

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	
	:	<b>Case No. 21-cr-160-5 (TJK)</b>
<b>v.</b>	:	
	:	
<b>WILLIAM CHRESTMAN</b>	:	

**GOVERNMENT’S OPPOSITION TO  
DEFENDANT’S MOTION TO RECONSIDER DETENTION**

“We stormed the Capitol building! We rushed that shit! We took that house back...we took it over...We made the House leave...they couldn’t finish their vote...that hasn’t been done since 1850...it was different than chaos; we the people took control!”

In a self-recorded telephone call on January 6, 2021,<sup>1</sup> defendant William Chrestman (“the defendant”) not only celebrated his active role in the violent effort to stop the peaceful transfer of presidential power, but also demonstrated to the Court why he is a danger to the community and should not be released. For this reason and the reasons fully discussed herein, the defendant’s Motion to Reconsider Detention (ECF No. 74) should be denied.

Rather than restate the facts of the case, the entire procedural history, and the arguments for detention that were raised before Chief Judge Howell (ECF No. 9), the government asks that the Court incorporate those facts and arguments in deciding this motion.

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<sup>1</sup> See attached Exhibit 1: transcript of a portion of recorded telephone calls made to W-1 on January 6, 2021. For reference, the defendant’s initials “WC” appear next to his statements, while W-1’s initials have been redacted, along with other information that could identify persons who are not involved in this litigation.

### **PROCEDURAL POSTURE**

The defendant was arrested and presented pursuant to a criminal complaint and was then released by a Magistrate Judge in the District of Kansas after denying the government's initial motion for detention. The government moved on February 20, 2021, for an Emergency Stay of the defendant's release, which was granted (ECF No. 13). The government and then-counsel for the defendant presented argument remotely before Chief Judge Howell on February 23, 2021. At the hearing, Chief Judge Howell reversed the Magistrate Judge's decision to release the defendant and thereafter issued a detailed Memorandum Opinion citing the reasons for the decision (ECF No. 26). Days later, on February 26, 2021, a grand jury returned an indictment (ECF No. 29) against the defendant and his co-defendants, charging the defendant with the following offenses: conspiracy, in violation of 18 U.S.C. § 371; obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2); civil disorder, in violation of 18 U.S.C. § 231(a)(3); threatening a federal officer, in violation of 18 U.S.C. § 115(a)(1)(B); and entering or remaining on restricted building or grounds with a dangerous weapon enhancement, in violation of 18 U.S.C. § 1752(a)(1) and (2) and (b)(1)(A). Following the indictment, the case was transferred to this Court. The defendant now moves for his release, asking the Court to reconsider his detention.

### **LEGAL AUTHORITY**

The Court can reconsider pretrial detention at any time before trial if the judicial officer finds that "information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community." 18 U.S.C. § 3142(f)(2); *United States v. Bikundi*, 73 F. Supp. 3d 51, 54 (D.D.C. 2014). However, even new information provided by the defendant in its motion would still be

subject to the Bail Reform Act, 18 U.S.C. § 3142(g), pretrial detention rubric. *See id.* at 54-55, 59.

For interlocutory pre-trial detention orders, the Court may also apply an “as justice requires” standard that is usually applied to motions under Federal Rules of Civil Procedure 54(b). *See, e.g., United States v. Hong Vo*, 978 F. Supp. 2d 41, 47 (D.D.C. 2013). However, reconsideration under that standard is warranted where the Court “patently misunderstood the parties, made a decision beyond the adversarial issues presented, or where a controlling or significant change in the law has occurred.” *Id.* at 48 (quoting *Arias v. DynCorp*, 856 F. Supp. 2d 46, 52 (D.D.C. 2012)).

### **ARGUMENT**

As was the case when his release was reversed by Chief Judge Howell, the “[d]efendant’s conduct on January 6 and blatant disregard for the law clearly show that he is a serious danger to the community and the nation, and that no condition or combination of conditions can be imposed that will ensure his compliance with the law pending trial in this matter.” ECF No. 23 at 31-32. While the defendant provides some limited information about his physical and mental health (ECF No. 74 at 6), the defendant offers no new information that has a *material bearing* on whether he should be released. The defendant instead rehashes the Bail Reform Act factors as he erroneously characterizes the nature of the case and the government’s evidence. ECF No. 74 at 3-8. This does not entitle him to a reconsideration of his bond status. *See* 18 U.S.C. § 3142(f)(2). Further, the defendant presents no argument that would avail himself to any reconsideration under the aforementioned “as justice requires” standard, nor is any reconsideration warranted under *United States v. Munchel*, 991 F.3d 1273 (D.C. Cir. 2021). Accordingly, there is no sufficient basis before the Court to grant the defendant’s motion.

**I. The Defendant's Proffered Physical and Mental Health Conditions Do Not Have a Material Bearing on His Pre-Trial Detention.**

In support of his motion for reconsideration, defendant Chrestman presents information about pre-existing medical conditions that he failed to present at prior hearings on his detention. ECF No. 74 at 6. The defendant states that he was “injured in a workplace accident” in 2010 which resulted in “long-term chronic backpain” and still persists to this day. *Id.* He states that at present he is “not receiving the appropriate regimen of medications during this period of incarceration,” and lists several pain medications. *Id.* He does not state whether the D.C. Jail is currently offering him any treatment for his back pain, or whether he has asked for a different treatment regimen and been denied, but just that he is not receiving the treatment he would normally receive while in the community.

Regardless, this is not a basis on which the defendant can move for reconsideration. First, information about pre-existing medical conditions is, almost by definition, not information “that was not known to the movant at the time of the hearing.” 18 U.S.C. § 3142(f)(2). Prior counsel made no mention of Chrestman’s mention chronic back pain in the February 23, 2021 hearing or in the preceding pleadings,<sup>2</sup> nor did the defendant himself raise this information at his initial hearing or at the subsequent appeal hearing. If he is arguing that the “new information” is that he is not at present receiving his preferred treatment, a motion to modify his medical treatment at the D.C. Jail with a hearing on the matter would be a more appropriate remedy.

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<sup>2</sup> For the Court’s convenience, the government has attached a consolidation of the defendant’s pleadings which were used to inform Chief Judge Howell before the February 23, 2021 hearing, and which do not appear on the Court’s docket for this case. The pleadings are attached as Exhibit 2, and are 1) the defendant’s opposition to the government’s request for detention (21-mj-8023-TJJ No. 7); and 2) the defendant’s opposition of the government’s request to stay release (21-mj-8023-JPO No. 13).

But second, and more importantly for this motion, the defendant does not state how, in any way, his chronic back pain or his lack of appropriate treatment (if that is indeed the case) assuages his danger to the community, which is required under the law for reconsideration. 18 U.S.C. § 3142(f)(2); *accord Bikundi*, 73 F. Supp. 3d at 54. Interestingly, the defendant's back pain did not prevent him from storming the United States Capitol while armed with an axe handle, threatening law enforcement officers, and attempting to prevent Congressional proceedings, among other conduct. Therefore, his back pain or treatment for the same has no material bearing on an analysis of the Bail Reform Act, and should not be used as a basis to reconsider his detention status.

Similarly, the defendant states plainly that he has some pre-existing mental health diagnoses for which he is not receiving treatment. *Id.* As with the back pain, he does not state whether he has reported these ailments to the D.C. Jail staff or whether the D.C. Jail has refused to offer treatment; merely he asserts that the conditions “are going untreated at present.” *Id.* Aside from the fact that previous counsel for the defendant represented that the defendant had no mental health conditions from which he suffered (*see* Exhibit 2 at 12), this is also not new information that would have a material bearing on the defendant's release for the same reasons articulated above. The fact that the defendant was receiving treatment for these conditions while in the community does nothing to allay his danger to the community as found by Chief Judge Howell. Furthermore, neither his physical nor mental health conditions require the Court to reconsider his conditions “as justice requires;” just because these issues were not previously litigated would not lead the Court to “misunderstand” the circumstances of the defendant's detention. *See Hong Vo*, 978 F. Supp. 2d at 47-48.

**II. The Defendant Remains a Danger to the Community Pursuant to the Bail Reform Act Factors.**

In his motion, the defendant states repeatedly that the Bail Reform Act factors do not support his detention because he is not a risk of flight. ECF No. 74 at 5, 6, and 8. Chief Judge Howell did not detain the defendant because he is a flight risk, but rather because the government “establish[ed], by clear and convincing evidence, that no condition or combination of conditions can be imposed that would reasonably ensure the *safety of the community* were he to be released pending trial.” ECF No. 23 at 32 (emphasis added). Any argument on the issue of the defendant’s flight risk is therefore irrelevant.

As to the issue of his dangerousness, the defendant first argues that the nature and circumstances of this case “leads to a conclusion of release,” and insinuates that Chief Judge Howell did not consider the “nature and circumstances *specifically in reference to him.*” ECF No. 74 at 4 (emphasis added). This is simply not true. In the Memorandum Opinion, Chief Judge Howell thoroughly examined the nature and circumstances of the defendant’s specific conduct when finding that he was a danger to the community, taking explicit care to reference that not every defendant charged with a felony from the January 6 attack on the Capitol has been held pending trial. ECF No. 23 at 13-18. In the instant motion, the defendant in a few sentences dismisses the several pages of specific conduct attributed to him in the detention decision, and speciously moves the goal posts on his conduct, stating that he was not there in an “‘official’ capacity” as a Proud Boy to effectuate a “concerted operation.” ECF No. 74 at 4. Notwithstanding that the government has never asserted he was there in any “official capacity,” the government has articulated ample evidence of the defendant’s role in leading not only his co-defendants, but also spurring on the efforts of untold others. *See* ECF No. 9 at 7-16, 20-21; *and* ECF No. 23 at 13-18.

The nature and circumstances of *his specific conduct* is a significant reason why he was held, and nothing presented by the defendant in his motion undermines this factor.

Along those lines, the defendant ineffectively attacks the weight of the evidence against him that has been proffered and disclosed by the government (ECF No. 74 at 5), even though he did not seriously challenge this factor in the previous hearings. *See* ECF no. 23 at 19. Despite the defendant's self-recorded videos and telephone calls detailing his conduct<sup>3</sup> and the social media and surveillance video that show the same, the defendant nevertheless argues incredulously that the government's evidence shows the defendant was merely "in the vicinity" and that he was only "involved in a protest event," and further that this evidence is "circumstantial rather than direct." ECF No. 74 at 5. This is a grievous misstatement of the evidence against him, which might explain why the defendant quickly moves on to argue that the weight of the evidence against the defendant is just one factor to consider against him. *Id.* Had Chief Judge Howell only considered the overwhelming weight of the evidence against the defendant when reaching her decision, the defendant might have some traction with his argument, but Chief Judge Howell was far more diligent, as the Bail Reform Act requires. *See, e.g., United States v. Taylor*, 289 F. Supp. 3d 55, 66 (D.D.C. 2018). The weight of the evidence in this case very clearly supports his continued detention.

Other than the previously discussed health concerns, the defendant offers nothing new by way of history and characteristics other than what has already been litigated. *See* ECF No. 23 at

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<sup>3</sup> Copies of which were furnished to counsel for the defendant on May 12, 2021, two weeks prior to the filing of the instant motion. These recorded calls (including the calls detailed in Exhibit 1) and videos were not known to the government in previous litigation on the defendant's detention decision and were only discovered after the defendant's cell phone was searched pursuant to a lawful search warrant. Even still, they serve only as further inculpatory evidence which would not have affected the outcome in the defendant's favor.

27. Perhaps unsurprisingly, the defendant does not even address the likely disposal of evidence in this case or the lack of remorse for his actions<sup>4</sup> which informed Chief Judge Howell's analysis. *Id.* at 28-29. For these reasons and the reasons discussed above, this factor still weighs in favor of his detention.

Finally, the defendant essentially restates his case for release when looking to the fourth Bail Reform Act factor, the nature and seriousness of the danger to the community posed by the defendant's release. ECF No. 74 at 7-8. But, while he does not cite explicitly to the United States Court of Appeals for the District of Columbia Circuit's decision in *United States v. Munchel*, 991 F.3d 1273 (D.C. Cir. 2021), he does claim that there is "no articulable threat identified by the government to form the basis of a danger to the community argument." ECF No. 74 at 8. Given that *Munchel* was decided more than a month after the defendant was ordered detained by Chief Judge Howell, it is worth a brief discussion as to whether *Munchel* would have impacted the decision. That said, according to the Circuit itself in *Munchel*, defendants who "aided, conspired with, planned, or coordinated [the attack on the Capitol] are in a different category than those who cheered on the violence or entered the Capitol after others cleared the way." 991 F.3d at 1284. The defendant is undoubtedly in the former category. His dangerousness is demonstrated not only by his active role in leading the co-defendants in his conspiracy and the crowd writ large in the attack on the Capitol, but also in the fact that he was carrying an axe handle during the attack and made threats to law enforcement officers. *See* ECF No. 23 at 30. Consequently, even when viewed

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<sup>4</sup> The defendant states in a footnote to his motion that "Mr. Chrestman has renounced any association with [the Proud Boys] or its goals." ECF No. 74 at 8 n. 1. This is not an expression of remorse for his conduct on January 6, 2021, but rather a prophylactic effort to distance himself from others with whom he joined that day. The defendant was evidently extremely proud of what he and his fellow Proud Boys accomplished after the attack, as evidenced in Exhibit 1.

through the lens of *Munchel*, the nature and seriousness of the danger to the community posed by the defendant's release wholly supports the defendant's continued detention.

**CONCLUSION**

For the foregoing reasons, and any additional reasons that may be cited at a hearing on this motion, the government respectfully requests the defendant's motion be denied.

Respectfully submitted,

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[REDACTED]

[REDACTED]

[noise]

WC: Fuck yeah, I'm okay. [noise] [pause]

[REDACTED] [UI]

WC: A co--y--'cause yeah, what we did, we stormed the Capitol Building, we rushed that shit, we took that house back. [noise]

[REDACTED] [UI]

WC: We're on our way back. We're on our way back, uh--to the house of--[noise]

[REDACTED] [UI]

WC: Yeah, but me and two others [noise], we were first ones through the gate. We lead everybody in [laughter]. We lead them--lead them, not let them. [noise] [pause]

[REDACTED] [UI]

WC: Okay, uh--absolutely! [noise]

[REDACTED]

[noise]

[End of recording]

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[REDACTED]

[REDACTED]

[REDACTED] Hello?

WC: Hi, [REDACTED]

[REDACTED] Hi.

WC: Oh . . . shit! I am sore--

[REDACTED] [OV] What?

WC: --and I'm tired.

[REDACTED] Oh. You sound scratchy, you been yelling?

WC: Th--[noise] that and fucking uh--CS gas and pepper spray. I boxed a--

[REDACTED] [OV] [UI] that.

WC: --I boxed a cop. I got--part of his uh, fucking uh, body armor, cause I thought he was attacking one of our boys, turns out it wasn't one of our boys, some other fucking dickhead had uh . . . orange tape on his, uh--[noise] he-helmet, but anyways, the cop was being kind of a dick. Uhm . . . [pause] it w--it was insane. It was insane and you know wha--you know what happened today? Because o--

[REDACTED] [OV] No.

WC: --because of, uh, we stor--we stormed the Capitol Building and we took it over. They're sti--they're still in there do--uh, doing shit . . . [pause] refusing to leave. We made, uh--fucking uh--the House leave. Like, they couldn't--

[REDACTED] [OV] [UI]

WC: --finish their vote.

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[noise]

[REDACTED] [UI]

WC: [OV] We--[pause] but--that hasn't been done [noise] since 1850.

[REDACTED] Yeah.

WC: [noise]

[REDACTED] No, I wanted to call you back, [REDACTED] I wanted to like, know what it--what happened.

[pause]

WC: Yeah, that's--

[noise]

[REDACTED] [REDACTED]

WC: [REDACTED]

[REDACTED] [REDACTED]

WC: Oh, yeah. [noise] No, [REDACTED] when I show you the videos, you're gonna be like, "Holy fuck!" This started the rev--

[REDACTED] [OV] So it was--

WC: [OV] No, [REDACTED]

[REDACTED] [OV] chaos?

WC: --Oh yeah, no--it was--it was different than chaos. We t--[noise] like--the people took control--

[REDACTED]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

WC: But, uhm . . . but, no, [REDACTED] we took-we-we took over the fucking uh--the Capitol Building.

[REDACTED] Okay, so it was chaos in a different way, cause, every-- [REDACTED] made it out like it was chaos, like the BLM, like--

WC: [OV] Mm.

[REDACTED] --cop cars were being flipped over and they were [UI]--

WC: [OV] No, no, they--we took over the State Capitol. I mean the uh--uh, Federal Capitol Building. [pause]

[REDACTED] [REDACTED]

WC: [REDACTED]

[REDACTED] [REDACTED] I was like, "Are you watching all the--all the chaos, [UI] are you watching it?"

WC: Fuck--fuck, yeah!

[REDACTED] [OV] "Maybe."

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

WC: It needed to happen. And uh--

[REDACTED] [OV] [UI]--

WC: [OV]--because--

[REDACTED] [REDACTED]  
[REDACTED]

WC: [OV] That was--

[REDACTED] [REDACTED]

WC: --that was wh--that was what was going on--[noise] on-on-on the floor.

[noise]

[pause]

[REDACTED] So, when you say you boxed a cop, you mean like, you fought a cop?

WC: Yeah. [noise]

[REDACTED] I'm [UI] you didn't get arrested. [noise]

WC: Dude, they-they were--

[REDACTED] [OV] You're probably on that

WC: [OV]--we had--we had--

[REDACTED] [OV] do-not-fly--

WC: [OV]--we had--we had--

[REDACTED] [OV] list anyway.

WC: [OV]--total control of-of everything in there.

[pause]

[noise]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] You're probably on a do-not-fly list, [REDACTED]

WC: [REDACTED]

[REDACTED] [OV] They probably think--

WC: [OV] [REDACTED] you know, how--

[REDACTED] [OV] you're a terrorist. [noise]

WC: --you--you know how they were trying to get a million people there? [noise]  
[pause] I think there were--

[REDACTED] [OV] Yeah--

WC: --like, two million people there. There were--

[REDACTED] [OV] Really?

WC: Oh, my God! Oh . . . my God!--

[REDACTED] [OV] [UI]

[noise]

WC: and . . . they a--they all followed us, Proud Boys. We-we marched [noise]  
straight--we marched straight from the uh, uh, Washington Memorial . . . all  
the--

[REDACTED] [OV] M-hm.

WC: --all the way down to the, uh, Capitol Building and . . . uh--

[REDACTED] [OV] Pretty sure when I talked to you, you said that [noise] storming the Capitol  
was not happening. [noise]

WC: [noise] I didn't think it was--it was--[noise] it wasn't planned, sweetheart.

[noise]

[REDACTED] [UI] [noise] Is it true that the Proud Boy guy, the lead got arrested and got told  
[noise] not to come to DC? [noise]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

WC: Yeah, well, that's--[noise] what started all this shit. [noise] Cause he got arrested for bullshit. For burning a--a Black Lives Matter banner--

[REDACTED] [OV] [UI]

WC: --[noise] that was just hanging on a fence. You know what I mean? And he didn't even do it. It was just other Proud Boys--

[REDACTED] [OV] Like, people were burning American flags--

WC: --e-exactly--

[REDACTED] [OV] [UI]

WC: --and they're taking them [noise] out of people's hands, which is actually private property, you know?

[REDACTED] Yeah.

WC: But it--what happened was, a bunch of Proud Boys got tired of it and they-- they tore down a-a paper BLM uh, [noise] homemade, bullshit banner that somebody just left hanging on a--on a fence. They tore it down and they burned it. [pause] [noise] [unintelligible background conversation] And--[noise] and so--they fucking--you know what I mean? But, what happened was, everybody got so pissed [noise] and then, uh, when we heard that, [noise] uh--that--what's his name? Our piece of shit Vice President Pence was gonna cuck under [noise] and . . . not do the right thing [noise] with the votes, we wa--uh, we decided to head down to the--uh, back down to the Capitol. 'cause we circled it, and then we walked past it, and then we walked down the street and then--

[REDACTED] [OV] Yeah.

WC: --[noise] so we walked back to the Capitol Building. [noise] And . . . uh, we went up to the fence and the first fence that was up there--bunch of people were standing against it, yelling at the cops, the cops started getting nervous and then--so I kicked the fence, I said, uh--uh--"We wan--we wanna talk to the fucking House right now!" [noise] And . . . all these people started yelling and, uhm, I kicked the fu-fucking fence again. Me and this fi--uh, five-foot l--little twenty-year-old girl and her brother that uhm--were palling around with me, because they knew somebody in the Proud Boys, but they couldn't find them. So, they wanted to hang--

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] [OV] Yeah.

WC: [OV]--you know what I mean? They--they were there with them, but they got--they got--cut off. So, they hung with me for like the entire thing, because--you know what I mean, all they knew was that the Proud Boys would take care of them and--

[REDACTED] [OV] Yep.

WC: [OV]--when I kicked that fence, holy shit, those two just lunged at the fence, dude. We-- knocked it down and everybody rushed.

[REDACTED] Wow! [noise] I'm surprised the cops didn't automatically start shooting you guys.

WC: Oh, no. No, no, no, no! [pause] That's what people think, they don't--they think, "They don't have control." We had total control.

[pause]

[REDACTED] [REDACTED] you should see the news here. [noise]

WC: [noise]

[REDACTED] They went--

WC: [OV] [noise]

[REDACTED] [OV]--downtown to the Plaza to ask--

WC: [OV] [noise]

[REDACTED] [OV]--random people their opinion [noise] and it's all like--people--

WC: [OV] Well, yeah, they're only gonna show the bad--

[REDACTED] [OV]--with Black Lives Matter masks and--

WC: [OV] Yeah.

[REDACTED] [OV]--gay guys. I'm like, "Really?"

[unintelligible background conversation]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

WC: Yeah. [noise] [pause] It's crap.

[REDACTED] But you're not going back, are you?

WC: No, we're done, we're done for the night, we're in.

[REDACTED] [OV] Okay.

WC: And they got the whole uh, Washington DC area on lockdown right now [noise].  
Curfew until s--

[REDACTED] [OV] [UI] the 6 PM curfew.

WC: Yeah . . . But, uhm . . . [noise] I--I fucking started it [REDACTED]

[REDACTED] That's cool.

WC: Yeah, I started a revolution. Because--[noise] once everybody heard about this,  
and then uh, we cleared out the House--[noise] uh, they evacuated the House and  
everything, to stop those votes. So the votes stopped, and then, uh . . . uh, when  
word of it got out, on the news [noise] people--uh, patriots in [noise] Georgia  
went and stormed the uh--[noise] the Capitol Building in Georgia, where all the  
votes were stolen and shit.

[REDACTED] [OV] Yeah, they stormed Topeka as well--

WC: [OV]--and Topeka and--

[REDACTED] [OV] and Jefferson City.

WC: Yeah--J--oh, Jefferson City, too?

[REDACTED] Yeah.

WC: And in Oregon. So, four State Capitols that--[UI] I know of now, got stormed too  
because of this.

[REDACTED] Yeah.

WC: Now, I-- [REDACTED] fucking [noise] fired the first shot, man [laughter].

[noise]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] [REDACTED]

[noise]

WC: [OV] Oh, well, yeah, I was--

[REDACTED] [OV]--those damn super--

WC: [OV] all over--

[REDACTED] --no. There was a guy in a Superman outfit with a Trump mask on. I was like, [UI]--

WC: [OV] No, no, that wasn't me--

[REDACTED] [noise]

WC: --I was wearing a bla--uh, I was wearing a black hoodie, uhm, green body armor and most of the time I was wearing eit-either a black ball cap or a black beanie, uh, but--once we got up in there and we were, uh--[noise] uh . . . fucking with the cops [noise] and stuff, [noise] I uh--went and put my uh . . . uh, helmet on. [noise]

[REDACTED] I wanna see you in your body armor.

WC: Oh, I took tons of videos, [noise] you're gonna see it. [noise]

[REDACTED] Yeah, I'm excited.

WC: Yeah, it was awesome.

[REDACTED] So, um--

WC: [OV] Uh, the government even said, uh [stammers] this was the start of the revolution. [noise] [pause]

[REDACTED] Yeah?

WC: Yup! I knew--I knew we were going down there and s--witness history, I just didn't realize, you know . . .

[REDACTED] It was just like--

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

WC: [OV] It--w-we were gonna make it. [laughter] Fucking--I'm so--[UI] [noise]  
[REDACTED] I am so excited. [noise] I mean, that--[noise]

[REDACTED]

WC: [SC] What's up? [SC]

[pause]

[REDACTED] [REDACTED]

WC: [OV] Yeah. [noise]

[REDACTED] --and I . . . mentioned, I was--I was like--

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

WC: [OV] Don't tell any--don't tell anybody the details. I'm seri--no, I'm serious.

[REDACTED] No, I didn't.

WC: Okay, 'cause they're probably gonna start sca--combing through video and looking for--you know what I mean?

[REDACTED] Yeah. But uh--[noise] I mentioned that you were there, like, not even thinking about it, and she just looks at me and says--

[REDACTED] [REDACTED]

[REDACTED] [OV] "Is [REDACTED] a Proud Boy?"

WC: [OV] [laughter]

[REDACTED] [REDACTED]

[REDACTED] [OV] And I was like, "You know what? Yeah, he is."

[REDACTED] [REDACTED]

[pause]

[noise]

[REDACTED] I was like [UI]--

[REDACTED] [REDACTED].

[REDACTED] But I was--I was like, "You know what?" [noise] "Yeah, he is." And . . . [REDACTED] goes, "Really?" I'm like, "Yeah, [noise] he is."

WC: [noise]--

[REDACTED] [OV] And [REDACTED] goes--

WC: [REDACTED] you don't have to tell people that.

[REDACTED] [UI] I've ever seen of them [noise] Well, no--I'm just--you know . . . I was like, "Yeah, you know, he is." [REDACTED]

[REDACTED] "Oh, if anyone's in riot, it's gonna be a Proud Boy."

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[REDACTED]

WC: You know what--you--you know what happens when we were there today? [noise] Before all this shit started--[noise] [pause] people were--uh, patriots from all over the country--no bullshit, coming up askin', "Are you guys Proud Boys?" And we're like, "Uh, yeah!" And they go, "Oh, my God, could we get our pictures taken with you guys? You guys are great!" Uh--they were treating us like fucking rock stars! They--uh, giving us water and all kinds of other--you know what I mean? Drinks, y--whatever, [noise] you know--

[REDACTED] [OV] Yeah.

WC: --trying to offer stuff all the time [noise]. We're like, "No, no, no, it's not about that [UI] [noise] Thank you guys for coming out and helping us!" You know? And . . . uhm, I'm not kidding you, [noise] they were treating us like rock stars. And . . . one of my--

[REDACTED] [OV] [UI]

WC: [REDACTED]

[REDACTED] [OV] Yeah.

WC: [REDACTED] I-I go, "Billy Chrestman." And [REDACTED] goes, "Where--uh, wh--what--what chapter are you with?" I said, "Uh, Kansas City." [REDACTED]

[REDACTED] [OV] [UI]

WC: [REDACTED]

[REDACTED] Mm-hmm--

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[REDACTED]

[REDACTED]

WC: And then, afterwards, uhm, that was probably, [noise] uhm, about 15 minutes before we walked back up to the Capitol, I said--[stammers] and I asked--I-I said, "Uh, we're getting ready to walk back up there, uh--do you wanna, uhm . . . go with us?" [REDACTED]

[REDACTED]

[REDACTED] [OV] Mm-hmm.

WC: [REDACTED] And oh, my God, it was--it was effing cra--[noise] it was the craziest shit I've ever seen. I was like, standing there in awe . . . walking through the State Building, everybody running around, yelling, [noise] "Whose house? Our house! Whose house? Our house!" You know what I mean? And--

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] [OV] You enjoyed it.

WC: --the Police were shitting bricks, they were like--you know what I mean? A--a--and--they tried to put the security doors up and we all shoved uh, fucking uh--chairs and stuff under and when some guys started getting out of hand, and started trying to like, loot and . . . [noise] and break shit, we're like, "No, we--we're not about that crap, [noise] you guys put that shit down. We're not here to loot, we're not here to break anything, we're here--we're here to uh--make a--make a statement--"

[REDACTED] [OV] That's not good.

WC: --Yeah. I said, "We're not Antifa, we're not--" a--and you know what? Everybody listened and we w--like--[pause] ou--out of the two million people, there was maybe . . . [noise] 600 Proud Boys, you know?

[REDACTED] Yeah--

WC: [OV] and--

[REDACTED] --You know--

WC: [OV] just because was a Proud Boy--

[REDACTED]--[UI]

WC: [OV] they--they all listened--

[REDACTED]--[UI] [pause] [noise] What?

WC: But, just because I was a Proud Boy everybody like listened to--"Oh, o--okay, sor--we're sorry, we're sorry, we're sorry [stammers]" and like, "Dude--

[REDACTED] [OV] Yeah.

WC: --it's not about all that. Think about it, dude. They're gonna paint us just as bad as they do BLM and--and . . . Antifa [UI], [noise] you know?"--

[REDACTED] [OV] Yeah, [UI] they're--[noise] they're calling, uh . . . ever--like, everyone--

WC: [OV] [noise]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] --I know on social media is saying that these are worse than the BLM riots and everything, I'm like--[pause] "How many rubber bullets were--were shot?--

WC: [OV] [noise]

[REDACTED] --how many people were arrested?--[UI]"

WC: [OV] Nah, one guy wh--uh--wh--uh--some people [noise] got really hurt, I don't know if that lady died, but they shot a lady in the neck.

[REDACTED] She did.

WC: Yeah. And then uh--

[REDACTED] [OV] She did die.

WC: --they were thr--they were throwing uh--uh, concussion grenades right at us--  
[pause] one went off and blew a dude's cheek half-off.

[noise]

[REDACTED] Oh, my God!

WC: Yeah. [noise]

[REDACTED] But--it was the police doing that [noise]--

WC: [OV] Yeah!

[REDACTED] --because nobody went--

WC: [OV] Yeah!

[REDACTED] --there to riot--

WC: [OV] Yeah. We didn't--

[REDACTED] [OV]--they went--

WC: [OV] I--I--I fought one--

[REDACTED] [OV]--[UI]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

WC: --I fought one cop--actually, we were on the cops' side, like a lot of guys were trying to get crazy with the cops and we--like, stood in between them, we're like, "No!" You know?--

[REDACTED] [OV] Yeah.

WC: "Hey, we're not fighting cops, we're not doing this and that--" you know? I said, we will get by them, but we're not gonna sit there and beat the crap out of them-- and the cops were actually thanking us. You know? Thanking the Proud Boys--

[REDACTED] [OV] Yeah.

WC: --and . . . uhm . . . I only fought one cop, because he was an asshole and he was-- he was on top of a dude and I saw the orange stripe u--uh, sticker on his--helmet and--

[REDACTED] [OV] Mm-hmm.

WC: --I thought he was one of us. He wasn't, he was--he was a dude that was kinda hanging out, but he was like--I think it was a wannabe, he--he said he was from the--uh--

[REDACTED] [OV] Yeah.

WC: [REDACTED] and shit like that, he was there by--all by himself and he said he wanted to hang out with us. We were like, "Well, okay, but"-- you know?

[REDACTED] Yeah.

WC: And we kept correcting him every time, like, somebody would say something, he'd go, "We--" I said, "No, you're not a Proud Boy." And he'd go, "Oh, w--w-- they--

[REDACTED] [OV] Yeah.

WC: --and I--" you know?

[REDACTED] Yeah.

WC: But . . . [noise] o--our membership is gonna explode, people--with people wanting to--[pause]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] Yeah, how did you go about that? Like, how did you--

WC: [OV] you--you look it up online, like, look for the Proud Boys' official website and then uhm . . . you--you look for the--how to join. You know what I mean?  
And then, you gotta--you gotta get in contact with the--with the--uhm . . . uh, Chapter Pre--President in your area, you know what I mean? [REDACTED]

[REDACTED] Uh-huh.

WC: And, uhm, it's like a get-to-know-you thing [noise] like it--it took--

[REDACTED] [OV] Yeah.

WC: --I got fast-tracked in, but it--it still took me about three months. So--some guys, it takes a year--

[REDACTED] [OV] Yeah. [noise] Oh, wow!

WC: Yeah.

[REDACTED] [REDACTED] you were a Proud Boy, [REDACTED] like, "All I've ever seen of them is them, uhm, beating up random black people." And I was like, "That's just not--

WC: [OV] No.

[REDACTED] --what it is at all. No."

WC: No.

[REDACTED] But I was like, "Can you not tell anyone?" [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

WC: [REDACTED]

[REDACTED] --no, [REDACTED] said, "I'm not gonna tell anyone." [REDACTED]  
[REDACTED]

WC: Yeah.

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] [REDACTED]  
[REDACTED]

[pause]

WC: It was crazy. [pause] You know--and--and--like--[pause] it's still not even like quite hitting me just how historic--[pause]

[REDACTED] Yeah--

WC: [OV] This day was. You know what I mean?--

[REDACTED] [OV]--Yeah. Oh, yeah, [UI] they're showing people are still out there.

WC: Oh, yeah, no--th--th--they're--there's still a whole bunch of people in the House. [noise] And I'm like, "Fuck, dude." This is--just ridiculous, 'cause we--we were only 600, but we had all two million people fucking following us . . . over there--

[REDACTED] [OV] Yeah.

WC: --you know what I mean? And--

[REDACTED] [OV] Yeah.

WC: --And . . . it started o--it started off just--[noise] just about like--[noise] eight . . . nine hundred people [noise] or something at first, storming the gate and then people [noise] saw all the ruckus and--and like the--the--flags and stuff going up the . . . steps and every--so, everybody started running from the Washington Monument over, which is about a mile away. [noise] But you could see it--

[REDACTED] [OV] Yeah.

WC: --because it's a clear shot, you know? And it's just--

[REDACTED] [OV] Yeah.

WC: --it was intense.

[REDACTED] That's really cool.

WC: But we all had--I mean, everybody had like--like--I had a [sic] axe handle and a lot of people had, uhm . . . sticks--and nobody hit a cop--[pause] that I'm aware of--

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] [OV] Yeah.

WC: --you know what I mean? Like--

[REDACTED] [OV] Yeah.

WC: --the cops were even jabbing us, [noise] like that--that little girl that wa--was--w-  
with me, the cop was trying to fucking jab her in the eye with like this--

[REDACTED] [OV] Yeah.

WC: --little skinny baton. And I caught it, three times. You know what I mean?

[REDACTED] M-hm--

WC: [OV] And I kept holding her back. And--she was feisty.

[REDACTED] Yeah.

[noise]

WC: I'm not gonna lie, if I was 20 years younger--[noise] you know what I mean? I--  
[laughter]--

[REDACTED] [OV] [laughter]

WC: --and not married--you know?

[REDACTED] Right.

WC: 'cause she w--she was fucking awesome and feisty, but--[pause] her--[UI]--  
honestly, the way I l--I looked at her and her brother, [REDACTED]  
[REDACTED]

[REDACTED] [OV] Yeah.

WC: [REDACTED]

[REDACTED] Yeah.

[pause]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

WC: And they kept gettin'--

[REDACTED] [OV] I didn't know, I was having like, a panic attack there with all those [UI]"--

WC: [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] [REDACTED]

[pause]

WC: [REDACTED]

[REDACTED] Yeah--

WC: [OV] 'cause of Antifa, you know? But--[pause]

[REDACTED] Yeah.

WC: We had Antifa--

[REDACTED] [OV] Was Antifa there?

WC: --oh, [noise] they tried a couple--a couple of 'em tried to like, dox us in the morning, [noise] like taking my picture and stuff like that, and we just started, you know--[noise] told 'em, "Come on over, come on over!" but they--they kept stayin'--standing behind the cops.

[REDACTED] Yeah.

WC: Said, "You want my picture? Come on over, talk to me, I'll give you all my information [noise]" You know what I mean?

KC: Yeah.

[REDACTED] And . . . they wouldn't--[noise] they wouldn't do it.

KC: Well . . . I'm glad you are safe. I was scared, when I--especially when I heard there were shots fired.

[REDACTED] Yeah.

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] So yeah, that lady died.

WC: That sucks. [noise] See, I don't know what she did to get shot, [noise] though, 'cause there were some people--

[REDACTED] [OV] Nothing.

WC: --that were act--there was a couple of people that were acting the fool.

[noise]

[REDACTED] Yeah.

WC: And some of those--those--some of those cops were legitimately scared.

[pause]

[noise]

[REDACTED] Wait, did you--like--did that girl that was with you all day, like, leave when you di--guys did?

WC: Yeah.

[REDACTED] Okay, it wasn't her--

WC: [OV] Cause I told her when we're--No, hell no. [pause] We took ca--we all took care of each other, you know what I mean? Everybody from the KC Chapter--

[REDACTED] [OV] Okay.

WC: --and they were--they were with us, [REDACTED]  
[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

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**In the United States District Court  
for the District of Kansas**

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**United States of America,**  
Plaintiff,

v.

Case No. 21-mj-08023-TJJ

**William Chrestman,**  
Defendant.

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**Detention Memorandum**

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The government asks for detention on three grounds: (1) serious risk of flight, (2) serious risk of obstruction, and (3) danger to the community. We address each in turn. Doc. 1 at 1.

**1. Serious risk of flight.**

The government points to very little in support of its argument that Mr. Chrestman poses a serious risk of flight. It relies instead on circumstances that it believes show “calculated efforts to distance himself from the crimes committed on January 6, 2021.” Doc. 1 at 10. The government does not explain the causal link between “distancing” one’s self from a crime and posing a serious risk of flight.

In any event, that causal link is empirically disproven by the facts of this case. Mr. Chrestman well knew that he was under investigation and may well face charges. He had been contacted by the Kansas City Star as early as January 24th

about his role in the Capitol Hill riot.<sup>1</sup> In a February 4th article, the Star related that multiple sources had identified him as a participant in the riot, and had so notified the FBI.<sup>2</sup> Mr. Chrestman's response was to contact counsel. Despite his looming arrest, the FBI found Mr. Chrestman at his home. Courts considering analogous cases have found evidence that a suspect understood his legal liability but did not flee powerfully contraindicating a finding that the suspect is a risk of flight.<sup>3</sup>

## **2. Serious risk of obstruction.**

We make three points here. First, what is left to obstruct? The government says it has photographic and video evidence of Mr. Chrestman literally committing the charged crimes. Doc. 1 at 8. While we appreciate the government's desire to batten down the hatches concerning tertiary pieces of corroborative evidence, nothing Mr. Chrestman could do now could seriously obstruct this prosecution.

Second, the government relies on its belief that Mr. Chrestman divested himself of firearms at some point between January 6th and his arrest. Doc. 1 at 6. If true,

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<sup>1</sup> Judy Thomas, *Proud Boy from Olathe Led Chants and Wielded Ax Handle Inside Capital at Jan. 6 Riot*, Kansas City Star, February 4, 2021, <https://www.kansascity.com/news/local/article248869704.html> (last visited 02/13/2021).

<sup>2</sup> *Id.*

<sup>3</sup> See *United States v. Hammond*, 204 F.Supp.2d 1157, 1166 (E.D. Wis. 2002) ("One year before his arrest ATF agents advised defendant that he was facing charges, and he did not abscond. This is strong evidence that defendant is not inclined to flee."); *United States v. Patriarca*, 948 F.2d 789, 793 (1st Cir. 1991) ("although Patriarca had known for some time that he was under FBI surveillance, he did not flee."); *United States v. Cruz*, 363 F.Supp.2d 40, 46 (D. Puerto Rico 2005) ("He has traveled abroad countless times during the past years on business or religious matters and always returned. The Court finds it most significant that he has been aware of his current predicament for bank fraud for some time now.")

that’s precisely the kind of responsible behavior this Court should encourage. The government has not alleged that the firearms at issue were instrumentalities of the charged offenses. With knowledge that the FBI might arrest him at this home and search the premises (as the FBI did), removing firearms from the home operated to potentially de-escalate the situation.

Third, the government’s evidence is a far cry from what courts have found constitutes sufficient evidence of a serious risk of obstruction justifying detention. Threatening to kill a witness,<sup>4</sup> injure a witness,<sup>5</sup> or manufacture false evidence<sup>6</sup> is the kind of stuff that gets one detained under 18 U.S.C. § 3142(f)(2)(B). More similar to our facts is *United States v. Demmler*, 523 F.Supp.2d 677 (S.D. Ohio 2007). There, the “Government allege[d] that Demmler talked about enlisting other defendants in the underlying Poulsen case in his and Poulsen's scheme[.]”<sup>7</sup> But whether the defendant “would have followed-up on these musings had he not been arrested, and whether he would do so now, are entirely speculative. It is just as

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<sup>4</sup> *United States v. Fontanes-Olivo*, 937 F.Supp.2d 198, 201 (D. P.R. 2012) (Authorizing detention based on potential obstruction where defendant told witness that “one of ‘his people,’ could ‘get rid of you’ based on a rumor that the UM was cooperating with authorities.”).

<sup>5</sup> *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988) (When “defendant, if released, will attempt to injure or intimidate other prospective witnesses (and if the evidence supports said conclusion) then, too, detention is authorized”).

<sup>6</sup> *United States v. Robertson*, 608 F.Supp.2d 89, 92 (D. D.C. 2009) (“Given the extraordinary lengths that these defendants went to in their efforts to tamper with witnesses and manufacture utterly false, misleading evidence at trial—and in light of their proven success in achieving a hung jury in one trial already—this Court ultimately has no choice but to detain these defendants prior to trial.”).

<sup>7</sup> *Demmler*, 523 F.Supp.2d at 683.

likely, on this record, that Demmler's arrest on federal charges has chastened, rather than emboldened, him.”<sup>8</sup> So too here.

### **3. Danger to the community.**

We see the government’s point here; exhibiting the profound lack of judgment necessary to decide to storm the United States Capitol would often augur poorly for a defendant’s success on pretrial release. But for Mr. Chrestman and the world around him, much has changed. As in *Demmler*, Mr. Chrestman’s arrest on federal charges has chastened, rather than emboldened, him.”<sup>9</sup> We take the § 3142(g) factors in order.

#### **3.1 The nature and circumstances of the offense.**

Mr. Chrestman’s charged offenses are not crimes of violence, violations of § 1591, a federal crime of terrorism, and do not involve a minor victim, controlled substance, firearm, explosive, or destructive device.<sup>10</sup> They are serious. To prefigure how those offenses relate to the likelihood of Mr. Chrestman succeeding on pretrial release, we must start long before January 6.

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<sup>8</sup> *Id.*; See also *United States v. Simon*, 760 F.Supp. 495 (D. V.I. 1990) (Detention inappropriate even when defendant attempted to speak with a juror in his brother’s murder trial; although “conduct is inexcusable, it is a far cry from the venality, corruption and violence of the sort common in organized-crime cases, designed to destroy the integrity of the criminal justice system.”)

<sup>9</sup> *Demmler*, 523 F.Supp.2d at 683.

<sup>10</sup> 18 U.S.C. § 3142(g)(1).

It is an astounding thing to imagine storming the United States Capitol with sticks and flags and bear spray, arrayed against armed and highly trained law enforcement. Only someone who thought they had an official endorsement would even attempt such a thing. And a Proud Boy who had been paying attention would very much believe he did.

They watched as their “pro-America, pro-capitalism and pro-Trump” rhetorical strategy “allowed the Proud Boys to gain entry into the Republican mainstream.”<sup>11</sup> They watched as law enforcement attacked Black Lives Matter and anti-fascism protestors, but escorted Proud Boys and their allies to safety.<sup>12</sup> They watched as their leader, Enrique Tarrio, was named Florida state director of Latinos for Trump.<sup>13</sup> They watched the Trump campaign, “well aware of the organized participation of Proud Boys rallies merging into Trump events. They don’t care.”<sup>14</sup> They watched when then-President Trump, given an opportunity to disavow the Proud Boys, instead told them to “stand back and stand by.”<sup>15</sup> They understood that phrase as “a call to arms and preparedness. It suggests that these

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<sup>11</sup> Brendan O’Connor, The Guardian, *Trump’s Useful Thugs: How the Republican Party Offered a Home to the Proud Boys*, <https://www.theguardian.com/news/2021/jan/21/donald-trump-useful-thugs-proud-boys-far-right-republican-party> (last visited 02/15/2021).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Dr. Kathleen Belew, New York Times, *Why Stand Back and Stand By Should Set Off Alarm Bells*, available at <https://www.nytimes.com/2020/10/02/opinion/trump-proud-boys.html> (last visited 02/15/2021).

groups, who are eager to do violence in any case, have the implicit approval of the state.”<sup>16</sup> Having seen enough, the Proud Boys (and many others who heard the same message)<sup>17</sup> acted on January 6.

Their calculations were wrong. The five weeks since January 6 have broken the fever dream. The Proud Boys are “radioactive now.”<sup>18</sup> Any “air of respectability is gone.”<sup>19</sup> The Proud Boys are in “disarray, as state chapters disavow the group's chairman and leaders bicker in public and in private about what direction to take the Proud Boys in.”<sup>20</sup> Their leader was arrested, then “outed as a longtime FBI informant, a role he has now admitted to.”<sup>21</sup> And not insubstantially, a number of their members have been arrested for their roles in the January 6 attack.

The government says that “[r]eleasing Defendant Chrestman to rejoin [the Proud Boys’] fold and plan their next attack poses a potentially catastrophic risk of danger to the community.” Doc. 1 at 10. We think that’s wrong. The world is a much different place since January 6. The Proud Boys are enfeebled. President Trump is now former president Trump. And Mr. Chrestman has experienced the clarity of

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (“Other groups aligned with the white power movement will certainly interpret Mr. Trump’s message as including them.”)

<sup>18</sup> Will Carless, USA Today, 02/12/2021, available at <https://www.usatoday.com/story/news/nation/2021/02/12/proud-boys-splintering-after-capitol-riot-revelations-leader/6709017002/> (last visited 02/12/2021).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

perspective sometimes imparted by a federal prosecution and associated incarceration.

It may be a small thing, but we're struck by the tone of a conversation that Mr. Chrestman had with a Kansas City Star reporter on January 26. When contacted for comment, Mr. Chrestman did not take the opportunity to glorify the January 6 attack, or to espouse the ideology of the Proud Boys. He replied only, "I appreciate you asking my side, even though I can't comment. Thank you very much. You have a great day, ma'am."

### **3.2 The weight of the evidence.**

Even if the facts are just what the government says, Mr. Chrestman likely has a viable defense. Acting at the behest or permission of federal officials has long been recognized as a defense to criminal charges, regardless of the charged crime's required *mens rea*.<sup>22</sup> If a federal official directs or permits a citizen to perform an act, the federal government cannot punish that act under the Due Process Clause. We discuss the Supreme Court cases establishing this rule in order.

In *Pennsylvania Indus. Chem. Corp.* (PICCO), the government charged a manufacturing corporation with pollution (discharging industrial refuse into a river without a permit) under the Rivers and Harbors Act. 411 U.S. at 658-59. The district court refused to permit PICCO to present evidence at trial that it had relied on longstanding Army Corps of Engineers regulations, and "that it was

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<sup>22</sup> See *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959).

affirmatively misled . . . into believing that the law did not apply in this situation.” *Id.* at 673-74. The Third Circuit reversed, and the Supreme Court affirmed: “[T]o the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.” *Id.* at 674.

In *Cox*, demonstrators were told by “the highest police officials of the city, in the presence of the Sheriff and Mayor” that they could hold a demonstration across the street from a courthouse. 379 U.S. at 571. Defendant Cox was thereafter arrested, prosecuted, and convicted for violating a state anti-picketing statute. The Supreme Court held that “[t]he Due Process Clause does not permit convictions to be obtained under such circumstances.” *Id.* The Court explained that “to sustain appellant’s later conviction for demonstrating where they told him he could ‘would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.” *Id.* (citing *Raley*).

In *Raley*, the Supreme Court reversed the contempt convictions of three witnesses on similar grounds. The witnesses had been told by a state legislative “Un-American Activities Commission” before which they had been summoned that they had a right to rely on their privilege against self-incrimination. This advice was incorrect—state law in fact deprived them of the privilege by immunizing their testimony. The state thereafter prosecuted the witnesses for contempt. On review,

the Supreme Court found “no suggestion that the Commission had any intent to deceive the appellants,” but held nonetheless that affirming the convictions “after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him.” 360 U.S. at 438. Pointing out that the witnesses had been subjected to “active misleading” by “the voice of the State most presently speaking” to them, the Court concluded that “[w]e cannot hold that the Due process clause permits convictions to be obtained under such circumstances.” *Id.* at 439.

We don’t intend to try this case in full on Wednesday. But in evaluating the weight of the evidence, the Court should consider the statement of Senator Mitch McConnell explaining his vote in the impeachment trial.

Fellow Americans beat and bloodied our own police. They stormed the Senate floor. They tried to hunt down the Speaker of the House. They built a gallows and chanted about murdering the Vice President. They did this because they had been fed wild falsehoods by the most powerful man on Earth — because he was angry he'd lost an election.

Former President Trump's actions preceding the riot were a disgraceful dereliction of duty. The House accused the former President of, quote, 'incitement.' That is a specific term from the criminal law. Let me put that to the side for one moment and reiterate something I said weeks ago: There is no question that President Trump is practically and morally responsible for provoking the events of that day. **The people who stormed this building believed they were acting on the wishes and instructions of their President.** (emphasis supplied).

And their having that belief was a foreseeable consequence of the growing crescendo of false statements, conspiracy theories, and reckless hyperbole which the defeated President kept shouting into the largest megaphone on planet Earth. The issue is not only the President's intemperate language on January 6th. It is not just his endorsement of remarks in which an associate urged 'trial by combat.' It was also the entire manufactured atmosphere of looming catastrophe; the increasingly wild myths about a reverse landslide election that was being stolen in some secret coup by our now-President.<sup>23</sup>

The Capitol Hill rioters were actively misled by “the voice of the State most presently speaking”<sup>24</sup>; former President Donald Trump. Trump told the assembled rabble what they must do; they followed his instructions. Then, he ratified their actions, cementing his symbiotic relationship with the rioters.



<sup>23</sup> Remarks of Sen. Mitch McConnell, transcribed at <https://www.cnn.com/2021/02/13/politics/mcconnell-remarks-trump-acquittal/index.html>. (last visited 2/13/2021).

<sup>24</sup> *Raley* at 439.

Convicting “a citizen for exercising a privilege which the State had clearly told him was available to him” violates the Due Process Clause.<sup>25</sup> The former President gave that permission and privilege to the assembled mob on January 6.<sup>26</sup> Trump’s incitement and enablement of this insurrectionary riot weighs heavily against the weight of the evidence prong, because the mob was given explicit permission and encouragement by the former President to do what they did. The American head of state directed a specific action; the Due Process Clause says that those who obeyed him have a viable defense against criminal liability.

### 3.3 History and characteristics of the person.

Mr. Chrestman is an army veteran and union sheet metal worker.<sup>27</sup> A long-time resident of Olathe, Kansas, Mr. Chrestman does not appear to have any

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<sup>25</sup> Cox at 571

<sup>26</sup> <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> (last visited 2/13/2021) (“And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore.”); (“Our country has had enough. We will not take it anymore and that's what this is all about. And to use a favorite term that all of you people really came up with: We will stop the steal.”); (“They're all running around like chickens with their heads cut off with boxes. Nobody knows what the hell is going on. There's never been anything like this. We will not let them silence your voices. We're not going to let it happen, I'm not going to let it happen. (Audience chants: “Fight for Trump.”); (“Democrats attempted the most brazen and outrageous election theft and there's never been anything like this. So pure theft in American history. Everybody knows it.”); (“Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down.”); (“Because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated.”); (“They want to recertify. But the only way that can happen is if Mike Pence agrees to send it back. Mike Pence has to agree to send it back.” (Audience chants: “Send it back.”); (“Make no mistake, this election was stolen from you, from me and from the country.”); (“And fraud breaks up everything, doesn't it? When you catch somebody in a fraud, you're allowed to go by very different rules.”); (“We won in a landslide. This was a landslide. They said it's not American to challenge the election. This the most corrupt election in the history, maybe of the world.”).

<sup>27</sup> See Attachment 1 (employment records).

scoreable criminal history. We are aware of no failure to appear at any court hearing. He has a family that loves him. He does not abuse drugs or alcohol, and does not suffer from any mental health condition. He was not on probation, parole, or any other kind of supervision at the time of the charged offense. He does not have the kind of substantial personal or business relationships in any other jurisdiction that would cause or enable him to seek refuge elsewhere.

### **3.4 Danger to the community.**

We have presented our argument concerning Mr. Chrestman's potential danger to the community in section 3.1.

[T]he burden of persuasion regarding risk-of-flight and danger to the community always remains with the government.”<sup>28</sup> “The government must prove risk of flight by a preponderance of the evidence, and it must prove dangerousness to any other person or to the community by clear and convincing evidence.”<sup>29</sup> Section 3142(g) requires the Court to consider various factors and the “nature and circumstances of the offense charged” and the “weight of the evidence” are but two. The government's motion rests solely on these two factors which as explained above do not support that Mr. Chrestman has any potential to be a danger to the community or will fail to appear at future court appearances. Mr. Chrestman's alleged actions following the January 6<sup>th</sup> event coupled with his history and characteristics all weigh in favor of release. Mr. Chrestman should be

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<sup>28</sup> *United States v. Stricklin*, 932 F.2d 1353, 1354-55 (10th Cir. 1991)

<sup>29</sup> *United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003)

released because he is not a danger to the community, poses no serious risk of flight and no serious risk that he will obstruct or attempt to obstruct justice; or will threaten, injure, or intimidate a prospective witness.

Respectfully submitted,

s/ Kirk C. Redmond

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### **CERTIFICATE OF SERVICE**

I certify that on February 16, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all interested parties.

s/ Kirk C. Redmond

KIRK C. REDMOND, #18914

**In the United States District Court  
for the District of Kansas**

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**United States of America,**  
Plaintiff,

v.

Case No. 21-mj-08023-TJJ

**William Chrestman,**  
Defendant.

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**Memorandum Opposing Stay of Release Order**

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This Court *can* stay its order releasing Mr. Chrestman; the relevant question is whether it *should*.<sup>1</sup> There is a familiar framework, repeatedly approved by the Supreme Court, to resolve stay motions.<sup>2</sup> Application of that framework here leads ineluctably to the conclusion that the government’s motion for stay should be denied.

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<sup>1</sup> D.E. 12 at 2. We recognize that there is currently a motion pending in the District of Columbia to stay Mr. Chrestman’s release and revoke this Court’s release order. D.E. 12, Attachment A. We believe that the government’s motion before the district court suffers from the same defects as the government’s pleading here, as we will explain below.

<sup>2</sup> It’s strange that courts don’t seem to employ the traditional stay framework cases arising under the Bail Reform Act. *But see United States v. McNair*, Not Reported in F.Supp., 2009 WL 10708741 at 1 (E.D. N.C. 2009) (applying traditional stay factors to a requested stay of a conditional release order). In the cases we’ve reviewed in this district, stays seem to be granted automatically, and without challenge. But “a reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review. *Nken v. Holder*, 556 U.S. 418, 427 (2009). The traditional four-factor test for evaluating stays must be employed “except when a statutory purpose to the contrary is evident[.]” *Nken*, 556 U.S. at 433, *citing Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). As the Bail Reform Act says nothing about stays, D.E. 12 at 2, the Court should employ the traditional test in evaluating the government’s motion.

The moving party bears the burden of showing that a stay is appropriate<sup>3</sup>, and must “make out a clear case of hardship or inequity, if there is even a fair possibility that the stay will damage another party.”<sup>4</sup> Stays are disfavored because they operate as “an intrusion into the ordinary processes of administration and judicial review[.]”<sup>5</sup> The “parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.”<sup>6</sup>

The legal principles governing stays “have been distilled into consideration of four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”<sup>7</sup> The “first two factors of the traditional standard are the most critical.”<sup>8</sup> The movant

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<sup>3</sup> *Digital Ally, Inc. v. Enforcement Video, LLC*, Not Reported in F.Supp., 2018 WL 780555 at 1 (D. Kan. 2018), citing *CANVS Corporation v. United States*, 118 Fed.Cl. 587, 591 (2014).

<sup>4</sup> *National Credit Union Administration Board v. RBS Securities, Inc.*, Not Reported in F.Supp., 2013 WL 11332740 at 3 (D. Kan. 2013), citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

<sup>5</sup> *Nken* at 427, citing *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921, 925 (C.A.D.C.1958) (per curiam).

<sup>6</sup> *Nken* at 427.

<sup>7</sup> *Nken* at 434; *In re: Motor Fuel Temperature Sales Practices Litigation*, Not Reported in F.Supp, 2010 WL 11431878 at 1 (D. Kan. 2010), citing *In re Lang*, 414 F.3d 1191, 1201 (10th Cir. 2005).

<sup>8</sup> *Nken* at 434.

must show both a strong likelihood of succeeding on the merits *and* irreparable injury.<sup>9</sup>

### 1. Strong showing of success on the merits

Here, the government must prove the existence of “questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.”<sup>10</sup> But it doesn’t even try; the government’s pleading fails to identify a single error in the Court’s extensive order.<sup>11</sup> When movants prevail on the first factor, it is typically because the court

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<sup>9</sup> *Curry v. Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers) (“It is no doubt true that, absent [a stay], the applicant here will suffer irreparable injury. This fact alone is not sufficient to justify a stay”); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (“[L]ikelihood of success on the merits need not be considered ... if the applicant fails to show irreparable injury from the denial of the stay”); *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers) (“[T]he applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.” quoting *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers)).

<sup>10</sup> *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996), citing 16 Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, *Federal Practice and Procedure* § 3954 (1995 Supp. at 706) (“serious legal question”) and *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981) (“substantial case on the merits when a serious legal question is involved”).

<sup>11</sup> *Securities Investor Protection Corp. v. Blinder, Robinson, & Co.*, 962 F.2d 960, 968 (10th Cir. 1992) (“As a basis for such a stay, the movant was required to show the district court: (1) its strong position on the merits of the appeal”).

committed an obvious legal error.<sup>12</sup> There is none here, and the government's stay motion must be denied as a result.<sup>13</sup>

## 2. Irreparable injury to the government

Irreparable harm must be “certain and immediate, not speculative or theoretical.”<sup>14</sup> Simply “showing some possibility of irreparable injury fails to satisfy the second factor.”<sup>15</sup> In its only nod to advocating irreparable injury, the government inexplicably claims that unless this Court stays its release order, “the issue will be conclusively disposed of without the District Court exercising its authority under 18 U.S.C. § 3145.”<sup>16</sup> The USAO in the District of Columbia has

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<sup>12</sup> Compare *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1096 (10th Cir. 2013) (Stay inappropriate under the likelihood of success prong because “*Citizens United* governs the outcome in this case.”); *F.T.C. v. Mainstream Marketing Services*, 345 F.3d 850, 860-1 (10th Cir. 2003) (Stay appropriate after lengthy analysis of legal merits of First Amendment claim); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (Because of district court’s “legal error”, plaintiff “has demonstrated a substantial likelihood of success on the merits on his First Amendment claim that campaign expenditure limitations are unconstitutional given the Supreme Court's clear statement that such limitations are subject to the exacting scrutiny applicable to limitations on core First Amendment rights of political expression[.]” (internal quotation marks omitted)).

<sup>13</sup> *Coalition of Concerned Citizens to Make Art Smart v. Federal Transit Administration*, 843 F.3d 886, 904 (10th Cir. 2016) (preliminary injunction inappropriate where no legal error established); *Nken* at 434 (“There is substantial overlap between [the stay factors] and the factors governing preliminary injunctions”); *Moore v. Keller*, Not Reported in F.Supp., 2012 WL 2458605 at 2 (E.D. N.C. 2012) (“Respondents assert that the court has erred and that there is therefore a ‘strong likelihood of success on appeal.’ However, in support of this contention, apart from challenging the court's reliance on two thematically related cases from other jurisdictions, respondents mostly offer a restatement of arguments already rejected by the court. Thus, for the reasons stated in the court's order granting-in-part and denying-in-part respondents' motion for summary judgment, the court does not find that respondents have demonstrated a strong likelihood of success on appeal.”).

<sup>14</sup> *In re American Freight System*, 180 B.R. 646, 647 (D. Kan. 1995).

<sup>15</sup> *Nken* at 434-5 (internal citations and quotation marks omitted).

<sup>16</sup> D.E. 12 at 2-3.

already filed an appeal of this Court’s release order. For purposes of this Court’s decision, to show irreparable injury, the government must establish that Mr. Chrestman will endanger the community, flee, or obstruct justice in the few days between now and the time the District Court hears the appeal. The government couldn’t show that Mr. Chrestman was a risk to do any of those things for the entire duration of his pretrial release; it certainly can’t show such risks exist for the short duration before the government’s appeal is heard.

### **3. Injury to Mr. Chrestman.**

Staying the release order would result in Mr. Chrestman serving an additional period of incarceration. That is injury as a matter of law.<sup>17</sup>

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<sup>17</sup> See generally *United States v. Sabillon-Umana*, 772 F.3d 1328, 1335 (10th Cir. 2014) (“we can think of few things that affect an individual’s substantial rights or the public’s perception of the fairness and integrity of the judicial process more than a reasonable probability an individual will linger longer in prison than the law demands only”); *Perez v. Hartley*, Not Reported in F.Supp., 2010 WL 3505062 at 2 (E.D. Cal. 2010) (“continuing Petitioner’s incarceration after a successful habeas petition would not only constitute a substantial injury to Petitioner but also extend the constitutional violation Petitioner has suffered.”); *Mezhbein v. Salazar*, Not Reported in F.Supp., 2008 WL 1908533 at 3 (C.D. Cal. April 27, 2008) (“[a] stay pending appeal will substantially harm Petitioner ... if the stay is granted Petitioner will face a prolonged period of continued incarceration when the Court has already determined that the denial of parole was not supported by the evidence. There can be no doubt that a stay will substantially injure Petitioner”); *Jordan v. Lamanna*, Not Reported in F.Supp., 2020 WL 6647282 at 6 (S.D. N.Y. 2020 (“Because Jordan ‘unquestionably would’ suffer substantial injury from continued detention, the Court finds that this factor weighs against a stay and in favor of release.”); *Miller v. Fleming*, Not Reported in F.Supp., 2006 WL 1030200 at 2 (W.D. Wash. 2006) (“a stay would substantially injure Mr. Miller. He has already spent approximately five years in prison and is now four months into thirty-six months of community custody. Delaying his release while the appeal is pending would likely leave him in custody for a significant portion of the remaining community custody sentence.”); *Spencer v. Scutt*, Not Reported in F.Supp., 2013 WL 5370731 at 5 (E.D. Mich. 2013) (“continued confinement will substantially injure Petitioner.”); *Newman v. Metrish*, 300 Fed.Appx. 342, 344, 2008 WL 4858801 (6th Cir. 2008) (“Newman suffered a continuing injury while incarcerated.”).

**4. The public interest.**

The Court has already explicitly balanced the public interest in its release order, concluding that Mr. Chrestman is not a danger to the community, a flight risk, or a risk to obstruct justice. The government might not like the result, but it does not quibble with the Court's reasoning. The public interest does not support a stay.

**Conclusion**

To obtain a stay, the government must prove both a strong likelihood of success on the merits and irreparable injury in the absence of a stay. Because it fails on both counts, the Court need not analyze the third and fourth factors. If it does, both factors militate against a stay.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 21, 2021, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all interested parties.

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