I have never heard Michael threaten, wish for or in any way support violence as a way to achieve political ends. Violence is simply not in this man's nature that I have observed.

Michael's initial incarceration has been difficult on his family and his supportive faith community are trying to rally around Chinh and his youngest son who remains at home (he is a senior in high school, preparing to finalize his college decision and play his final year of high school baseball and his father's sudden absence has been traumatic).
Michael has deep ties to this local community. His wife works six days a week to provide for the family as Michael is on disability due to PTSD and, from what he has told me, suffers from an inoperable brain tumor. Michael does not have the means nor the inclination to flee nor does he pose a risk to the community. While I cannot speak to the events of January 6, nor can I comment on Michael's involvement, I do know for certain his past actions point to a deep concern for others and for the community in which he lives.

I am asking you to release Michael back to his family and to his faith community, pending trial and / or the dispensation of his case. He will not be left abandoned by the parish community. Regardless of the terms of his release, I assure you that people will continue the outreach, help him remain grounded, humbled and ready to face trial for his alleged crimes once the time comes.

Thank you for your consideration and for the important work that you do.

Sincerely,



John P. Claus

Lancaster County, Pennsylvania

March 30, 2021

To whom it may concern;

My name is Frederick Rogers and I am a physician and trauma surgeon practicing over 30 years in leadership roles throughout the country. The last twelve years (since 2008) were in Lancaster, PA where I I got to know and become friends with Mr. Michael Lopatic, who was an active member of our parish, St Mary's Church. While I have no first- hand information surrounding the events in the capital on January 6, and, as such, will not comment on the extent of Mr. Lopatic's involvement, I can quite comfortably comment on my knowledge of Mr. Lopatic's character, having known him and worked closely with him within the activities of our Church. Mr. Lopatic was a devoted member of our Church attending Mass every week and, when he could, even attending daily Mass. He was an usher at our 11am Mass every Sunday. He taught religious education to the second- grade students. I smiled every time I walked by his room because he was so tall and the children were so small, he was like Gulliver in the land of the Lilliputians. Despite his imposing figure he was a gentle giant with a huge heart that would do anything for anyone who was ever in need. He was never threatening to anyone. A couple of examples speak to the kind of character Mr. Lopatic possessed. We had a fellow parishioner who through some very unfortunate circumstances ended up being incarcerated for a number of years, leaving behind a wife and several small young children (all adopted) bereft of any father figure in their life. Mr. Lopatic stepped into this vacuum and began to take the two young boys on outings every Saturday morning. Not many people I know would give up their valuable free time on Saturdays with their own family to help out his fellow man. But that's the kind of person Mr. Lopatic was. Another example was a man named Marshall, who was a well-known parishioner in our Church who was old and frail. Everyone pitched in and helped him because he had no family or friends (he was a bit of a recluse). Finally. he was too weak to live on his own and he ended up in the public nursing home. Everyone seemed to forget about Marshall after that- everyone that is except Mr. Lopatic . When I would call Marshall once every few weeks, I would ask him if anyone he come to visit him and he would reply, "No, no one except for

Mike [Mr. Lopatic}"(this was in the pre-covid era when nursing home visitations were still allowed). It seemed like Mr. Lopatic was there for all the people who were disenfranchised in our Church community. Mr. Lopatic and his wife are faithful members of our marriage enrichment group and we met every Saturday evening to learn how we can become better spouses to each other. It was here I really got to know and understand Mr. Lopatic and his deep abiding love for his wife and children which emanated from a deep abiding love of God and his country. No doubt Mr. Lopatic was passionate about his beliefs but never at any time did I feel in any way threatened or fearful of anything he said. He had strong beliefs which he held to be inviolate and I didn't feel like his values were that much different than my own (he just lived out his values better). I know Mr. Lopatic has other activities he was involved in such as being a member of the Knights of Columbus and a veteran who saw active duty- I will leave it to others to attest to that aspect of his character. I also know as a physician he was at least partially disabled from surgery on his brain to remove a tumor. Although I did talk to him about his condition, I did not directly treat him, and as such, cannot comment on how much his brain disability would be a mitigating condition surrounding his actions on January 6. It is my sincere hope that the judicial review of Mr. Lopatic will take into account these aspects of his character. Mr. Lopatic is a very strong loving individual. He loves his wife and children very much and they will miss him terribly if he is incarcerated for a long period of time. He loves his country very much, has put his life on the line in the past for it, and in my opinion still has much to contribute to it still. And most of all he loves God very much and wants to do the right thing in God's eyes. Whatever transgressions Mr. Lopatic has had in his past I am fairly confident God has already forgiven him for. I hope this court in its wisdom will find compassion and mercy when considering all aspects of Mr. Lopatic's actions.

Sincerely,

Frederick B. Rogers

Frederick B. Rogers MD, MS. MA. FACS

February 22, 2021

To Whom It May Concern:

In the last twenty-plus years that I have known Mike Lopatic, I have never known him to be violent or hurtful to anyone. In fact, I've known him to be a smiling, outgoing fellow.

Mike and his family attended church regularly. He and his wife attended the parish-sponsored-monthly marriage program, "I Still Do," learning how to be better spouses to one another. Couples then interacted in a social that followed.

Mike is quite the storyteller. He is known to speak his mind and tell the truth. He is an advocate and defender of life-in-the-womb and has attended the peaceful Pro-life Marches in Washington.

Whenever there was a need, Mike was right there. He even extended himself to one of our homebound men when he was in need. Mike maintained contact with this individual even after he took up residence in a nursing home. Since COVID, Mike hasn't been able to visit the facility where he lives, nor has Mike been able to call him since he's been incarcerated.

His employment history is sporadic because of his physical and mental health issues for which he is on medication. It would be advisable, in my opinion, that Mike be evaluated physically and mentally before any hearing or trial.

It saddens me to learn of the predicament that Mike is in. I pray that justice is served and that Mike is fairly treated.

Sincerely,

Fran Sescilla

Member of Historic St. Mary's Church

Lancaster, PA 17603

March 8, 2021

To whom it may concern:

Some years back I had been the coordinator of volunteers for the Friday Night Community Meal at St. Mary's Church. This was part of a program in Lancaster to provide a nutricious meal to the needy of the community each night of the week. And Friday night was a tough night to fill the needed volunteer roster.

One of the volunteers was Mike Lopatic who served for several years. During his time of service, Mike could be counted to be on duty when scheduled and sometimes when not

scheduled just to lend a hand. Mike was easy to work with. He would do anything requested from running the dishwasher, to helping on the serving line, cleaning up after the dinner and taking out the trash.

Mike did not have any problem mingling and chatting with our "guests" and assisting those with physical limitations and greeting them with his big smile. Most of the time Mike brought his children as a way to teach them that service to those in need is important. To Mike, service to others is a requirement.

Over the last 20 years or so, Mike and I also helped out at other parish events, and always had a good time and lots of laughs with him. I never felt that Mike was someone prone to violence or harbored anger towards others.

I trust that my words about Mike Lopatic will put him in a positive light as he moves forward and through the situation he is in.

Sincerely,

Paul C. Sescilla

Parishioner, St. Mary's Church

To Whom it May concern,

Dear Sir/Madam, 3/31/21

I have known Mike for over ten years as a member of our parish. He has been active as an usher and he and his wife, Chinh, are members of our marriage enrichment group. He is devoted to his family of four children, one who is still at home and in high school.

In all my times with Mike I have always known him to be a friendly and engaging person with a dry sense of humor. In my encounters with Mike I have never seen him angry or violent. Mike has strongly held political values which I believe are only exceeded by his devotion to his family and his faith.

Joe Clupp
[redacted]

**Michael Lopatic's Refence Letter**

March 31, 2021

Lancaster, Pennsylvania

To whom it may concern,

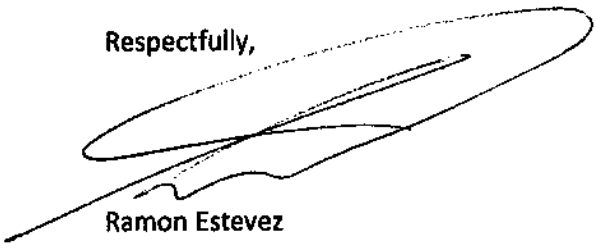
My name is Ramon Estevez from Strasburg, Pennsylvania. I am writing this reference letter on behalf of Michael Lopatic, resident of Manheim Township, who I have had the privilege and the blessing to know well since 2007 in both Church and social settings.

Mr. Lopatic has been an active member of our Church throughout all the years since I met him; he has actively participated in many capacities from being an Usher, a religious education teacher (even to one of my children), and janitor, among others.

He is a beautiful and caring human being who is very generous with his time, takes a real interest in helping and getting to know people of all walks of life. He makes you feel welcome and that you belong. Mr. Lopatic has been a very good community leader by coaching basketball to high schoolers where he instilled in the players the importance of the team over the individual by having the whole team supporting the weakest player to become better and more confident; he has played a role model to a young boy for almost two years since his adopted father could not longer be at home; another example of how Mike's life has been one of giving of himself to others was becoming a marine and serving our country in the Middle East.

Mr. Lopatic loves his family, loves God, loves his Country, and even more important, he has a unique gift of showing love by being a Good Samaritan to perfect strangers who may be in physical, emotional, or spiritual need. He would stop whatever he is doing to lend a hand, give a big smile and hug, and share his literal "huge" humanness with anyone he encounters. He has certainly been a man of high integrity, a man of peace and a law-abiding citizen.

Respectfully,



Ramon Estevez

March 31, 2021

To Whom it May Concern,

We have known Mike Lopatic for well over 10 years. In that time, we have found him to be a gentle giant, a man who was kind hearted towards everyone. He is a great individual who is very committed to his family and friends. He is a loving husband to his wife, Chinh, and is especially proud of his children, Michael, Ramsey, Mayciann and Coleby, who he adores! He is dedicated and very active in his faith based civic organizations and church community. He's a participating member in our local Knights of Columbus Council 867, doing charitable work for our local parishes. He is also active in several other ministries at our church, Historic St. Mary's, in Lancaster, PA. Some of the ministries that he is very active in are the "I Still Do" marriage ministry, which helps to support & encourage stronger marriages in our parish family. For many years he has been dedicated to teaching CCD (Catechism Classes) to the youth of our parish to help them learn more about our faith. He really enjoyed helping out at our annual parish picnics, cooking or helping to set up or clean up after the event. He is a man that many people look up to in our parish community for his dedication to the Church and his commitment to helping people. Over the many years that we have known Mike, he has gone out of his way to help anyone who needed a hand, smiling all the while with a funny story to pick up their spirits. He's always been someone you could depend on to be there for you if you needed him. We have always admired his very strong faith, along with his dedication to our country (he is a disabled veteran of the US Marine Corps) and his political activity. We have never known Mike to be violent in any way, as we mentioned above, he is a gentle giant with a very big heart, especially for helping others!

We pray for a favorable outcome for Mike!

Respectfully,

Dawn M Stratchko

Dr. Richard A. Stratchko, D.O.

Dawn M. Stratchko

[redacted]

March 1, 2021

To Whom It May Concern,

I have known Michael Lopatic for over ten years. He has been an active participant in our church and local community. With our church, Historic St. Mary's, he has been active teaching Sunday school, helping as an usher, participating with our Men's Group and always being available to help fellow parishioners and the community. He has been active with his sons' Little League and Baseball teams. He has chaperoned our church teenagers (including my son) to their annual summer retreat at Franciscan University. All of the young men who attended enjoyed his company, his many stories and the testimonial he gave regarding his faith journey. He certainly left a positive impression on these young men.

In my personal relationship with Mike, I have never seen him angry or bitter. He has always been a loving father and attentive husband. He has a strong faith in God and uses Jesus and the Bible as his compass.

If I can be of any further assistance, please feel free to contact me.

Sincerely,

Robert D. Hong, M.D.

[redacted]

March

To Whom it May Concern:

Re: Michael Lopatic

My name is Don Spica, and I have known Mike for at least 10-15 years through out Church. In the past 8 years, Mike has become a friend. Mike has been an active/faithful member of our church, and the community at large. I got to know Mike better as we served in the ministry of Hospitality in our Church community. Mike has served well in this capacity, as he has been very patient, kind, and ready to help others especially those elderly and those physically handicapped. He is friendly and gentle with children.

He served at a teacher of the students in Sunday school. I heard from a number of them that they enjoyed Mr. Lopatic's class. Mike served selflessly in serving the homeless on our Friday night meals at the Church. He has been willing to help others in need, whether it be a ride to a shelter home or transportation to see family etc....

Mike and his wife, Chinh, have been active in our marriage support/enrichment group at the Church. It is here, that we (my wife Marilyn and I) have seen a very honest, decent man who is humble, and who, like most of us there, are working to become a better person and a better spouse. Mike loves his wife and his children dearly.

The arrest of Mike came as a surprise. Although we know him to be politically active, in the years that we have known him, he has never been a violent person.

Sincerely,

Don Spica

3/31/2021

Andrew Odell
[redacted]
[redacted]

To Whom it concerns:

My name is Andrew Odell and I have known Mike Lopatic for about 10 years. We are members together at St. Mary's Catholic Church in Lancaster, Pennsylvania.

My wife and I know Mike to be a devout Catholic, very involved in the church. He is a good person who cares about his friends, the community, and his family. He was a religious education teacher for the youth at the parish for a number of years. He was dedicated in this effort and volunteered significant amount of time to this teaching.

He has worked as a role model to others in need. There was a family at church whose father was incarcerated, and he helped take care of the kids. He was a good role model to those kids, showing them how to do things, and spending time making sure they had fun on the weekends. He always seems to be one of the first to help those in need. We've always known him as a caring, generous person.

Mike is interested in politics, and how political decisions affect religious liberties. However, he never spoke about or acted in any violent way. I've never known him to be dangerous in any manner.

He was a coach and mentor to his own kids. Coaching sports and involving himself with activities that revolved around his family was important to him and he spent a lot of time with his kids. We know the youngest son from church and baseball. I can tell that he has a strong sense of family and closeness with his kids and wife.

We are praying for him and his family during this difficult time.

Best Regards,

AOdell

Andrew Odell

April 1, 2021

Hello, my name is Samuel Ellis, I'm 20 years old and am currently serving with NET Ministries. I'm from the same community in Lancaster as Mike Lopatic.

I've known Mike for a long time, probably past 5-6 years. I always saw him at church and one day my father began talking with him. Thus ensued our relationship with the Lopatic family. Mike would always take time to say hi to our family and talk with us - the whole family. Man he can talk your ear off. He can talk to literally anyone about anything for hours. He has always attended mass and church at St. Mary's in Lancaster, where his family and our family go.

Mike is such a great member of the community. He's always there to help people and to aid one another. He's always first to help grilling hotdogs and hamburgers, behind the sign in table to make sure people know what they're doing, helping his kids with sports, or showing up to help with a project. Being supportive and doing acts of service are obviously important because he was always doing them.

He is part of the Knights of Columbus, a Catholic men's organization that aids the community and church. He spends a huge amount of time on his property down by the Conestoga River. He's always working on some project, he helped us with a go-cart once.

This man loved his country. He was in the Corps when he was younger and very pro-life. Mike's children are so nice. I've met 4 of them, each one is very polite, firm and easygoing. I know his youngest pretty well and he's a good kid. If one can judge the character of a parent by the way their children act, Mike's influence on his kids becomes pretty evident- in a good way.

He has been a chaperone for several youth events and conferences and used to help out with the youth group.

Mike may be a rough looking man but his heart is strong and filled with conviction and love of God and his fellow man.

Thank you for your kind attention.

Sincerely,

Samuel Ellis

April 1, 2021

To whom it may concern,

We have been blessed in many ways. First we are blessed with our youngest son Michael who has Trisomy 21 (commonly referred to as Down Syndrome). We have also been bless to know Michael Lopatic. Mr. Lopatic is a kind and good man. We have seen this kindness especially when he has interacted with our son Michael.

Mr. Lopatic is an usher at St. Mary's Roman Catholic Church in Lancaster, PA. We first met Mr. Lopatic when we visited St. Mary's several years ago to attend mass. Our son Michael took to Mr. Lopatic right away. He was drawn to him as he often is to kind and friendly souls. He enjoyed Mr. Lopatic's beard and how tall he is. Mr. Lopatic wasted no time and invited Michael to join him in his usher duties. He carried Michael about ensuring all whom they saw were able to meet Michael.

A few years later, we saw Mr. Lopatic at a party celebrating the recovery of our niece from cancer. Our son Michael recognized Mr. Lopatic and ran to him without haste. Mr. Lopatic was overjoyed to see Michael and hoisted him high with a big hug and once again carried him around, meeting all the guests.

Mr. Lopatic has always seen Michael for who he is, a true child of God. Michael has always seen Mr. Lopatic for who he is, a kind and friendly soul.

Thank you for your time.

Mary and Brendan Corrigan
West Bradford, PA

[redacted]

April 2, 2021

The Honorable G. Michael Harvey
U.S. District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Harvey:

My name is Chinh Lopatic. I've been married to Michael Lopatic, my husband, for 34 years. We have 4 children together. We have 3 boys and one girl. Our oldest son, Michael- 30 years old. Our second oldest son, Ramsey- 29 years old. Our daughter, Mayciann- 20 years old. Our youngest son, Coleby- 18 years old. Coleby is a senior in high school and he will be graduating this June. He is hoping to continue with his education in college and play baseball as it is his passion.

For all of the years I have known my husband, I have never known him to have violence within him. He has never laid his hand on any of the children, and he has never laid his hand on me. My son, Coleby, and I miss him very much and we want him home with us. The other 3 oldest ones, no longer at home, miss him also.

Michael likes to get involved with the community and has given a helping hand wherever he was needed. We attend church and a marriage group so we can really understand and strengthen our faith so we can be better people. He volunteered to coach baseball and basketball because he likes to work with the kids and help them. He also wanted to make it fun for the kids. He has helped out at the community meal for the poor in Lancaster through our church. He wanted to teach our children to be kind and help out and to serve others rather than to be served. He is always ready and willing to help out whenever they need him. It doesn't matter what as long as he can do it, he will help who ever calls on him. If he sees some stranger needs help, he'll stop and ask them if he can help them. He volunteered to teach the religion class at our church, because he wanted the kids to have a better understanding of our beliefs.

Michael served in Marine Corps for 3 years. He was a mortarman in Beirut, Lebanon. When he got out of the service, he lost his hearing in both ears. He has high blood pressure and lipoma disease. Then about 9 years ago, he was diagnosed with a brain tumor. It cannot be operated on and he has to be on medication to keep the tumor stable. He also has PTSD and Bipolar Disorder as well. So, with all kinds of health issues Michael has, he needs to be home and he needs his medications. We are very worried that he is not receiving the proper care needed in detention pending trial.

Michael has always been a kind and gentle husband and father. He has helped his community while asking nothing in return. I am asking you to show mercy and to release him so he can come home to us, his family and friends. We will take care of him until he must face his trial.

Sincerely,

Chinh Lopatic

Kristin M. Young

102 Covered Wagon Drive

Willow Street, PA 17584

c/o Lopatic Family

14 Haskill Drive

Lancaster, PA 17601

To Whom It May Concern:

I am writing this letter in support of Michael Lopatic.

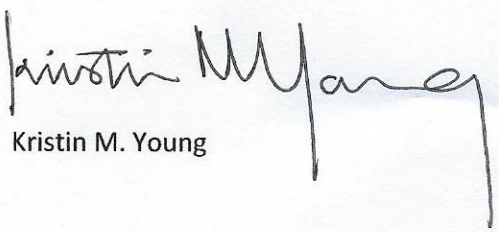
One thing Michael Lopatic cannot be accused of is acedia. He is a man whose heart is ablaze with the love of God. A man of character, of deeply held beliefs in the sanctity of life (the supreme issue in our world today), he has not a violent bone in his body. Knowing Mike for over thirteen years, I have had ample opportunity to get to know him and his family. Each week, for several years, he accompanied his young daughter to my home for her piano lessons, supporting her musical pursuits in multiple ways. Ever interested in helping his kids succeed, he coached baseball for his son's team, making a difference in several of the boys' lives. One of the team members, whose life he impacted, shared that Mr. Lopatic's encouragement and kindness during his tenure as baseball coach, was very much uplifting and appreciated.

Mike's love of God permeates every aspect of his life. Attending Mass weekly with his family of 6, married to the same woman for at least thirty years, he actively participated in parish life. Serving the homeless at the community meal, attending the marriage fellowship program, helping those who need an extra hand, standing up for the sanctity of life, Mike was deeply involved with his faith community.

Mike's character is straight forward. He speaks his mind, tells you where he is coming from, and does not wear a veil of political correctness. He is honest, forthright and strong in his beliefs. A truly likable individual, I believe the person the press has depicted him to be is fiction. The real Michael Lopatic is a man of honor and a man of God.

Thank you for considering this letter in your defense of Michael. And may St Michael, the Archangel, his patron saint, guide and protect him and all who assist in defending him.

Sincerely,



Kristin M. Young

# EXHIBIT D

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Decided March 26, 2021

No. 21-3010

UNITED STATES OF AMERICA,
APPELLEE

v.

ERIC GAVELEK MUNCHEL,
APPELLANT

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Consolidated with 21-3011

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On Appeal of Pretrial Detention Orders
(No. 1:21-cr-00118-1)
(No. 1:21-cr-00118-2)

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*A. J. Kramer*, Federal Public Defender, and *Sandra G. Roland*, Assistant Federal Public Defender, were on appellant Eric Munchel's Memorandum of Law and Fact.

*Gregory S. Smith*, appointed by the court, was on appellant Lisa Eisenhart's Memorandum of Law and Fact.

*Elizabeth Trosman* and *Elizabeth H. Danello*, Assistant U.S. Attorneys, were on appellee's Memorandum of Law and Fact.

Before: ROGERS, WILKINS and KATSAS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* KATSAS.

WILKINS, *Circuit Judge*: We consider an appeal of a pretrial detention order issued after a Magistrate Judge had previously ordered the two appellants released pursuant to a lengthy set of stringent conditions. For the reasons stated below, we remand for the District Court to consider anew the government's motion for detention.

**I.**

The facts, as found by the District Court, and as observed in a 50-minute video of much of the incident at the heart of the case, are as follows.

Eric Munchel and his mother, Lisa Eisenhart, participated in the January 6, 2021 incident at the Capitol. Munchel is a thirty-year-old resident of Nashville, Tennessee. He previously worked as a waiter and has twice been convicted for misdemeanor possession of marijuana in Georgia state courts. *See United States v. Munchel*, No. 1:21-CR-118-RCL, 2021 WL 620236, at *1 (D.D.C. Feb. 17, 2021). Eisenhart is a fifty-seven-year-old resident of Woodstock, Georgia. She has been employed as a nurse for approximately thirty years and has no prior criminal history. *Id.*; Eisenhart Mem. at 13.

On January 6, Eisenhart and Munchel attended President Trump's "Stop the Steal" rally to protest the election results. Both wore tactical vests and Munchel had a taser, holstered on

his hip. Munchel also wore his iPhone, mounted on his tactical vest, and used it to take a video of some of the day's events. Following the rally, Eisenhart and Munchel marched towards the Capitol. *See Munchel*, 2021 WL 620236, at *2–3. As they approached the Capitol, they milled around outside and talked with others. They met members of the Oath Keepers militia and Munchel bumped fists with one of them. *Id.* at *2; Video at 11:56–12:05.

At some point while Munchel and Eisenhart were standing around, someone yelled out "they broke the line up there" and people began saying "let's go in." Eisenhart told Munchel they should go in, but she added, "[w]e're going straight to federal prison if we go in there with weapons." Video at 12:28–12:40. Munchel responded that he would not go into the Capitol, and Eisenhart suggested that they put "em" in their backpacks. *Id.* Munchel and Eisenhart then moved across the crowd to an area where a backpack was stowed and Munchel stashed a fanny pack in the backpack. *See Munchel*, 2021 WL 620236, at *2; Video at 16:00–16:25. Munchel contends that the only weapon in the fanny pack was a pocketknife; the government suggests that other weapons could have been inside, perhaps even a firearm. *See* Tr. of Dist. Ct. Detention Hr'g at 10. Munchel kept his taser holstered on his hip. *See Munchel*, 2021 WL 620236, at *2.

Subsequently, Eisenhart encouraged others to enter the Capitol, stating the tear gas "isn't bad" and repeatedly stating, "let's go in." Video at 16:28–17:45. Munchel and Eisenhart pushed their way through the crowd to continue towards the Capitol. Munchel followed Eisenhart, often holding on to a strap on her back. *E.g.*, *id.* at 17:45–23:00. En route, Eisenhart encouraged a man who claimed to have "punched two of them in the face," telling him, "while everyone else is on their couch, you guys are training, and getting ready for it." *Id.* at 23:56–

24:12. Munchel told members of the crowd that "we're not playing f__ing nice no god damn more," that he is "f__ing ready to f__ sh__ up," and "I guess they thought we were playing." *Id.* at 25:18, 26:58–27:01, 36:53–36:56; Munchel Mem. at 11. Additionally, when Eisenhart heard that Congress was "shut down" by tear gas she exclaimed that "they got tear-gassed, motherf__ers" and proclaimed it her "best day to know they got tear-gassed." Video at 30:08–30:29. Directly in front of the Capitol and near an entrance, Munchel stated, this is "probably the last time I'll be able to enter the building with armor and . . . f__ing weapons." *Id.* at 36:29–36:35.

Munchel and Eisenhart entered the Capitol through an open door and stayed inside for approximately twelve minutes. *Id.* at 38:30–38:50 (entry); Munchel Mem. at 11. Police officers were standing to the right of the door, not blocking their entry. Munchel Mem. at 11 (citing to Video). While walking through the Capitol, Munchel told members of the mob "don't break sh_," "no vandalizing sh__. We ain't no god damn Antifa, motherf__ers," and "you break sh__, I break you." Video at 42:45, 43:20–43:43, 44:13–44:15.

Additionally, while inside, Munchel and Eisenhart spotted plastic handcuffs, known as "zip ties." *Munchel*, 2021 WL 620236, at *2; Video at 43:43. Upon seeing the zip ties, Munchel shouted "Zip ties! I need to get me some of them motherf__ers." Video at 43:43–43:48. Munchel took several zip ties and Eisenhart took one. *See* Munchel Mem. at 12. Munchel and Eisenhart eventually made their way to the Senate gallery, both still carrying the zip ties, and Munchel still carrying his taser. *Munchel*, 2021 WL 620236, at *2; Gov't Mem. at 12 (pictures of Munchel in Senate gallery with zip ties). Inside the gallery, Eisenhart chanted "Treason! Treason!" and Munchel looked down at the dais and said, "I want that f__ing gavel," referring to the Senate's artifact.

Video at 45:14–45:17, 47:21–47:23. Munchel made no effort to steal the gavel. *Id.* at 47:21–47:23; *Munchel*, 2021 WL 620236, at *2.

After leaving the gallery, Eisenhart told Munchel not to carry the zip ties, stating that they "need[ed] to get them out of [their] hands." Video at 48:43–48:48. Later, Munchel took some home with him to Tennessee. *See Munchel*, 2021 WL 620236, at *2. Eisenhart has claimed that she took the zip ties to keep them away from "bad actors." *Id.*; Eisenhart Mem. at 3.

Eventually, Munchel and Eisenhart left the Capitol. As they were exiting, Munchel said to nearby police officers, "Sorry, guys, I still love you." Video at 49:27–49:29; Munchel Mem. at 13.

On the evening of January 6, a Metropolitan Police Department officer stopped Munchel and seized his taser. *See Munchel*, 2021 WL 620236, at *3.[1] The next day, as they packed their car to go home, both Eisenhart and Munchel spoke to the media. Eisenhart stated:

> This country was founded on revolution. If they're going to take every legitimate means from us, and we can't even express ourselves on the internet, we won't even be able to speak freely, what is America for? . . . I'd rather die as a 57-year-old woman than live under

[1] On January 5, a police officer had observed Munchel's taser and allowed him to keep it, ostensibly because it was legal to possess on the street in the District of Columbia. *Munchel*, 2021 WL 620236, at *1.

> oppression. I'd rather die and would rather fight.

Laura Pullman, *Trump*'s *Militias Say They Are Armed and Ready to Defend Their Freedoms*, THE TIMES (of London) (Jan. 10, 2021), https://www.thetimes.co.uk/article/trumps-militias-say-they-are-armed-and-ready-to-defend-their-freedoms-8ht5m0j70https://www.thetimes.co.uk/article/trumps-militias-say-they-are-armed-and-ready-to-defend-their-freedoms-8ht5m0j70 (attached to the Gov't Suppl. Mem. at 26). Munchel told the newspaper:

> We wanted to show that we're willing to rise up, band together and fight if necessary. Same as our forefathers, who established this country in 1776. . . . It was a kind of flexing of muscles. . . . The intentions of going in were not to fight the police. The point of getting inside the building is to show them that we can, and we will.

*Id.*

Later, Munchel and Eisenhart returned to Tennessee, and Eisenhart continued on to her home in Georgia. The FBI posted bulletins on the internet and in the media with photos of Munchel and Eisenhart from January 6, asking for the public's help in identifying them. On the morning of January 10, FBI agents executed a search warrant at Munchel's apartment. The agents found the tactical vest Munchel wore at the Capitol, zip ties, firearms, and a large quantity of loaded magazines. Munchel was licensed to possess those weapons. *See Munchel*, 2021 WL 620236, at *3. Soon after learning about the search, Munchel turned himself in. *Id.* at *4; Munchel Mem. at 15. Munchel also made arrangements for his attorney to give his iPhone to the FBI. Munchel Mem. at 15. Once Eisenhart

learned she was the target of a federal investigation, she spoke to a local FBI agent every day to determine whether there was a warrant for her arrest, and when the warrant issued, she self-surrendered. *See Munchel*, 2021 WL 620236, at *4, *7; Eisenhart Mem. at 3.

Munchel and Eisenhart were charged in a complaint with unlawful entry, violent entry, civil disorder, and conspiracy. *See* Complaint, *United States v. Munchel*, No. 1:21-CR-118-RCL, 2021 WL 620236, ECF No. 1 (D.D.C. Feb. 17, 2021). Munchel and Eisenhart had pretrial detention hearings before Magistrate Judge Jeffrey Frensley in the Middle District of Tennessee. Magistrate Judge Frensley concluded that neither Munchel nor Eisenhart were flight risks nor posed a danger to the community and issued release orders for both appellants with various conditions, including home detention, GPS monitoring, refraining from possessing firearms or dangerous weapons, and supervision by Pretrial Services. *See* Jan. 22, 2021 Transcript ("Munchel Tr.") at 181, 186–89 (included in Munchel Suppl.); Jan. 25, 2021 Transcript ("Eisenhart Tr.") at 163, 164–66 (attached to Eisenhart Mem.).

Magistrate Judge Frensley briefly stayed both of his release orders, *id.* at 171; Munchel Tr. at 198–99, and the government promptly appealed both orders to the United States District Court for the District of Columbia. Chief Judge Beryl A. Howell stayed both release orders pending appeal, *see* Stay Orders, ECF Nos. 4, 7, and ordered both appellants to be transported to D.C., *see* Transport Orders, ECF Nos. 5, 9. COVID-19-related complications slowed the appellants' transport to D.C. *See* Status Report, ECF No. 18. While their transports were pending, Eisenhart moved to rescind the stay or to conduct an immediate review of her detention, which Munchel joined. *See* ECF Nos. 14, 15, 27. Additionally, the government filed motions seeking review of Judge Frensley's

release orders. *See* ECF Nos. 3, 6. In the meantime, Munchel and Eisenhart were detained.[2]

Subsequently, on February 12, a grand jury sitting in the District of Columbia returned an indictment charging Munchel and Eisenhart with obstruction of an official proceeding; Munchel with unlawful entry while armed with a dangerous weapon, and violent entry while armed with a dangerous weapon; and Eisenhart with aiding and abetting unlawful entry while armed with a dangerous weapon, and aiding and abetting violent entry while armed with a dangerous weapon. *See* Indictment, ECF No. 21; *Munchel*, 2021 WL 620236, at *7. On February 17, the District Court arraigned Munchel and Eisenhart on the indictment and the government made an oral motion for pretrial detention. *See id.* at *4. During the detention hearing in the District Court, the government proceeded by proffer rather than calling live witnesses. In addition to what had been presented to Magistrate Judge Frensley, the government introduced the 50-minute videotape into evidence and proffered that after January 6, Munchel was in contact with a suspected member of the Proud Boys and was

[2] Even though Magistrate Judge Frensley had found that the government had not met its burden of proving dangerousness by clear and convincing evidence, the government sought and obtained an *ex parte* stay of that release order that resulted in the appellants being detained for three weeks without any court finding of dangerousness, notwithstanding the statute's mandate that review occur "promptly," 18 U.S.C. § 3145(a), and the statutory and constitutional requirement of a dangerousness finding, *see infra*. While COVID-19 issues caused a delay in the appellants' transport to the District of Columbia, the record does not indicate why a D.C. District Judge could not have heard this matter prior to February 17, even if the appellants were in another location. Ultimately, this issue, while troubling, is not presented as a ground for reversal in this appeal.

told that he was too "hot" after he expressed interest in joining the group. *Id.* at *6; Tr. of Dist. Ct. Detention Hr'g at 51.

Following the detention hearing, the District Court ordered both Munchel and Eisenhart to be detained pending trial, denied as moot Munchel and Eisenhart's motions seeking to rescind the stay of Judge Frensley's orders, and denied as moot the government's motion seeking review of Judge Frensley's orders. *See* Detention Orders, ECF Nos. 25, 26; *see also* ECF No. 27. The District Court concluded that both Munchel and Eisenhart were eligible for detention because they were charged with felonies while carrying a dangerous weapon, explaining that the indictment alleges that Munchel carried a dangerous weapon (the taser) and that Eisenhart aided and abetted Munchel and therefore she was liable as if she were the principal. *See Munchel*, 2021 WL 620236, at *5, *7.

Applying *de novo* review, the District Court determined that appellants were not flight risks but that detention was appropriate on the basis of dangerousness. *Id.* at *5–8. The District Court concluded that appellants' history and characteristics weighed against detention but that the nature and circumstances of the charged offenses, the weight of the evidence, and the potential danger appellants pose to the community weighed in favor of detention. *Id.* The District Court further determined that neither appellant was likely to be deterred by release conditions. *Id.* at *7, *8.

Munchel and Eisenhart timely appealed. They contend that the District Court erred in not deferring to Magistrate Judge Frensley's factual findings as to their dangerousness. They also contend that the District Court inappropriately relied on a finding that they were unlikely to abide by release conditions to detain them, because that factor is applicable only to revocation of pretrial release. They also argue that the

charged offenses do not authorize detention, claiming that felonies involving possession of a weapon, rather than use, do not qualify for detention and, relatedly, that Munchel's taser is not a "dangerous weapon" within the meaning of the statute. Munchel and Eisenhart also object that several other defendants who participated in the insurrection have been released before trial, arguing that the conduct of those defendants is indistinguishable (or even worse) than their conduct on January 6. Finally, they contend that the District Court's determinations in support of detention were clearly erroneous.

**II.**

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

The Bail Reform Act of 1984 authorizes one of those carefully limited exceptions by providing that the court "shall order" a defendant detained before trial if it "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e). "In common parlance, the relevant inquiry is whether the defendant is a 'flight risk' or a 'danger to the community.'" *United States v. Vasquez-Benitez*, 919 F.3d 546, 550 (D.C. Cir. 2019). Here, the District Court held that both Munchel and Eisenhart should be detained on the basis of dangerousness.

In assessing whether pretrial detention is warranted for dangerousness, the district court considers four statutory factors: (1) "the nature and circumstances of the offense charged," (2) "the weight of the evidence against the person," (3) "the history and characteristics of the person," and (4) "the

nature and seriousness of the danger to any person or the community that would be posed by the person's release." 18 U.S.C. § 3142(g)(1)–(4). To justify detention on the basis of dangerousness, the government 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." *Id.* § 3142(f). Thus, a defendant's detention based on dangerousness accords with due process only insofar as the district court determines that the defendant's history, characteristics, and alleged criminal conduct make clear that he or she poses a concrete, prospective threat to public safety.

In *Salerno*, the Supreme Court rejected a challenge to this preventive detention scheme as repugnant to due process and the presumption of innocence, holding that "[w]hen the Government proves by clear and convincing evidence that an arrestee *presents an identified and articulable threat* to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee *from executing that threat*." 481 U.S. at 751 (emphasis added).

**III.**

We can readily dispatch with some of the appellants' arguments.

First, we conclude that we need not reach appellants' contention that the District Court erred in not deferring to Magistrate Judge Frensley's factual findings as to their dangerousness. The statute concerning review of a Magistrate Judge's release order says nothing about the standard of the district court's review, *see* 18 U.S.C. § 3145(a), and we have

not squarely decided the issue.[3] We need not break new ground in this case, because as the appellants maintain in their briefing, Munchel Reply Mem. 8, n.3, the government submitted substantial additional evidence to the district judge that had not been presented to the Magistrate Judge, including the 50-minute iPhone video, a partial transcript of the video, and several videos from Capitol CCTV.[4] As a result, this was not an instance where the District Court made its dangerousness finding based on the same record as was before the Magistrate Judge. Here, the situation was more akin to a new hearing, and as such, the issue before the District Court was not really whether to defer (or not) to a finding made by the Magistrate Judge on the same evidentiary record. Thus, we conclude that the issue complained of by appellants is not squarely before us in this appeal and we see no need to reach it.

Second, we reject the argument that the District Court inappropriately relied on a finding that appellants were unlikely to abide by release conditions to detain them, because that factor is applicable only to revocation of pretrial release. The

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[3] This court stated long ago, in dictum, in a case arising under the predecessor Bail Reform Act that district courts review such prior determinations with "broad discretion." *Wood v. United States*, 391 F.2d 981, 984 (D.C. Cir. 1968) ("Evaluating the competing considerations is a task for the commissioner or judge in the first instance, and then the judges of the District Court (where they have original jurisdiction over the offense) have a broad discretion to amend the conditions imposed, or to grant release outright, if they feel that the balance has been improperly struck.").

[4] Below, the government contended that the 50-minute iPhone video was presented to the Magistrate Judge in Eisenhart's detention hearing. ECF No. 41 at 2 & n.2. However, it does not dispute the appellants' claim that the partial transcript of the video and the videos from Capitol CCTV were not presented to the Magistrate Judge.

District Court's finding as to appellants' potential compliance is relevant to the ultimate determination of "whether there are conditions of release that will reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(f) and (g). Indeed, other courts have found a defendant's potential for compliance with release conditions relevant to the detention inquiry. *See, e.g., United States v. Hir*, 517 F.3d 1081, 1092–93 (9th Cir. 2008) (explaining that release conditions require "good faith compliance" and that the circumstances of the charged offenses indicate "that there is an unacceptably high risk that [the defendant] would not comply. . . with the proposed conditions"); *United States v. Tortora*, 922 F.2d 880, 886–90 (1st Cir. 1990). While failure to abide by release conditions is an explicit ground for revocation of release in 18 U.S.C. § 3148(b), it defies logic to suggest that a court cannot consider whether it believes the defendant will actually abide by its conditions when making the release determination in the first instance pursuant to 18 U.S.C. § 3142.

Third, we reject Munchel and Eisenhart's arguments that the charged offenses do not authorize detention. Under 18 U.S.C. § 3142(f)(1)(E), detention is permitted if the case involves "any felony . . . that involves the *possession* or use of a . . . dangerous weapon." (emphasis added). Two of the charges in the indictment meet this description: Count Two—entering a restricted building "with intent to impede and disrupt the orderly conduct of Government business . . . while armed with a dangerous weapon," in violation of 18 U.S.C. § 1752(a)(1) and (a)(2) and 18 U.S.C. § 2 (aiding and abetting charge for Eisenhart); and Count Three—violent entry or disorderly conduct, again "while armed with a dangerous weapon," in violation of 40 U.S.C. § 5104(e)(1) and (e)(2) and 18 U.S.C. § 2. Indictment, ECF No. 21 at 2. The Bail Reform Act thus explicitly authorizes detention when a defendant is

charged with committing certain felonies while possessing a dangerous weapon, as is alleged in this indictment.[5]

## IV.

That leaves us with Munchel and Eisenhart's final two arguments: (1) that the District Court's determinations in support of detention were clearly erroneous; and (2) that several other defendants who participated in the insurrection have been released before trial, even though the conduct of those defendants is indistinguishable (or even worse) than their conduct on January 6. The first challenges the District Court's finding that no condition or combination of conditions of release could reasonably assure the safety of the community while these appellants await trial. Appellants did not raise the

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[5] Eisenhart's argument that a taser is not a dangerous weapon—which Eisenhart raises for the first time in reply, and which Munchel seeks to adopt in his reply—is without merit. The relevant statute, 40 U.S.C. § 5104(a)(2)(B), defines the term "dangerous weapon" to include "a device designed to expel or hurl a projectile capable of causing injury to individuals or property. . . ." While the record contains no evidence or proffer as to how Munchel's taser operates, a taser is commonly understood as a device designed to expel a projectile capable of causing injury to individuals. *See Cantu v. City of Dothan*, 974 F.3d 1217, 1224–25 (11th Cir. 2020); *Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011) ("[A] taser uses compressed nitrogen to propel a pair of 'probes'—aluminum darts tipped with stainless steel barbs connected to the taser by insulated wires—toward the target at a rate of over 160 feet per second. Upon striking a person, the taser delivers a 1200 volt, low ampere electrical charge. The electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless." (internal alterations and quotation marks omitted)). Thus, at this stage, the evidence sufficiently demonstrates that Munchel's taser is a dangerous weapon under the statute.

latter argument below, so we decline to pass on it in the first instance and without the benefit of full briefing.

**A.**

We review the District Court's dangerousness determinations for clear error. *United States v. Smith*, 79 F.3d 1208, 1209 (D.C. Cir. 1996); *United States v. Simpkins*, 826 F.2d 94, 96 (D.C. Cir. 1987). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also United States v. Celis*, 608 F.3d 818, 843 (D.C. Cir. 2010). If, upon reviewing the record, it does not appear that the District Court considered substantial countervailing evidence that supported release when analyzing the detention factors, we sometimes remand for reconsideration rather than reverse. *See United States v. Nwokoro*, 651 F.3d 108, 110 (D.C. Cir. 2011) (remanding where the "district court [did not] demonstrate that it considered many of the facts apparent from the record before it").

In this case, the District Court found that because Munchel has limited criminal history and Eisenhart has none, their history and characteristics weighed against a finding that no conditions of release would protect the community. *Munchel*, 2021 WL 620236, at *6, *8. However, the District Court found that the nature and circumstances of the charged offenses, weight of the evidence, and danger to the community factors all weighed in favor of finding that no conditions of release would protect the community. *Id.* at *5–7 (Munchel)[6], *7–8

[6] Although the government presented evidence that Munchel was in contact with a member of the Proud Boys after January 6 and was

(Eisenhart). The crux of the District Court's reasoning was that "the grand jury alleged that [the appellants] used force to subvert a democratic election and arrest the peaceful transfer of power. Such conduct threatens the republic itself. . . . Indeed, few offenses are more threatening to our way of life." *Id.* at *5. Furthermore, because in media interviews Munchel showed no remorse and indicated that he would "undertake such actions again," while Eisenhart stated that she would rather "fight" and "die" than "live under oppression," the District Court found that both appellants were a danger to the republic and unlikely to abide by conditions of release. *Id.* at *6, *8 (quoting Pullman, *supra*). Nevertheless, we conclude that the District Court did not demonstrate that it adequately considered, in light of all the record evidence, whether Munchel and Eisenhart present an identified and articulable threat to the community. Accordingly, we remand for further factfinding. *Cf. Nwokoro*, 651 F.3d at 111–12.

**B.**

The crux of the constitutional justification for preventive detention under the Bail Reform Act is that "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, . . . a court may disable the arrestee from executing that threat." *Salerno*, 481 U.S. at 751. Therefore, to order a defendant preventatively detained, a court

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interested in joining the group, *id.* at *6, the District Court made no finding as to whether this evidence indicated that Munchel posed a danger to the community. It did, however, consider the evidence of Munchel's contact with the Proud Boys in its analysis of Munchel's history and characteristics, and determined that despite the evidence, Munchel's history and characteristics weighed against detention. *Id.*

must identify an articulable threat posed by the defendant to an individual or the community. The threat need not be of physical violence, and may extend to "non-physical harms such as corrupting a union." *United States v. King*, 849 F.2d 485, 487 n.2 (11th Cir. 1988) (quoting S. REP. NO. 98–225, at 3 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3195–96). But it must be clearly identified. *See Salerno*, 481 U.S. at 750 (noting that the Act applies in "narrow circumstances" where "the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community"); *cf. Tortora*, 922 F.2d at 894 (Breyer, C.J., concurring) (reversing an order of release where the district court failed to "carefully analyze[] the danger [the defendant] posed"). Detention cannot be based on a finding that the defendant is unlikely to comply with conditions of release absent the requisite finding of dangerousness or risk of flight; otherwise the scope of detention would extend beyond the limits set by Congress. As we observed of the Bail Reform Act of 1966, "[t]he law requires reasonable assurance[,] but does not demand absolute certainty" that a defendant will comply with release conditions because a stricter regime "would be only a disguised way of compelling commitment in advance of judgment." *United States v. Alston*, 420 F.2d 176, 178 (D.C. Cir. 1969).

The threat must also be considered in context. *See Tortora*, 922 F.2d at 888 ("Detention determinations must be made individually and, in the final analysis, must be based on the evidence which is before the court regarding the particular defendant. The inquiry is factbound." (internal citations omitted)). It follows that whether a defendant poses a particular threat depends on the nature of the threat identified and the resources and capabilities of the defendant. *Cf. Nwokoro*, 651 F.3d at 110–11 (noting that evidence "favoring appellant's pretrial release" included the fact that appellant had

no assets under his control, no ability to flee the country, and "no prior criminal record"). Whether the defendant poses a threat of dealing drugs, for instance, may depend on the defendant's past experience dealing, *see, e.g.*, *United States v. Briggs*, 697 F.3d 98, 102 (2d Cir. 2012), and her means of continuing to do so in the future, *see, e.g.*, *United States v. Henry*, 172 F.3d 921 (D.C. Cir. 1999) (unpublished).

Here, the District Court did not adequately demonstrate that it considered whether Munchel and Eisenhart posed an articulable threat to the community in view of their conduct on January 6, and the particular circumstances of January 6. The District Court based its dangerousness determination on a finding that "Munchel's alleged conduct indicates that he is willing to use force to promote his political ends," and that "[s]uch conduct poses a clear risk to the community." *Munchel*, 2021 WL 620236, at *6. In making this determination, however, the Court did not explain how it reached that conclusion notwithstanding the countervailing finding that "the record contains no evidence indicating that, while inside the Capitol, Munchel or Eisenhart vandalized any property or physically harmed any person," *id.* at *3, and the absence of any record evidence that either Munchel or Eisenhart committed any violence on January 6. That Munchel and Eisenhart assaulted no one on January 6; that they did not enter the Capitol by force; and that they vandalized no property are all factors that weigh against a finding that either pose a threat of "using force to promote [their] political ends," and that the District Court should consider on remand. If, in light of the lack of evidence that Munchel or Eisenhart 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. In our view, those who actually assaulted police officers and broke through windows, doors,

and barricades, and those who aided, conspired with, planned, or coordinated such actions, are in a different category of dangerousness than those who cheered on the violence or entered the Capitol after others cleared the way. *See Simpkins*, 826 F.2d at 96 ("[W]here the future misconduct that is anticipated concerns violent criminal activity, no issue arises concerning the outer limits of the meaning of 'danger to the community,' an issue that would otherwise require a legal interpretation of the applicable standard." (internal quotation and alteration omitted)). And while the District Court stated that it was not satisfied that either appellant would comply with release conditions, that finding, as noted above, does not obviate a proper dangerousness determination to justify detention.

The District Court also failed to demonstrate that it considered the specific circumstances that made it possible, on January 6, for Munchel and Eisenhart to threaten the peaceful transfer of power. The appellants had a unique opportunity to obstruct democracy on January 6 because of the electoral college vote tally taking place that day, and the concurrently scheduled rallies and protests. Thus, Munchel and Eisenhart were able to attempt to obstruct the electoral college vote by entering the Capitol together with a large group of people who had gathered at the Capitol in protest that day. Because Munchel and Eisenhart did not vandalize any property or commit violence, the presence of the group was critical to their ability to obstruct the vote and to cause danger to the community. Without it, Munchel and Eisenhart—two individuals who did not engage in any violence and who were not involved in planning or coordinating the activities—seemingly would have posed little threat. The District Court found that appellants were a danger to "act against Congress" in the future, but there was no explanation of how the appellants would be capable of doing so now that the specific

circumstances of January 6 have passed. This, too, is a factor that the District Court should consider on remand.

**C.**

Finally, Munchel and Eisenhart argue that the government's proffer of dangerousness should be weighed against the fact that the government did not seek detention of defendants who admitted they pushed through the police barricades and defendants charged with punching officers, breaking windows, discharging tasers at officers, and with planning and fundraising for the riot. *See* Munchel Reply Mem. at 9–12. Appellants did not raise this claim before the District Court and the government did not substantively respond to it on appeal because Appellants raised it for the first time in Munchel's reply. Whatever potential persuasiveness the government's failure to seek detention in another case carries in the abstract, every such decision by the government is highly dependent on the specific facts and circumstances of each case, which are not fully before us. In addition, those facts and circumstances are best evaluated by the District Court in the first instance, and it should do so should appellants raise the issue upon remand.

* * * *

It cannot be gainsaid that the violent breach of the Capitol on January 6 was a grave danger to our democracy, and that those who participated could rightly be subject to detention to safeguard the community. *Cf. Salerno*, 481 U.S. at 748 ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous." (citations omitted)). But we have a grave constitutional obligation to ensure that the facts and circumstances of each case warrant this exceptional

treatment. Accordingly, we conclude that the appropriate resolution of this case is to remand the detention orders for reconsideration forthwith of the government's oral motion for pretrial detention.

*So ordered.*

KATSAS, *Circuit Judge*, concurring in part and dissenting in part: These appeals present the question whether Eric Munchel and his mother, Lisa Eisenhart, may be detained pending trial for their participation in the riot at the United States Capitol on January 6, 2021. The answer to that question does not turn on any generalized, backward-looking assessment of the rioters or the riot, as the district court erroneously suggested. Instead, it turns on a specific, forward-looking assessment of whether Munchel and Eisenhart as individuals currently pose an unmitigable threat to public safety. My colleagues and I agree on this critical point about the governing legal standard in these appeals. We also agree that the district court failed to justify the detention of Munchel and Eisenhart on the record before it. But whereas my colleagues remand for a do-over, I would reverse outright.[1]

The Bail Reform Act permits pretrial detention in only "carefully defined circumstances." *United States v. Simpkins*, 826 F.2d 94, 95–96 (D.C. Cir. 1987). To support detention, a court must find that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e)(1). In assessing public safety and flight risk, courts must consider four factors: (1) "the nature and circumstances of the offense charged," (2) "the weight of the evidence against the person," (3) "the history and characteristics of the person," and (4) "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." *Id.* § 3142(g). For the

[1] I join parts I to III of the Court's opinion. I also agree with much of the legal analysis in part IV, including the proposition that those who assaulted police officers or forcibly breached Capitol security on January 6 "are in a different category of dangerousness" than those who, like Munchel and Eisenhart, only "cheered on" the disruption and "entered the Capitol after others cleared the way." *Ante* at 18–19.

public-safety determination, the government must prove all relevant facts "by clear and convincing evidence," *id.* § 3142(f)(2), and we review all relevant findings for clear error, *United States v. Smith*, 79 F.3d 1208, 1209 (D.C. Cir. 1996).

In this case, a magistrate judge concluded that neither Munchel nor Eisenhart is a flight risk and that neither would pose a safety risk if subjected to conditions including home detention, GPS monitoring, a ban on possessing firearms, a ban on travel to Washington, D.C., and supervision by the U.S. Pretrial and Probation Services System. Munchel Mag. Tr. at 177, 181, 185–89; Eisenhart Mag. Tr. at 152, 163, 164–66. The district court agreed that Munchel and Eisenhart do not present a flight risk, but found that no combination of release conditions would reasonably ensure public safety. *United States v. Munchel*, No. 1:21-CR-118-RCL, 2021 WL 620236, at *1, *5, *7 (D.D.C. Feb. 17, 2021). The court found that all but one of the subsidiary statutory factors weigh in favor of detention. *Id.* at *5–8.

In my view, the district court clearly erred in finding that the government satisfied its burden to prove an unmitigable threat to public safety by clear and convincing evidence. The court's errors infected both its assessment of the individual factors and its ultimate determination that Munchel and Eisenhart must be detained.

The first factor looks to both the "nature" and "circumstances" of the "charged" offense: "the former refers to the generic offense while the latter encompasses the manner in which the defendant committed it." *United States v. Singleton*, 182 F.3d 7, 12 (D.C. Cir. 1999). Munchel and Eisenhart have been charged with obstructing an official proceeding, *see* 18 U.S.C. § 1512(c)(2); entering a restricted building unlawfully or with the intent to impede government business, *see id.*

§ 1752(a)(1)–(2), (b); carrying a dangerous weapon on the Capitol grounds, *see* 40 U.S.C. § 5104(e)(1); and entering the Capitol with the intent to disrupt official business, *see id.* § 5104(e)(2). The district court described the charged offenses as "grave," asserted that "few offenses are more threatening to our way of life," and quoted at length from George Washington's Farewell Address. *Munchel*, 2021 WL 620236, at *5–7. But none of the charged offenses is a Class A or Class B felony, *see* 18 U.S.C. § 3559(a), none carries a mandatory minimum sentence, and none gives rise to a rebuttable presumption of detention.

The district court was primarily concerned with how Munchel and Eisenhart committed their offenses. In addition to the descriptions noted above, the court asserted that their conduct showed "a flagrant disregard for the rule of law"—and indeed "threatens the republic itself." *Munchel*, 2021 WL 620236, at *5–6. The court described Munchel as "willing to use force to promote his political ends" and as "[s]torming the Capitol to disrupt the counting of electoral votes." *Id.* at *6. Further, it found that Munchel's entering the Capitol "carried great potential for violence" because he was "armed with a taser," "carried plastic handcuffs," and "threatened to 'break' anyone who vandalized the Capitol." *Id.* But as the court itself acknowledged, "[t]he record contains no evidence indicating that, while inside the Capitol, Munchel or Eisenhart vandalized any property or physically harmed any person." *Id.* at *3.

A video recorded by Munchel—documenting what he and his mother did on January 6—confirms the more benign assessment. The video shows the following: Munchel and Eisenhart did not organize the election protest or the ensuing march to the Capitol, hatched no advance plan to enter the Capitol, and acted in concert with no other protestors. Nor did they assault any police officers or remove any barricades in

order to breach Capitol security. They decided to enter the Capitol only after others had already done so forcibly. By the time they made their way to the building, police were making no attempt to stop or even discourage protestors from entering. To go inside, Munchel and Eisenhart walked through an open door. While there, they attempted neither violence nor vandalism. They searched for no Members of Congress, and they harassed no police officers. They found plastic handcuffs by chance, but never threatened to use them. Munchel's threat to "break" anyone who vandalized the Capitol was intended to prevent destruction and was addressed to no one in particular. *See* Munchel iPhone Video at 43:41. For ten to twelve minutes, Munchel and Eisenhart wandered the halls of the Capitol, with Eisenhart leading the way and Munchel asking his mother what her plan was. At one point, they entered the Senate gallery. At another, as they entered what appears to be a hallway of offices, Munchel told his mother that "[w]e don't want to get stuck in here, this is not a place for us," which caused her to turn around. *Id.* at 42:11–14. Munchel and Eisenhart voluntarily left the building—while many other protestors remained and before the police began to restore order. Their misconduct was serious, but it hardly threatened to topple the Republic. Nor, for that matter, did it reveal an unmitigable propensity for future violence.

Turning to the second factor, the district court found that the "weight of the evidence" supported pretrial detention. *Munchel*, 2021 WL 620236, at *6, *8. The video in this case documents exactly what Munchel and Eisenhart did inside the Capitol. It forecloses any contention that pretrial detention is inappropriate because of uncertainty about whether the alleged conduct occurred. But as explained above, the conduct does not show that Munchel and Eisenhart pose an unmitigable future threat to public safety. The second factor thus moves the needle neither one way nor the other.

The district court next found that the defendants' "history and characteristics" do not support detention. *See Munchel*, 2021 WL 620236, at *6, *8. The government fails to challenge that finding—and for good reason. Munchel maintained employment until his arrest, has no history of violence, has no prior felony convictions, and is not a member of any anti-government or militia group. He has two prior misdemeanor convictions for possession of marijuana, which are both more than five years old, and there was no proof that he has ever failed to comply with any probation conditions imposed as a result. Munchel Mag. Tr. at 174–75. Eisenhart is 57 years old, has been a nurse for three decades, and has no criminal history. Both appellants voluntarily surrendered to the FBI. Munchel took affirmative steps to preserve the evidence in his cellphone and arranged to provide it to the government. *Id.* at 176. Before her arrest warrant had even issued, Eisenhart established daily contact with the FBI so that she could turn herself in as soon as it did. Eisenhart Mag. Tr. at 152. The third factor thus cuts strongly in favor of release.

In evaluating the "nature and seriousness" of any danger, the district court highlighted statements that Munchel and Eisenhart made to the media on January 7. Munchel said that "[t]he point of getting inside the building is to show them that we can, and we will," *Munchel*, 2021 WL 620236, at *6, while Eisenhart, invoking the American Revolution, said that she would "rather die and would rather fight" than "live under oppression," *id.* at *8. To the district court, these statements indicated that the defendants pose "a clear danger to our republic" and that Eisenhart is a "would-be martyr." *Id.* at *6, *8. But the defendants' actual conduct belied their rhetorical bravado. During the chaos of the Capitol riot, Munchel and Eisenhart had ample opportunity to fight, yet neither of them did. Munchel lawfully possessed several firearms in his home, but he took none into the Capitol. Munchel Mag. Tr. at 179,

182. Indeed, before entering the Capitol, Munchel and Eisenhart stashed a knife inside a backpack that they left outside, precisely for fear of ending up in "federal prison." *See Munchel*, 2021 WL 620236, at *2.

Moreover, even if their comments indicate some willingness to engage in future protests or disruption, the Bail Reform Act permits detention only to prevent an "identified and articulable threat to an individual or the community." *United States v. Salerno*, 481 U.S. 739, 751 (1987). Here, the district court identified one such threat—that Munchel and Eisenhart would attempt "to stop or delay the peaceful transfer of power." *Munchel*, 2021 WL 620236, at *6, *8. But the 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 and Eisenhart had been involved in its planning before their arrest. The government's gesturing towards the possibility of their joining future protests falls well short of any "identified and articulable threat." *Salerno*, 481 U.S. at 751.

After evaluating the four statutory factors, the district court turned to the ultimate question in the case—whether no release conditions would reasonably ensure public safety. The court worried that a "determined defendant" could "cut off an ankle monitor, ignore travel restrictions, elude a third-party custodian, unlawfully rearm, and endanger his community." *Munchel*, 2021 WL 620236, at *7. The court found that Munchel was such a defendant given his "brazen actions in front of hundreds of law enforcement officers" and his media comments. *Id.* It found that Eisenhart also qualified, because of her supposed "willingness to die for her cause." *Id.* at *8.

Yet the record shows otherwise. As explained above, Munchel and Eisenhart chose to trespass—not to engage in violence, much less fight to the death. Afterwards, both voluntarily surrendered to the FBI, as the district court recognized in concluding that neither posed a flight risk. *See Munchel*, 2021 WL 620236, at *5, *7. Munchel preserved and voluntarily turned over his cellphone video. Munchel Mag. Tr. at 176. Likewise, even after he was identified as a suspect, Munchel made no attempt to hide or remove the firearms that he lawfully possessed at his home. *Id.* at 181–82. As for the defendants' attitudes towards law enforcement, the video shows that police did not seek to discourage their entry into the Capitol through an open door, Munchel iPhone Video at 38:48; Munchel and Eisenhart made no attempt to harass officers while inside the Capitol; and, as they were preparing to exit, Munchel encountered an officer and said "Sorry, guys, I still love you," *id.* at 49:26. Finally, contrary to the district court's characterization of Eisenhart as a "would-be martyr," she specifically declined to bring a knife into the Capitol because of her expressed concerns with "federal prison." *See Munchel*, 2021 WL 620236, at *2. The defendants' other personal characteristics—which the district court acknowledged to weigh in favor of release—further indicate that they are likely to comply with release conditions.

In this case, the magistrate judge imposed strict release conditions. For Munchel, he required confinement at the home of a third-party custodian, GPS location monitoring, supervision by Pretrial Services, no possession of firearms, no travel to D.C., no excessive use of alcohol, no possession or use of any controlled substance, and drug testing if ordered by Pretrial Services. Munchel Mag. Tr. at 185–89. For Eisenhart he required home confinement, location monitoring, supervision by a third-party custodian, no possession of firearms, no travel to D.C., and submission to psychiatric

treatment if ordered by Pretrial Services. Eisenhart Mag. Tr. at 164–66. The district court gave no plausible explanation for why these stringent conditions would not reasonably ensure public safety.

Of course, we review dangerousness findings only for clear error, *Smith*, 79 F.3d at 1209, which requires affirmance if a district court's "account of the evidence is plausible in light of the record viewed in its entirety," *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985). But while the standard of review here is favorable to the government, both substantive law and the standard of proof favor the defendants. The Bail Reform Act requires a showing that "no condition or combination of conditions" would even "reasonably assure" the safety of individuals or the community. 18 U.S.C. § 3142(e)(1). And it requires this showing to be made by "clear and convincing evidence," *id.* § 3142(f)(2)—a heightened standard of proof under which the fact finder must "give the benefit of the doubt to the defendant," *United States v. Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994); *see Addington v. Texas*, 441 U.S. 418, 424 (1979). Putting it all together, because the record strongly suggests that Munchel and Eisenhart would present no safety risk if subjected to strict release conditions, the district court clearly erred in finding that the government had proved its case by clear and convincing evidence.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. Because the district court clearly erred here, I would reverse its detention order and remand for the setting of appropriate release conditions.