UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-3066
(No. 21-CR-53 (CJN))

UNITED STATES OF AMERICA, Appellee,

v.

EDWARD JACOB LANG, Appellant.

APPELLEE'S MEMORANDUM OF LAW AND FACT

Over two-and-a-half hours on January 6, 2021, appellant assaulted seven police officers who were defending the U.S. Capitol. In some assaults, he used a metal baseball bat or a commandeered police riot shield. In others, he punched or kicked. Appellant inflicted significant injury on at least one victim, leaving the officer limping for days. Appellant took a de facto leadership role during the Capitol attack. He repeatedly made his way to the front of the crowd, launched tactical strikes to probe weaknesses in the officers' defenses, encouraged other rioters to commit violence, and shouted down those who urged peace. And in the days that followed, appellant tried to organize regional militias to

stop the presidential inauguration. He bragged about building an "arsenal," telling one follower that because "[t]he First Amendment didn't work, we pull out the Second." Fortunately, appellant was arrested before he could engage in further violence.

Appellant now faces a 13-count indictment, including charges for the seven assaults, for his use of weapons, and for attempting to obstruct certification of the election. The district court's finding that appellant poses a danger to the community is correct, and certainly is not clearly erroneous. And the discovery disputes that appellant seeks to raise are not subject to interlocutory appeal. This Court should affirm the detention order.

BACKGROUND

Procedural History

Appellant was arrested in New York on January 16, 2021 (D.E. 1/16/21).[1] At his initial appearance there on January 19, appellant did

[1] "Memo." refers to appellant's memorandum of law and fact. "ECF" refers to documents filed on the docket below. "D.E." refers to docket entries. "Opp." refers to the government's September 7 opposition to defendant's bail motion (ECF 31). "Ex." refers to exhibits from that opposition. "Tr." refers to the transcript of the September 20 hearing.

not object to detention pending trial, although he indicated he might file a future bail application (Opp. 2). He did the same at his February 9 detention hearing in the District of Columbia (*id.*; D.E. 2/9/21).

The September 15 superseding indictment included 13 charges: Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon, Inflicting Bodily Injury (18 U.S.C. § 111(a)(1), (b)); two counts of Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon (18 U.S.C. § 111(a)(1), (b)); four counts of Assaulting, Resisting, or Impeding Certain Officers, two of which included aider and abettor liability (18 U.S.C. §§ 2, 111(a)(1)); Civil Disorder (18 U.S.C. § 23l(a)(3)); Obstruction of an Official Proceeding, including aider and abettor liability (18 U.S.C. §§ 2, 1512(c)(2)); Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon (18 U.S.C. § 1752(a)(2), (b)(l)(A)); Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon (18 U.S.C. § 1752(a)(4), (b)(l)(A)); Disorderly Conduct in a Capitol Building (40 U.S.C. § 5104(e)(2)(D)); and Act of Physical Violence in the Capitol Grounds or Buildings (40 U.S.C. § 5104(e)(2)(F)) (ECF 36).

Appellant moved for pretrial release on August 23, 2021 (ECF 29). After the government opposed (ECF 31; ECF 34) and appellant replied (ECF 38), the Honorable Carl J. Nichols held a hearing and denied the motion on September 20 (Tr. 70-83; D.E. 9/20/21). Appellant noticed a timely appeal 14 days later (ECF 42).

Appellant's Actions on January 6[2]

While some parts of the U.S. Capitol building had already been breached by 2:40 p.m. on January 6, the police were still protecting the "very prominent" entrance off the second landing of the building's Lower West Terrace, through which the President typically passes during inauguration (Opp. 5-6). That entrance—"the point of one of the more intense and prolonged clashes between protesters and law enforcement at the Capitol on that day" (Opp. 7)—was the site of appellant's crimes. Entering the Capitol there requires walking from the (outdoor) second-story landing up a set of stairs and through an arch and tunnel, passing

[2] This summary comes from the government's opposition, which included a detailed proffer (Opp. 3-23) and dozens of exhibits, including video, photos, and electronic communications (see Ex. A-DD). The Bail Reform Act "permit[s] the overnment to proceed by way of proffer in lieu of presenting live witnesses at a pretrial detention hearing." *United States v. Smith*, 79 F.3d 1208, 1209-10 (D.C. Cir. 1996).

through a series of locked glass doors (Opp. 6). The tunnel and doorways are narrow, at times measuring just ten feet across (*id.*).

At 2:41 p.m., appellant was among the first rioters to enter the tunnel, where officers maintained a line at the second set of glass doors (Opp. 6-7). After rioters broke through both sets of locked doors, they came face to face with the officers (Opp. 7-9). Appellant made his way to the front of the rioters, who were pushing against the column of officers lined up in the tunnel (Opp. 8-9). He yelled to the officers that they were "enemies of the state" (Opp. 9). And he tried to organize the rioters' push forward, directing: "Lock your shields and push." "Get the women out of the way." "If you are not going to fight, move" (*id.*).

Around 2:57 p.m., appellant and another rioter repeatedly slammed a door against the head of Sergeant J.M., who was bent forward in a prone position with his head pressed against the door, trying to hold onto his shield (Opp. 9-10; Tr. 34-35). And at least five times, appellant kicked at Sergeant J.M. while the sergeant was stuck against the door (*id.*).

After pausing outside the tunnel to take a "selfie," appellant returned and joined the rioters' continuing push from farther back (Opp. 11-12). The rioters pushed in unison, calling "heave ho" (Opp. 12). During

these pushes, an officer was violently crushed against the first set of doors (*id.*). Appellant found an abandoned gas mask in the tunnel, which he wore for much of the day (*id.*). Around 3:20 p.m., officers finally pushed the rioters out and retook control of the tunnel (*id.*). Relative peace briefly returned (*id.*).

Half an hour later, however, violent efforts to breach the entrance resumed, led in part by appellant (Opp. 13). At 4:01 p.m., appellant "crowd-surfed" to the front of the police line at the arch (*id.*). From the air, he repeatedly grabbed and punched Detective W.M. (*id.*; ECF 36 at 3), as surveillance video showed (see Exs. P-2, P-4):

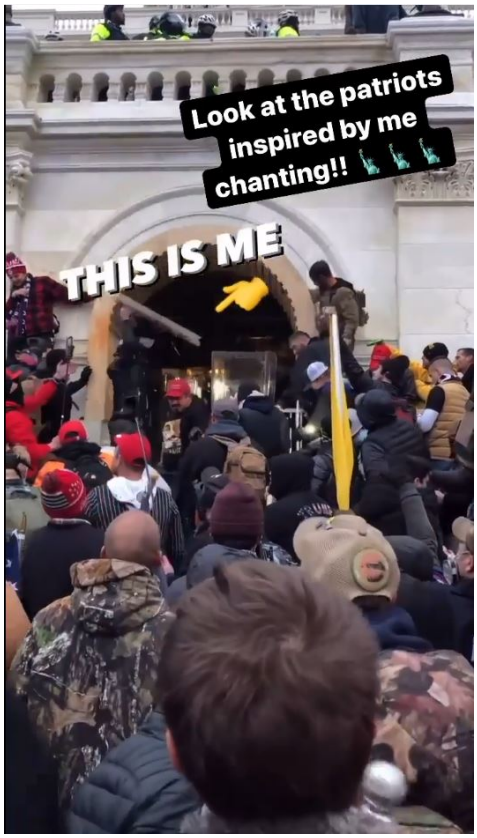
Appellant was still on the front lines ten minutes later, when Detective P.N. fell to the ground (Opp. 13). Appellant repeatedly kicked the detective while he was down (*id.*).

At 4:37 p.m., appellant filmed a video of himself (in gas mask) pointing at the line of officers in the arch, which he posted on social media (Opp. 14; Ex. S-1). He also stole a police riot shield (Opp. 14).

At 4:43 p.m., a woman came to the front of the crowd and tried to stop appellant and others from committing more violence, saying, "You guys are better than that" (Opp. 14). But appellant responded, "This is how our country was founded, woman!" and then began hitting Officer T.C. with the stolen shield (*id.*). In three minutes, appellant hit Officer T.C. with the shield ten times, and hit the officer beside him once (*id.*).

Minutes later, someone else came forward and again tried to stop the violence (Opp. 15). Again, the voice of calm was turned away, and other rioters attacked the police with a metal baseball bat and a police helmet (*id.*). Appellant collected the bounty from these attacks, passing a fallen shield back to other rioters, and trying on the police helmet (*id.*).

At 4:51 and 4:54 p.m., appellant sought to rile up the crowd (and perhaps taunt the officers) by repeatedly raising the stolen shield triumphantly and slamming it down, directly in front of the officers (Opp. 15-16). He later bragged on social media about how his actions "inspired" the mob (see Ex. W-1):



Finally, at 4:55 p.m., appellant got hold of the metal baseball bat that other rioters had used (Opp. 16). For the next five minutes, appellant repeatedly and strategically attacked front-line officers with the bat, striking Officers I.F. and H.S. at least 16 times (see Opp. 16-17):

Appellant's mode of attack with the bat evolved, starting with simple swings, then switching to a more complex approach that varied between

low swings, overhead swings, and thrusts (*id.*). According to Officer H.S., these varying strikes were more effective (Opp. 18). Appellant stopped only after getting shot in the foot with a rubber bullet (Opp. 16).

Appellant's actions directly injured at least one officer. After appellant beat him in the leg with the baseball bat, Officer H.S. had trouble standing (Opp. 18). He limped for days after, and the swelling took a month to subside (*id.*). *See also* Opp. 24-25 (noting possibility of injuries to other officers, given that many officers—including some appellant assaulted—were assaulted multiple times, and it was difficult to attribute injuries to particular rioters); Tr. 37 (same).

Appellant's Subsequent Statements and Efforts to Organize Militias to Stop the Inauguration

Appellant repeatedly boasted about his January 6 crimes on social media. He told followers that while others "slowly funneled in[to]" the building through windows, he and those around him were "trying to get through the main gates" (Opp. 18). He bragged to his mother about taking "metal" to the heads of officers (Opp. 19). And he repeatedly declared the violence on January 6 was not a "protest" or "mob," but "war": "This was an organized unit of patriots trying to take on tyrants."

"This was patriots on a goal, on a mission to have the Capitol building. To stop this presidential election from being stolen so that we at least have one presidential veto left from all of these bullshit laws and restrictions." (Opp. 18-21.)

Appellant's posts also promised more violence. When a woman asked what happens next, appellant replied: "Guns. . . . That's it. One word. The First Amendment didn't work, we pull out the Second." (Opp. 19 (ellipsis in original).) He added: "No one wants to take this and die for our rights, but dying for our rights is the only option that any person with a logical brain sees right now. This is it." (*Id.*) He also told followers: "The tree of liberty is thirsty for the blood of tyrants. God give us strength in the battle ahead." (*Id.*) And "Redcoats this will be the last thing you see before your maker" (*id.*).

In addition, appellant organized group Telegram chats seeking to organize militias, fight the government, and stop the inauguration of President Biden (Opp. 20). Appellant took a leadership role: he divided the militias geographically into "regiments," assigned "regional leaders," instructed participants on how to hide their identities online, and encouraged them to recruit friends and family (Opp. 20-21). He

explained: "If anything goes down where we need to mobilize and show up like the minute men, the Regional Leader messages everyone and we come armed" (Opp. 21). For inspiration, he pointed to the video of himself hoisting the stolen shield in front of the crowd, bragging that he "got the redcoats full gear, gas mask, shield, helmet," and "now the redcoats get to hide and wonder if they are safe at night" (Opp. 22-23).

Appellant also revealed further plans to attack the government, focusing on "making a stand on [January] 17th and 20th" (Opp. 21-22). He told one person: "Can't wait for the 20th. I'm getting a fucking arsenal together." (*Id.*) And two days before his arrest, he posted to the group: "Our best and honestly easiest option right now is to make sure Joe Biden never gets in that office" (*id.*).

The Bond-Review Motion and Ruling

In seeking pretrial release, appellant emphasized an affidavit from Philip Anderson, who said appellant had saved his life by pulling him from a pile of fellow rioters (ECF 29 at 4-5, 7-8, Ex. A). He also argued that some officers had used excessive force (ECF 38 at 4-5). His primary argument for release, however, focused on his detention conditions—alleging that he had been mistreated at the jail and unable to review

discovery or enjoy confidential communications with his attorneys (ECF 29 at 9-19, 23-25).

The government countered that appellant's conduct made clear that his release would pose a danger to the community, rendering pretrial detention mandatory (Opp. 23-28). As to the conditions of confinement, the government was "committed to ensuring the safety all of inmates," but the Bail Reform Act was not the vehicle for litigating the issue (Opp. 32). Many of appellant's objections appeared tied to the jail's COVID-19 precautions (complicated by his decision to decline vaccination), which were the subject of ongoing litigation (Opp. 29-30 & n.5, 32-33). Further, it appeared, the defense had never tried the jail's pandemic procedures for confidential attorney-client communications or reviewing discovery (Opp. 30-31; Tr. 48-54).

The district court denied release, reviewing each 18 U.S.C. § 3142(g) factor (Tr. 70-78). First, the "nature and circumstances of the charged offenses weigh heavily in favor of continued detention" (Tr. 73). In particular, the "brazenness" of appellant's actions, "in full view of officers and cameras," suggest "that he may view the present government as illegitimate and that no amount of monitoring or surveillance or other

conditions of release would sufficiently deter him from future unlawful conduct" (*id.*). Appellant's 13 charges include "some very serious felonies" (Tr. 71). And "even more troubling" than the statutory offenses themselves was "the particular circumstances" of his alleged crimes (*id.*): Appellant "was at times at the very front of a large mob seeking to enter the Capitol" (*id.*). And he "appears to have been one of the leaders" (not a "preplanning leader but just physically the leader") and an "instigator[ ] of the violence" (*id.*).

The district court rejected any suggestion that appellant's actions "were in response to violence on the part of law enforcement personnel," were "planned to be a peaceful First Amendment activity," or occurred in circumstances "peculiar and unlikely to happen again" (Tr. 72). Instead, appellant's conduct "spanned more than two hours and was not in a momentary heat of passion" (*id.*). And in the following days, he showed "very little remorse" and indeed "appeared proud of his actions and publicly boasted about what he did" (*id.*). "The time and place of the charged offenses raise their severity and suggest that [appellant] does pose a threat of future violence" (*id.*).

Second, the weight of the evidence was "very strong" (Tr. 73). "[S]ubstantial evidence" from "social media accounts, surveillance footage, and police-worn body cameras show[s] him repeatedly attacking Capitol Police" "with a metal bat, a riot shield and quite likely with his feet by kicking them" (*id.*).

Third, appellant's history and characteristics were mixed, but "tend[ed] to suggest that it's possible that some condition of release could assure his peacefulness and presence at future proceedings" (Tr. 74, 76). In appellant's favor, he had "a relatively clean record" with one prior conviction for misdemeanor possession of a controlled substance, although "there are some additional pending matters" (Tr. 74). On January 6, appellant was also "looking out for the lives of others," helping fellow rioters who were injured (Tr. 74-75). And while appellant had provided no "substantial evidence" to confirm his alleged ties to the community and local law enforcement, his parents were at the hearing and offered to post bond, suggesting ties that would decrease his risk of flight and future violence (Tr. 75). On the other hand, other aspects of appellant's history and characteristics were "quite to the contrary" (Tr. 75-76). In particular, appellant's "apparent pride in his violent actions on

and around January 6th and his efforts to organize others through Telegram and social media" show a future "risk of committing or advocating violence in favor of his political beliefs" (*id.*).

Fourth, and finally, the danger to the community posed by appellant's release "weigh[ed] in favor of continued detention" (Tr. 76). The court stressed the "direct[ ] attack[s] [on] law enforcement personnel in full view of thousands of people on camera over the course of several hours," appellant's apparent "belief that the United States' current government is illegitimate," and the fact that he "led and encouraged others [o]n the day of the January 6th attack and through his internet-based messages" (Tr. 76-77). Based on the evidence, appellant "appears interested in the possibility of continuing to attack the United States government," and "the reason we don't have to test [that] proposition" "is because he got arrested" (Tr. 77).

The district court also denied without prejudice appellant's objections to his conditions of confinement. It is "important," the court emphasized, for appellant to be able to review discovery and confer with counsel (Tr. 78, 80). Indeed, the jail's pandemic protocols were being litigated before another judge and were the subject of weekly

communications "between a group of judges and the D.C. Jail" (Tr. 80-81; see Tr. 67-69).

But appellant had yet to show that the jail procedures interfered with his rights. As to discovery, the jail had procedures for defendants to review video and other record evidence, but "the defense ha[d] not attempted to use those procedures" (Tr. 78; see Tr. 63-67, 87-90). The issue was thus, "essentially, an unripe dispute" (Tr. 79). As to communications with counsel, it was "not unproblematic" that the jail would require unvaccinated inmates (like appellant) to quarantine for 14 days after meeting with counsel in "a confidential, small-room setting" (Tr. 79-80). Still, the court was "not prepared to intervene at this time," because appellant had not established that this policy was "seriously imped[ing]" his communications with counsel—the policy affected only in-person meetings, counsel was based in New York, and they could communicate confidentially by phone (Tr. 80-81). Finally, as to the allegations of mistreatment, there was not "enough evidence, certainly, to grant that motion" (Tr. 83). For each issue, the court underscored that if appellant found the policies unworkable or gathered further evidence, he should file another motion (Tr. 79-83).

ARGUMENT

A. Standard of Review and Legal Principles

Under the Bail Reform Act, a district court "shall order" pretrial detention if it "finds that no condition or combination or conditions will reasonably assure [the defendant's] appearance . . . and the safety of any other person and the community." 18 U.S.C. § 3142(e). In making that decision, the court considers (1) "the nature and circumstances of the offense charged," (2) "the weight of the evidence," (3) "the history and characteristics" of the defendant and (4) "the nature and seriousness of the danger . . . that would be posed by the [defendant's] release." 18 U.S.C. § 3142(g). The government must prove dangerousness by clear and convincing evidence. 18 U.S.C. § 3142(f).

This Court reviews the district court's factual findings for clear error, including its assessment of the danger presented by a defendant's release. *See United States v. Hale-Cusanelli*, 3 F.4th 449, 454-55 (D.C. Cir. 2021). "This standard of review is highly deferential." *Id.* at 455. This Court reverses only if, "on the entire evidence," it "is 'left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. Munchel*, 991 F.3d 1273, 1282 (D.C. Cir. 2021)).

B. The District Court's Dangerousness Finding Was Not Clearly Erroneous.

The district court stood on firm ground in finding that appellant's release would endanger the community. While expressing some hesitation about detaining January 6 defendants "who cheered on the violence or entered the Capitol after others cleared the way," this Court has emphasized that "those who actually assaulted police officers . . . and those who aided, conspired with, planned, or coordinated such actions, are in a different category of dangerousness." *Munchel*, 991 F.3d at 1284. This Court has repeatedly affirmed the detention of defendants who assaulted officers or coordinated the attack.[3] The district court did not clearly err in finding that appellant's release posed a similar danger.

To begin, appellant "actually assaulted police officers," beating or kicking or punching seven officers in separate incidents over more than

[3] *See, e.g.*, *United States v. Brown*, No. 21-3063, 2021 WL 5537705, at *1 (D.C. Cir. Nov. 17, 2021); *United States v. Gieswein*, No. 21-3052, 2021 WL 5263635, at *1 (D.C. Cir. Oct. 19, 2021); *United States v. Donohoe*, No. 21-3046, 2021 WL 4768375, at *1 (D.C. Cir. Sept. 27, 2021); *United States v. Khater*, 856 F. App'x 322, 323 (D.C. Cir. 2021); *United States v. Sandlin*, 853 F. App'x 682 (D.C. Cir. 2021); *United States v. Biggs*, 851 F. App'x 220 (D.C. Cir. 2021); *United States v. Quaglin*, 851 F. App'x 218, 219 (D.C. Cir. 2021); *United States v. Sibick*, 848 F. App'x 442 (D.C. Cir. 2021); *United States v. Worrell*, 848 F. App'x 5 (D.C. Cir. 2021).

two hours, usually striking them several times. He repeatedly forced his way to the front of the crowd to target victims. And he sought to do them real harm (see Tr. 41)—shoving a door against Sergeant J.M.'s head, punching Detective W.M. from the air, repeatedly kicking Detective P.N. as he lay on the ground, and hitting Officer H.S. with a metal baseball bat in rotating strikes that left the officer limping for days.

Appellant also helped "coordinate" the Lower West Terrace attacks, assuming a de facto leadership role and instigating violence (see Tr. 71, 76-76). He tried to organize the initial push through police lines, telling those who would not "fight" to "move." He shouted down a woman who urged peace. And he riled up the crowd with a stolen police shield, afterwards bragging: "Look at the patriots inspired by me chanting!!" (Ex. W-1). *See Hale-Cusanelli*, 3 F.4th at 451, 456-57 ("[s]ignificant[ ]" that defendant "assumed a leadership role during the incident" by "using voice and hand signals to urge other members of the mob at the Capitol to 'advance'").

Appellant's actions after January 6 raised more red flags. The problem was not merely a lack of remorse (cf. Memo. 17, 19-21), though his pride in his crimes and his view that he was engaged in a "war" did

suggest continuing danger. *See Hale-Cusanelli*, 3 F.4th at 456 (no plain error in finding "a potential danger to the community" based on statements about coming "civil war" and that "the tree of liberty should be refreshed with the blood of patriots and tyrants"). Rather, even after the Capitol attack, appellant continued to organize and advocate armed resistance against those who opposed his politics. His social media posts suggested that he would kill the "Redcoats" and "tyrants" who stood in his way. He acted on these threats, seeking to coordinate militias with regiments, while highlighting his January 6 actions for inspiration. And he injected weapons into the mix, urging followers to turn to guns and the Second Amendment to vindicate their beliefs, and promising that he was putting together an "arsenal" for Inauguration Day. *Cf. United States v. Tanios*, 856 F. App'x 325, 326 (D.C. Cir. 2021) (citing lack of "post-January 6 criminal behavior that would otherwise show him to pose a danger to the community" in reversing pretrial detention).

Appellant's scattered objections essentially ignore the district court's reasoning. He first complains that the court should have given more weight to his "prior history" (Memo. 5-8). But the court agreed that appellant's "relatively clean record" and family ties supported release

(Tr. 74-75). The district court committed no clear error, however, in concluding that the other § 3142(g) factors—all indicating danger—outweighed his marginally favorable history. Similarly, based on appellant's alleged crimes and post–January 6 actions, the district court sufficiently articulated (cf. Memo. 9) why his release would pose "a danger to the community, either because of his own direct action or incitement of others to action against law enforcement personnel, the United States government or others" (Tr. 77-78; see Tr. 42-47, 70-78).

Nor were appellant's political beliefs the "main factor" in his detention (Memo. 5-8). He is in jail because his *actions* demonstrate that he poses a danger to the community, as evidenced by his attacks on at least seven police officers on January 6 and his threats of violence in the days after. Still, because his beliefs motivated his crimes, they properly inform the question of whether he will act upon them again. Given his hostility toward the "Redcoats" and "tyrants" who disagree with him, his insistence that he was taking part in a "war," and his post–January 6 efforts to assemble an "arsenal" and to organize others for further violence, the district court appropriately recognized a continuing "risk of committing or advocating violence in favor of his political beliefs" (Tr.

75-76). *See Hale-Cusanelli*, 3 F.4th at 456-57 (affirming detention of defendant who had not committed violence on January 6 in large part because of his "prior statements about 'committing violence against those who he feels are pitted against him'").

The district court was not required to embrace appellant's alternative proposal of home detention, which would not solve those concerns (cf. Memo. 7, 9, 22). His online planning and coordination after January 6 showed how he could "incite[ ] others to action against law enforcement personnel, the United States government or others" (Tr. 77-78) without leaving his house. And there was little reason to think that appellant would comply with a court order to stay home: his "brazen" actions on January 6 "in full view of officers and cameras," his "disregard for the rule of law," and his "belief that the United States' current government is illegitimate" all supported the court's finding that "no amount of monitoring or surveillance or other conditions of release would sufficiently deter him" (Tr. 73, 77-78).

Appellant's attempts to minimize his actions on January 6 also fail. He emphasizes that he helped fellow rioters in need of aid (see Memo. 2, 4, 9, 11, 18-19). The district court too noted that point in his favor (Tr. 41,

75-76). But helping his *allies* to avoid injury while they brought violence to the Capitol does not erase the threat he poses to the "Redcoats" and "tyrants" that he sees as "enemies of the state."

Similarly unfounded is the suggestion of a viable "defense of others" claim (see Memo. 11, 17-19). The district court specifically rejected the argument that appellant's actions "were in response to violence on the part of law enforcement personnel" (Tr. 72). And appellant has never offered record evidence or case law to support a defense-of-others claim in his case, so the district court's failure to credit it cannot be clearly erroneous. Nor do the facts of this case make the defense viable. Appellant seems to think that if he witnessed excessive force at any point on January 6—a predicate that he has not established—the defense of others would justify his assaults of other officers. But that is not how the defense works. One officer's excessive force is not a license to assault all other police officers. Rather, defense of others allows a person to use "reasonable force" in defense of another "when he reasonably believes that the other is in *immediate danger* of unlawful bodily harm from his adversary and that the use of such force is *necessary to avoid this danger*." 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.5 (3d ed. upd. Oct.

2020) (emphasis added). Appellant has not articulated how he was defending others from immediate danger by shoving a door into the head of a vulnerable sergeant, or repeatedly kicking a detective after he fell to the ground, or using a baseball bat to beat officers standing sentry. In any event, the district court did not clearly err in declining to adopt his self-serving characterization of the offenses.

Finally, equal protection does not require everyone charged with similar crimes to have the same detention status (cf. Memo. 10-11). Rather, "every [detention] decision by the government is highly dependent on the specific facts and circumstances of each case." *Munchel*, 991 F.3d at 1284. While appellant ticks off a list of January 6 defendants granted release, he never explains why those defendants are similarly dangerous. *See id.* (same); *see also* Tr. 43. Instead, appellant's "extreme and repeated violence that day puts him in a category all his own—as very few (if any) other defendants committed as much violence against law enforcement officers" (Opp. 25-26).

C. Appellant's Discovery-Related Complaints Would Not Justify Pretrial Release and Are Not Otherwise Properly Before This Court.

Beyond contesting the district court's dangerousness decision, appellant objects to his conditions of confinement at the D.C. jail, alleging that he is unable to adequately review discovery or consult with counsel (Memo. 12-17). But those trial-preparation issues are irrelevant to detention under the Bail Reform Act. If release would endanger the community, the judge "shall order the detention of the person before trial." 18 U.S.C. § 3142(e). The proposed Federal Bail Reform Act of 2020, H.R. 9065, 116th Cong., has not passed Congress and thus cannot alter the analysis (cf. Memo. 13, 15-16). And even if conditions at the D.C. jail were unconstitutional, the remedy would be transfer to another federal facility—not the release of a dangerous defendant.[4]

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[4] *See, e.g.*, Spencer S. Hsu & Paul Duggan, *Unacceptable Conditions at D.C. Jail Lead to Plan to Transfer About 400 Inmates, Officials Say*, Wash. Post (Nov. 2, 2021), https://www.washingtonpost.com/local/public-safety/dc-jail-inmates-transferred/2021/11/02/b5255388-3be8-11ec-bfad-8283439871ec_story.html (recent inspection by U.S. Marshals Service found unacceptable conditions in one D.C. jail facility, leading to transfer of 400 federal detainees to a federal prison, but conditions in facility housing January 6 defendants were found to be "largely appropriate and consistent with federal prisoner detention standards").

Nor can this Court now resolve his trial-preparation objections separate from pretrial detention (cf. Memo. 14-15). The collateral-order doctrine confers appellate jurisdiction for only a "small class" of prejudgment orders. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The order must be (1) "conclusive," (2) "resolve important questions separate from the merits," and (3) "effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* (quotation omitted). Traditional qualifying criminal-law decisions are "motions to reduce bail, motions to dismiss on double jeopardy grounds, and motions to dismiss under the Speech or Debate Clause." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (citations omitted).

Appellant's discovery disputes fail at least the first and third collateral-order requirements. The district court's ruling was tentative, not "conclusive," finding the discovery complaint unripe and the counsel-communication objection underdeveloped, with promises to reconsider if new information emerges (Tr. 78-83). Further, appellant's disputes about discovery and consultation with counsel are "effectively reviewable" in a postjudgment appeal. *See Mohawk Indus.*, 558 U.S. at 103, 108 (same for

disclosure orders adverse to the attorney-client privilege, noting that "'we have generally denied review of pretrial discovery orders'"); *Flanagan v. United States*, 465 U.S. 259 (1984) (same for pretrial disqualification of defense counsel). They are therefore not properly before this Court.

CONCLUSION

WHEREFORE, the government respectfully requests that the Court affirm the district court's detention order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 27(d)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this motion contains 5,168 words, and therefore complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). This motion has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/
ERIC HANSFORD
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing motion to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, Martin H. Tankleff, on this 17th day of December, 2021.

/s/
ERIC HANSFORD
Assistant United States Attorney