

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

UNITED STATES OF AMERICA,

v.

ERIC CHASE TORRENS,

Defendant.

Case No. 21-cr-204-BAH-2

**REPLY MEMORANDUM IN FURTHER SUPPORT OF THE
PRESS COALITION'S APPLICATION FOR ACCESS TO VIDEO EXHIBITS**

The Press Coalition respectfully submits this reply memorandum in further support of its Application for access to video recordings of the riot at the United States Capitol on January 6, 2021, which have been referenced in Government filings and submitted to the Court in this matter. In response to the Coalition's Application, Defendant Eric Chase Torrens has informed the Court that he does not oppose the Press Coalition's Application. Resp. to Press Coalition's Application for Access to Video Exhibits, Dkt. 78. On September 3, 2021, the Government informed the Court that it continues to oppose release of certain video exhibits captured on Capitol surveillance cameras (the "CCTV Videos") on grounds that it "would reveal non-public information, and compromise the security of the United States Capitol and those who work there." *See* United States' Further Explanation of Its Position as to Release of the Video Evidence Re: Eric Chase Torrens Plea at 1, Dkt. 80 ("Gov't's Further Explanation").

In light of the increasing proliferation of public access to Capitol surveillance footage, and no specific articulation of the risk of harm if these particular videos were released, the Court should provide access, without restriction, to these CCTV Videos as well. In the alternative, the Press Coalition respectfully requests that the Court instruct the Government to initially release to

the Coalition versions of the CCTV Videos narrowly redacting any information that poses a substantial likelihood of harm to the security interests in the Capitol building, and file a redaction log to enable the Court to assist the parties with any disputes over the redactions.

BACKGROUND

On August 15, 2021, ahead of a plea agreement hearing requested by the parties, the Court directed the Government “to submit to the Court a report on the length and source(s) of the video evidence described in the Statement of Offense (‘SOF’), which SOF provides the factual basis for the plea and was submitted by the government to the Court,” and to “make such video evidence available for the Court’s review.” Minute Order of Aug. 15, 2021. The Court further directed the parties “to provide their positions . . . whether this video evidence may be made publicly available without restriction.” *Id.*

The Defendant initially objected to public access to all videos, and the Government objected to release of the five CCTV Videos (identified as videos 4, 6, 7, 8, and 9) captured on the Capitol Police’s security cameras. *See* United States’ Report and Position Regarding Public Release of Video Evidence Re: Eric Chase Torrens Plea, Dkt. 67; Def.’s Position on Public Dissemination of Video Discovery Material, Dkt. 68.

At the August 19 plea agreement hearing, the Court stated it had requested that the Government submit the videos because of “accusations” that the Government was “cherry-picking excerpts from videotapes” when submitting exhibits in the Capitol riot prosecutions. *See* Aug. 19, 2021 Hr’g Tr. 27:1-8. The Court also reminded the parties of the “strong presumption in favor of public access to judicial proceedings, including judicial records” and the public interest in the January 6 prosecutions:

At its core, the right of public access to judicial documents serves to provide the transparency of the Court’s decision-making process. And when judicial documents are

originally submitted by the government in connection with a criminal proceeding, that same value, core value, of transparency to the Court's decision-making process also provides important transparency to the decision-making and evaluation of the evidence by federal prosecutors.

So the cases arising from the events of January 6th have drawn much public attention due to the gravity and seriousness of what occurred that day; and despite the fact that the attack of the Capitol was broadcast on television -- not just in the United States, but globally -- and into the homes of millions of Americans, debate and dispute over what really happened that day continues.

In this context, it behooves the government to explain its prosecutorial decisions in how different kinds of conduct are being charged and resolved, and support those decisions with the evidence at hand.

Id. at 29:10-30:5.

Following the docketing of the Press Coalition's Application for access to the Video Exhibits, the Court asked the Government and Defendant to file responses. Defendant Torrens promptly informed the Court that he no longer opposes release of the video exhibits. Resp. to Press Coalition's Application for Access to Video Exhibits, Dkt. 78.

The Government, however, responded that it continues to object to release of the CCTV Videos. The Government relies on the Declaration of Thomas A. DiBiase, General Counsel to the U.S. Capitol Police, which states that under the "mosaic theory," the release of "a significant volume of footage provides a road-map for those who may seek to repeat the events of January 6th." Gov't's Further Explanation at 1-2. The Government also represents that (1) the CCTV Videos "show an entrance into the Capitol building and entry and exit points into and out of the Crypt" and "when combined with other footage from nearby cameras, could be used to track individual rioters moving through the building thereby creating a visual pathway which other bad-actors could use in planning their breach point and pathway for future attacks;" (2) the videos reveal "how law enforcement responded to the attack," and future rioters could piece together "combat and crowd control techniques;" and (3) the cameras "have different

technological capabilities,” meaning some may be pan-tilt-zoom (“PTZ”) cameras whereas some may be fixed cameras, and disclosure of this information would implicate security concerns. *Id.* at 1-3.

ARGUMENT

The Court has already determined the CCTV videos are judicial records subject to a “strong presumption in favor of public access to judicial proceedings, including judicial records.” Aug. 19 Hr’g Tr. 29:10-30:5. As judicial records, a First Amendment and common-law right of access applies. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 3 (1986) (recognizing First Amendment right of access); *Leopold v. United States*, 964 F.3d 1121 (D.C. Cir. 2020) (releasing judicial records based on common-law right of access); *see also United States v. Jackson*, 2021 U.S. Dist. LEXIS 49841, at *16-22 (D.D.C. Mar. 17, 2021) (ordering release of video exhibits submitted at a detention hearing in another Capitol riot case after concluding they are judicial records subject to the “strong presumption in favor of public access” under the common law and applying the six-factor test articulated in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980)¹); *In re Application for Access to Certain Sealed Video Exhibits*, 2021 U.S. Dist. LEXIS 122124, *11-15 (D.D.C. June 30, 2021) (same). The Government has not met its burden to overcome this presumption on the record here.

A. The Government’s position here contradicts its position in other riot cases.

As the Court noted in its August 16 Minute Order, by objecting to release of the CCTV Videos, the Government contradicts the position it has taken in at least six other pending Capitol

¹ Those factors are: (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. *Hubbard*, 650 F.2d at 317-22.

riot prosecutions, where it has chosen not to contest the release of Capitol surveillance footage. *See, e.g.*, Minute Order of July 2, 2021, *In re Application for Access to Certain Sealed Video Exhibits*, 21-mc-74-EGS (ordering release of CCTV video exhibits shown in *United States v. Cua*, 21-cr-107-RDM-1, after the Government indicated that “it and Mr. Cua are in agreement that the video . . . can be released”); Minute Order of June 19, 2021, *United States v. Morss*, 21-cr-40-TNM-5 (ordering release of videos, including four clips of CCTV footage, after “neither the government nor the defense objects to the release”); Minute Order of June 23, 2021, *United States v. Owens*, 21-cr-286-BAH (ordering release of video exhibits, including two CCTV video clips, to the Press Coalition based on the parties’ consent); Minute Order of June 24, 2021, *In re Application of Press Coalition for Certain Sealed Video Exhibits*, 21-mc-85-CRC (ordering release of four video compilations shown to the court in *United States v. Egtvedt*, 21-cr-177, which included CCTV footage, after “both the government and the defendant have indicated their consent to the release”); *Jackson*, 2021 U.S. Dist. LEXIS 49841, at *2 (noting the Government took no position on a Press Coalition member’s request for release of Capitol surveillance videos shown at a detention hearing); United States’ Second Supp. Resp. to Expedited Mot. for Public Access to Certain Sealed Video Exhibits, *In re Application of Press Coalition for Certain Sealed Video Exhibits*, 21-mc-34-TFH, Dkt. 8 (withdrawing objection to release of Capitol surveillance videos shown to the court in *United States v. Tanios*, 21-cr-222-TFH-2).

Additionally, during the House impeachment proceedings, fourteen different CCTV video clips were shown alongside a graphic depicting the rioters’ movements through the Capitol building. *See full video of how insurrection at Capitol unfolded*, CNN (Feb. 10, 2021), <https://www.cnn.com/videos/politics/2021/02/10/security-footage-capitol-riot-plaskett-timeline->

[impeachment-trial-two-vpx.cnn](https://www.c-span.org/video/?c4945108/impeachment-trial-shown-video-assault-house-senate-chambers-shooting-ashli-babbitt) (Capitol security video shown at 12:30, 17:30, 21:40, 22:50, 33:40, 34:34 during President Trump’s second impeachment trial); *Impeachment Trial Shown Video of Assault of House and Senate Chambers and Shooting of Ashli Babbitt*, CSPAN (Feb. 10, 2021), <https://www.c-span.org/video/?c4945108/impeachment-trial-shown-video-assault-house-senate-chambers-shooting-ashli-babbitt> (Capitol security video shown at 1:20, 4:40, 8:05, 11:20, 12:40, 14:40, 16:30, 18:40).

Through releases pursuant to Coalition member requests, as well as video shown during the impeachment proceedings, a total of 28 CCTV video clips depicting the Capitol riots have been released. The clips appear to have been captured from 21 different CCTV cameras, and 18 of these CCTV cameras capture the Capitol interior. *See, e.g., Video Evidence Shown in the Capitol Insurrection Criminal Cases*, ProPublica (July 27, 2021), <https://projects.propublica.org/jan-6-video-evidence/> (compiling videos provided to the Press Coalition, thirteen of which are CCTV video clips);² *News4 Obtains Video of Alleged Baseball Bat Attack at US Capitol Insurrection*, NBCWashington (Mar. 18, 2021) <https://www.nbcwashington.com/news/local/news4-obtains-video-of-alleged-baseball-bat-attack-at-us-capitol-insurrection/2611519/> (CCTV footage shown at 1:06).

² Those CCTV videos are “IMG_4100.mov” under “USA v. Anderson;” “Detention Ex 4 Cua.mp4” under “USA v. Cua;” “BWC and CCTV of Incident.mp4” under “USA v. Egtvedt” (including two CCTV video clips); “Exhibit H- Par 21- 22.mp4,” “Exhibit J- Par 25-26.mp4,” “Exhibit L-Par 27-28.mp4” and “Exhibit N- Par 31-34.mp4” under “USA v. Morss;” “Exhibit 3 - Rotunda doors.mp4” and “Exhibit 4 - Rotunda doors.mp4” under “USA v. Owens;” “Exhibit 11 - Video Upper Terrace West-1.mp4” and “Exhibit 12 - Video Upper Terrace West-2.mp4” under “USA v. Tanios;” and “Ex. 5 - USCP - Lower West Terrace - 16.48.38.mp4” under “USA v. Whitton.”

B. The Government's rationale for secrecy does not withstand scrutiny.

Because the First Amendment right of access applies to the CCTV Videos, they must be released because the Government has not shown that sealing them “is essential to preserve higher values and is narrowly tailored to serve that interest.” *Dhiab v. Trump*, 852 F.3d 1087, 1102 (D.C. Cir. 2017) (Williams, J., concurring) (quoting *Press-Enter. Co.*, 478 U.S. at 9). The common-law right of access similarly creates a presumption of access to judicial records, which the Government “can rebut only by showing competing interests that compel a conclusion that justice requires maintaining a seal.” *Leopold*, 964 F.3d at 1129.

The Government has not demonstrated that its security concerns defeat the First Amendment and common-law presumptions of access, or that full denial of the Press Coalition's request for access to the CCTV Videos is essential to preserve those interests.

1. The rioters' movements through the Capitol are already trackable.

According to the Government, the CCTV Videos “show an entrance into the Capitol building and entry and exit points into and out of the Crypt” and “when combined with other footage from nearby cameras, could be used to track individual rioters moving through the building thereby creating a visual pathway which other bad-actors could use in planning their breach point and pathway for future attacks.” Gov't's Further Explanation at 1-2. But the rioters' movements through the Capitol are already easily followed through publicly accessible videos online.

For example, in two of the publicly available videos the Government submitted to the Court in response to its August 16 Minute Order, which are 31 minutes and 44 minutes in length, rioters document their journey beginning outside the Capitol, then entering the Capitol building and navigating the hallways, and eventually moving into the Crypt. *See* United States' Report and Position Regarding Public Release of Video Evidence Re: Eric Chase Torrens Plea, No. 2

and 3; see also *Patriots Storm Congress Raw Footage Includes Execution of Ashli Babbitt*, BANNED.video <https://cantcensortruth.com/watch?id=5ff6857e00bac0328da8e888> (rioter enters the Crypt at 14:00); *Extended Footage Charts Rioters Breaking Into Capitol And Battling Police*, YouTube (Jan. 29, 2021), <https://www.youtube.com/watch?v=E-6bRNfx2c> (rioter enters the Crypt at 24:50). Other videos recorded by rioters who entered the Crypt and moved through the Capitol are also available online. See, e.g., *What Parler Saw During the Attack on the Capitol*, Jan, 17, 2021), <https://projects.propublica.org/parler-capitol-videos/> (collecting more than 500 videos posted by the rioters on January 6 on the website Parler, five of which were filmed inside the Crypt).³

Presented with a similar situation in the *Anderson* case, where the defendant challenged the “Highly Sensitive” designation of a CCTV video clip and the Government had previously released footage from the same Capitol security camera, Judge Contreras recently described the DiBiase Declaration as “very, very generalized” and noted that when the Government has already released footage from the same camera, “the already thin reed snaps.” July 28, 2021 Hr’g Tr. at 5:20-6:6, 10:8-21. Judge Contreras thus ordered the Government to remove its “Highly Sensitive” designation in that case so that the defendant could share the CCTV video clip with the press. Order, *United States v. Anderson*, 21-cr-215-RC, Dkt. 37.

³ The videos recorded inside the Crypt are accessible at the following links: <https://projects.propublica.org/parler-capitol-videos/?id=C6CA3XcXO87g>; [https://projects.propublica.org/parler-capitol-videos/?id=c4k8U92UeYTx](https://projects.propublica.org/parler-capitol-videos/?id=c4k8U92UeYTx;); <https://projects.propublica.org/parler-capitol-videos/?id=4wIDySD7tKxo>; and <https://projects.propublica.org/parler-capitol-videos/?id=c5OGpk9fnFPA>. One video recorded by a rioter shows the individual entering the Capitol and walking through a series of hallways and rooms, including the Crypt. See <https://projects.propublica.org/parler-capitol-videos/?id=NYRHCOsbi0bi>.

Indeed, the Government submitted the same DiBiase Declaration four months ago with its initial opposition to release of CCTV video exhibits in the *United States v. Tanios* riot case, and then abandoned its opposition altogether. See Decl. of Thomas A. DiBiase (“DiBiase Decl.”), *In re Application of Press Coalition for Certain Sealed Video Exhibits*, 21-mc-34-TFH, Dkt. 4-1; United States’ Second Supp. Resp. to Expedited Mot. for Public Access to Certain Sealed Video Exhibits, Dkt. 8 (withdrawing objection to release of Capitol surveillance videos). Since then, footage from many different Capitol CCTV cameras has been released to the public. See *supra* Part A.

The D.C. Circuit addressed an analogous situation in *Washington Post v. Robinson*, where the Post sought access to the plea agreement of a district employee who cooperated with an investigation into Mayor Marion Barry. 935 F.2d 282, 283-85 (D.C. Cir. 1991). The government argued that the record should remain sealed because it “was part of an ongoing criminal investigation that might be compromised or that might embarrass innocent parties if publicized,” because “release of the agreement may [have made] it difficult to secure the cooperation of other witnesses,” and because “the safety of [the cooperator] and his family would have been placed at risk.” *Id.* at 291 (citation, internal marks, and alterations omitted). The district court rejected these speculative concerns, reasoning that the substantial amount of already-public information about the investigation and the cooperator’s involvement, including information reported by the press, meant that unsealing the plea agreement “could hardly have posed any additional threat to the ongoing criminal investigation.” *Id.* at 292 (emphasis added).

Because the public already has access to an enormous volume of videos from inside the Capitol, the Government likewise cannot demonstrate that releasing these CCTV Videos would expose any new information about the rioters’ actions on January 6 or otherwise present a further

threat to the security of the Capitol. And any speculative security concern should not outweigh the public's interest in viewing evidence that substantiates the basis for a guilty plea. The Court should therefore order the Government to remove that designation from the CCTV Videos and to make the CCTV Videos available to the press and the public.

2. Videos depicting law enforcement's actions on January 6 are also already publicly accessible.

Scores of hours of footage showing law enforcement officers attempting to control and remove rioters are also available online, which undermines the Government's argument that disclosure of the CCTV Videos would "reveal[] police tactics and capabilities" and enable future rioters to overcome law enforcement in the Capitol building. Gov't's Further Explanation at 3. For example, the Government itself has released video depicting officers becoming overwhelmed by the rioters, as well as officers effectively controlling rioters and taking swift and heroic action to protect Members of Congress. *See, e.g., See full video of how insurrection at Capitol unfolded*, CNN (Feb. 10, 2021), <https://www.cnn.com/videos/politics/2021/02/10/security-footage-capitol-riot-plaskett-timeline-impeachment-trial-two-vpx.cnn> at 14:10 (officer seen spraying rioters breaking into the building then being overwhelmed by the crowd); *id* at 18:20 (Capitol Officer Eugene Goodman seen leading Sen. Mitt Romney to safety in a Capitol hallway); *id* at 22:24 (Officer Goodman seen leading rioters away from the Senate Chambers door and toward other officers); *News4 Obtains Video of Alleged Baseball Bat Attack at US Capitol Insurrection*, NBCWashington (Mar. 18, 2021) <https://www.nbcwashington.com/news/local/news4-obtains-video-of-alleged-baseball-bat-attack-at-us-capitol-insurrection/2611519/>, at 1:06 (rioters seen pushing through a line of officers inside the Capitol); *Maryland man physically confronts police multiple times at Capitol riots, new video shows*, WUSA9 (June 25, 2021) <https://www.wusa9.com/article/news/national/capitol-riots/new->

[capitol-riots-videos-police-confrontation-maryland-man-daniel-egtvedt/65-7fc0c9f0-ee08-4d76-b81f-8bc069949eff](https://www.youtube.com/watch?v=b81f-8bc069949eff) (officers seen pulling Capitol riot defendant Daniel Dean Egtvedt to the ground and forcing him outside the building in video recorded on several different cameras).

Additionally, through applications and motions filed by the news media, including this Coalition, nearly 50 videos captured on officers' body-worn cameras reflecting the officers' movements and points of view have been released.⁴ And, as noted, rioters shared more than 500 videos on the dark web on January 6, and many of these videos depict law enforcement officers attempting to control the crowd.

⁴ See, e.g., Minute Order of August 8, 2021, *United States v. Gieswein*, 21-cr-24-EGS (releasing three BWC videos); Minute Order of July 23, 2021, *United States v. Sabol*, 21-cr-35-EGS-1 (releasing video exhibits, including three BWC videos); Minute Order of July 22, 2021, *United States v. Morss*, 21-cr-00040-TNM-5 (releasing video exhibits, including six BWC videos); Minute Order of July 19, 2021, *In re Application for Access to Certain Sealed Video Exhibits*, 21-mc-86-CJN (releasing four BWC video exhibits from *United States v. McKellop*, 21-cr-268-CJN); Minute Order of July 9, 2021, *United States v. Perkins*, 21-cr-447-CJN-4 (releasing two BWC videos); Minute Order of July 8, 2021, *In re Press Coalition's Motion for Access to Video Exhibits*, No. 21-mc-84-EGS (releasing video exhibits from *United States v. Whitton*, 21-cr-35-EGS-5, including three BWC videos); Minute Order of July 3, 2021, *In re Application for Access to Certain Sealed Video Exhibits*, 21-mc-89-TSC (releasing five video exhibits from *United States v. Foy*, 21-cr-108-TSC-1, including one BWC video); Minute Order of July 6, 2021, *In re Application for Access to Certain Sealed Video Exhibits*, 21-mc-82-ABJ (releasing one BWC video exhibit from *United States v. Sibick*, 21-cr-291-ABJ-1); Minute Order of June 28, 2021, *In re Application for Access to Video Exhibit*, 21-mc-80-TJK; Minute Order of June 25, 2021, *United States v. McHugh*, 21-mj-00436-GMH-1 (releasing nine BWC videos); Minute Order of June 23, 2021, *United States v. Owens*, 21-cr-286-BAH (releasing two BWC videos); Minute Order of June 23, 2021, *United States v. Mock*, 21-mj-469-RMM-1 (releasing two BWC videos); Minute Order of June 21, 2021, *In re Application for Access to Video Exhibits*, 21-mc-76-TJK; Minute Order of June 17, 2021, *In re Application for Access to Certain Sealed Video Exhibits*, 21-mc-77-RCL (releasing four video exhibits submitted in *United States v. Fairlamb*, 21-cr-120-RCL-1, including one BWC video); Minute Order of June 17, 2021, *In re Application for Access to Video Exhibits*, 21-mc-83-APM (releasing BWC video submitted in *United States v. Webster*, 21-cr-208-APM-1); Minute Order of June 16, 2021, *In re Application for Access to Video Exhibits*, 21-mc-79-TNM; see also Mem. Op. and Order, *In re Application for Access to Video Exhibits*, No. 21-mc-75-PLF (ordering release of all video exhibits other than sealed Capitol surveillance videos the Government represented "contain sensitive information about the U.S. Capitol surveillance system").

The Government nevertheless argues disclosure of the CCTV Videos would reveal “how law enforcement responded to the attack” and piece together “combat and crowd control techniques” used inside the Capitol against the rioters. *See* Gov’t’s Further Explanation at 3. This presumably is an allusion to the facts of *Dhiab*, in which the D.C. Circuit denied a request by news outlets for release of video depicting guards at Guantanamo Bay removing a detainee from his cell and force-feeding him because of potential national security harms. 852 F.3d 1087. Specifically, the panel found a potential risk that disclosure “would enable detainees, assisted by outside militants, to develop countermeasures to the guards’ cell-extraction and enteral-feeding techniques.” *Id.* at 1096. But Guantanamo Bay is a high-security prison and other videos of these particular law enforcement techniques were not publicly available, whereas in this case, video of officers interacting with the rioters in the Capitol have been heavily circulated by the Government as well as the rioters. They simply do not depict analogous confidential security measures or techniques as the videos that were ordered sealed in *Dhiab*.

Because the Government cannot demonstrate that disclosure of the CCTV Videos will create any additional threat of disclosure of unknown law enforcement techniques used to diffuse unwelcome crowds inside the Capitol, the argument fails to overcome the First Amendment and common-law presumption of access. *Robinson*, 935 F.2d at 292.

3. The Government has not adequately articulated the likely harm from disclosure of CCTV camera capabilities to justify sealing the CCTV Videos.

Continued withholding of the CCTV Videos is appropriate only if “specific, on the record findings are made” demonstrating that sealing of judicial records is “essential to preserve higher values.” *Dhiab*, 852 F.3d at 1092. Sealing would therefore be appropriate here only if the Government showed a “substantial probability of harm to national security” from release of the CCTV Videos. *Id.* at 1097. The Government has not made that showing. Additionally, in

deciding whether to grant the Government's request, the Court must consider whether there are "reasonable alternatives short of" complete denial of access to these judicial records. *Press-Enterprise Co.*, 478 U.S. at 14; *Robinson*, 935 F.2d 282, 283-85; *see also Jackson*, 2021 U.S. Dist. LEXIS 49841, at *23 n.4 (in granting access to Capitol riot video exhibits based on the common law right of access, rejecting a potential argument because "alternative remedies exist"). The Government has not provided enough information for the Court to make such a finding.

First, the Government has not provided specific information about the national security risks in disclosing these CCTV Videos. The Government represents that "different cameras have different technological capabilities" and that "cameras have the ability to pan, tilt and zoom." Gov't's Further Explanation at 1. Nowhere does the Government represent that these CCTV cameras have those capabilities. Additionally, the Press Coalition attaches to this reply the Declaration of media attorney and photojournalist Mickey H. Osterreicher, who has more than forty years' experience working with camera technologies and attests to the commonplace nature of the types of cameras the Government describes. According to Mr. Osterricher, "PTZ capabilities are not remarkable or unique technologies for security cameras" and "most CCTV cameras part of a robust security system have these capabilities." Decl. of Mickey H. Osterreicher ¶ 7. To overcome its burden to demonstrate a "substantial probability of harm," the Government must do more than make, at best, a soft suggestion that commonplace technologies may be deployed in the Capitol.

Second, the Government has not demonstrated that a categorical withholding of the CCTV Videos, rather than releasing narrowly redacted footage, is necessary to secure the national security interest. As Mr. Osterreicher explains, if the CCTV Videos are not fixed views

of the scenes in and around the Crypt, the Government can edit out any transitions to different perspectives that reflect a demonstrable security risk, and may also remove the time stamp to avoid disclosing any unique capabilities of a specific camera. Osterreicher Decl. ¶ 8. Likewise, to avoid disclosing the “substantially different quality” of the CCTV Videos, “those videos could be dubbed (copied) in such a way as to make them all appear of the same quality.” *Id.* ¶ 10.

Because the Press Coalition has demonstrated that the Government has not met its burden to withhold any footage, the Government, at the very least, should be ordered to release narrowly redacted images. And for transparency and to establish a record for any further proceedings, the Government should also be ordered to submit a log of the redactions.

CONCLUSION

For the foregoing reasons, the Press Coalition respectfully requests that the Court order the Government to release all of the requested videos, without restriction, within 72 hours. In the alternative, the Coalition respectfully requests that the Government be ordered to release the video footage with narrow redactions and submit a redaction log.

Dated: September 12, 2021

Respectfully submitted,

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DECLARATION OF MICKEY H. OSTERREICHER

I, Mickey H. Osterreicher, have personal knowledge of the following facts and will testify to them, if called to do so:

1. I am an attorney licensed to practice in the state of New York, and I have more than 20 years' experience practicing law with a focus on First Amendment and media law. I have been general counsel to the National Press Photographers Association since 2006 and an attorney at the law firm Finnerty Osterreicher & Abdulla in Buffalo, New York since 2019. Through my law practice, I have become well-versed in how journalists gather the news, including newsgathering through cameras in the courtroom and media access to public proceedings and records.

2. In fact, prior to practicing law, I worked full-time as a staff photographer, videographer and producer at various news outlets. Specifically, I was a staff photographer for the *Buffalo Courier-Express* from 1973 to 1982, and I served as a staff photographer, reporter, editor, and producer for the Buffalo news station WKBW-TV from 1982 to 2004. I have continued to work on freelance still photography and video projects for national news outlets throughout my legal career.

3. In 2015, the Society of Professional Journalists named me as a “Fellow of the Society,” the highest professional honor given by the Society for extraordinary contribution to the profession, and I was inducted into the Buffalo Broadcasters Hall of Fame in 2021 for my visual journalism and legal advocacy on behalf of the profession.

4. Through my work as a professional photojournalist, I have taken, reviewed and edited many videos images captured by all types of cameras, and I am generally familiar with the capabilities of many different types of cameras and lenses. I specifically have experience with pan-tilt-zoom (PTZ) cameras, meaning cameras that may be remotely rotated, tilted, and zoomed in or out, from my decades of work at WKBW-TV. I also have experience reviewing and editing footage captured by security cameras and included in news reports.

5. I have reviewed the Government’s filing titled United States’ Further Explanation of Its Position as to Release of the Video Evidence Re: Eric Chase Torrens Plea submitted on September 3, 2021 in this matter, as well as the Declaration of Thomas A. DiBiase referenced in the Government’s Further Explanation.

6. In its Further Explanation, the Government represents “different cameras have different technological capabilities,” and while “some cameras have the ability to pan, tilt and zoom (‘PTZ’), “other cameras do not have that capability.” *See* United States’ Further Explanation at 1.

7. Based on my experience with security-system videos during my news reporting, PTZ capabilities are not remarkable or unique technologies for security cameras. In fact, most Closed-Circuit Television (CCTV) cameras that are a part of a robust security system have these capabilities and are so common that the Government links to a Wikipedia explanation related to television production in a footnote. *Id.* at 2. PTZ permits security professionals remotely

monitoring the feed from a security system to follow and record individuals and events of interest. Because PTZ capability is widespread and common, it would not disclose sensitive security information for the public to know that CCTV cameras are in service in the heavily monitored Capitol building or how many of the cameras in the Capitol have PTZ capability.

8. Additionally, if the Government has specific concerns about any of the images captured by a PTZ camera in the Capitol, it can avoid disclosing this information by editing out the portions of video showing transitions that might reveal the PTZ capabilities of a particular camera. For example, if the video at one point is panned to the right or left, or tilted up or down, that portion of the video captured while the camera is moving could be deleted. Similarly, a camera's transition as it zooms in or widens out could be deleted so that only images from fixed fields of view are disclosed.

9. Further, based on my review of released Capitol CCTV footage now publicly available, it appears CCTV camera footage by default includes a visible time code and/or camera identifier, and that the Government sometimes removes or otherwise edits the videos so those do not appear on the publicly released footage. The Government may similarly edit the video to remove that visible information in order to avoid disclosure that others may use to determine what time and from which CCTV camera the video was captured.

10. The Government also expressed concerns regarding the “substantially different [] quality” of the videos in question, *Id.* at 3, and that those differences could be used to “gain valuable knowledge about the capabilities of the U.S. Capitol’s CCTV system.” *Id.* Once again, prior to release, those videos could be dubbed (copied) in such a way as to make them all appear of the same quality, thus allaying this concern.

11. I therefore believe, based on my professional experience, that at least portions of the CCTV Videos referenced in the Government's Further Explanation could be disclosed without exposing or compromising sensitive security information.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 12, 2021.


MICKEY OSTERREICHER