

In the Supreme Court of the United States

KYLE WAGNER, APPLICANT

v.

UNITED STATES OF AMERICA

**RESPONSE IN OPPOSITION TO THE APPLICATION
FOR A STAY OF THE JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

United States v. Wagner, No. 26-cr-20059 (Mar. 25, 2026)

United States Court of Appeals (6th Cir.):

United States v. Wagner, No. 26-1294 (Aug. 12, 2026)

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No. 26A446

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RESPONSE IN OPPOSITION TO THE APPLICATION FOR A STAY OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General respectfully files this response to the application for a stay of the judgment of the United States Court of Appeals for the Sixth Circuit pending the disposition of a petition for a writ of certiorari. Applicant, a promoter of anti-government violence who has been charged with federal cyberstalking and threat offenses, seeks emergency relief based on his own willingness to prolong his pretrial proceedings—and thus his detention—in order to obtain rushed consideration of a standard-of-review issue on which he asserts a four-decade-old circuit disagreement, which this Court has declined to address before, and which has little apparent practical importance to his case or others. That is not an emergency, and relief should be denied.

Applicant is a self-identified member of Antifa based in Minneapolis, Minnesota. After the Department of Homeland Security began an immigration-enforcement operation in the Twin Cities area last winter, applicant engaged in escalating attacks via social media against Immigration and Customs Enforcement (ICE) and its perceived supporters—urging his followers to kill ICE agents and march on a fed-

eral building with firearms, among other measures. To take one of the milder examples, which applicant now portrays as referring to “nonviolence or self-defense,” applicant urged his followers to “[g]o take [ICE agents] f----- masks off and take their f----- guns.” Appl. 7-8 (quoting Pet. App. 170a).¹ Applicant also solicited funds to help him “evade detection by the authorities” and held himself out in a text-message exchange as able to assist with a plot to murder “a former high-ranking government official.” Pet. App. 2a, 5a. His campaign culminated in his “doxx[ing]” of a “pro-ICE” individual by revealing that individual’s personal information—including his and his parents’ addresses—on the Internet. *Id.* at 5a (citation omitted). When he was arrested on charges of violating federal laws prohibiting cyberstalking and transmitting threats, see 18 U.S.C. 875(c), 2261A(2), applicant pushed and spat on the arresting agents and, in his booking photo, made an obscene gesture that he clarified was “for the judge,” Pet. App. 6a (citation omitted).

A magistrate judge ordered applicant detained pending trial in light of his lack of a stable job or housing and his desire to evade law enforcement. See 18 U.S.C. 3142(e)(1) (mandating pretrial detention when “no condition or combination of conditions [of release] will reasonably assure the appearance of the person as required and the safety of any other person and the community”). But the district court, despite acknowledging the government’s “very strong argument” that applicant’s release would threaten the public safety, Pet. App. 143a, revoked applicant’s detention and ordered him released on conditions that would allow him to use the Internet and leave his residence (which could enable him to use the Internet unmonitored) for various purposes. The court of appeals reversed, recognizing that, given applicant’s evident

¹ Citations of “Pet. App.” herein refer to the appendix to applicant’s petition for a writ of certiorari, which was filed on September 18, 2026 (No. 26-391). Citations of “Appl. App.” refer to the appendix to applicant’s stay application.

dangerousness and the inadequacy of the district court's release conditions to protect the public, the correct result under the Bail Reform Act was that he be detained pending trial. In this Court, applicant seeks a stay of the court of appeals' judgment pending the disposition of his recently filed petition for certiorari.

Applicant satisfies none of the requirements for obtaining a stay from this Court. The Court is not likely to grant certiorari in this case. Although applicant asserts a decades-old circuit conflict over the appellate standard of review for bail decisions, the Court has previously declined to review the same purported conflict, see *Gray v. United States*, 143 S. Ct. 492 (2022) (No. 22-5113), and for good reason. All circuits, including the court below, agree that district courts' factual findings about matters like the defendant's dangerousness and flight risk are reviewed with deference, and there appears to be a general consensus that pure legal questions are reviewed de novo. Particularly given the centrality of the deferentially reviewed factual findings, see 18 U.S.C. 3142(g), any disagreement in the courts of appeals is too narrow and abstract to warrant certiorari. Furthermore, even if the question presented in applicant's petition warranted review, this case would be a poor vehicle for resolving it. The court of appeals' decision to reverse the release order was correct regardless of the stated standard of review. And applicant's challenge to his pretrial detention will be moot in January, when his trial is scheduled to take place.

Applicant's claim could well have become moot already, but he has voluntarily delayed his trial multiple times in an admitted (Appl. 32) effort to avoid mootness. Therefore, even if applicant could show a likelihood of certiorari and reversal, his strategic delay would preclude him from showing that the denial of a stay would inflict irreparable harm upon him. A pretrial detainee's self-prolonged detention is not a form of irreparable harm that is cognizable in equity, particularly when the de-

tainee, like applicant, identifies no concrete way in which pretrial detention has hindered his preparation for trial. Finally, even if the stay calculus were close enough to require a weighing of the equities, the strong governmental and public interests in protecting the public and ensuring applicant's appearance by detaining him pending trial would dwarf applicant's interest in release. The application—as well as his alternative motion to expedite his petition for a writ of certiorari—should be denied.

STATEMENT

A. Pretrial Release Under The Bail Reform Act Of 1984

Under the Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. I, 98 Stat. 1976, when a person is arrested for a federal crime, the judicial officer (typically a magistrate judge) “before whom [the] arrested person is brought shall order that such person be released or detained, pending judicial proceedings.” 18 U.S.C. 3141(a). The particulars of pretrial release or detention are governed by 18 U.S.C. 3142. Section 3142(b) requires release on personal recognizance or bond “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” 18 U.S.C. 3142(b). In the latter event, the judicial officer may order the person released subject to conditions (*e.g.*, “remain[ing] in the custody of a designated person,” “maintain[ing] employment”) that “will reasonably assure the appearance of the person as required and the safety of any other person and the community.” 18 U.S.C. 3142(c)(1)(B).

But “[i]f, after a hearing * * * , the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.” 18 U.S.C. 3142(e)(1); see 18

U.S.C. 3142(f) (“The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.”). In undertaking that inquiry, the judicial officer is required to consider “the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of [18 U.S.C.] 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.

18 U.S.C. 3142(g).

A defendant who is ordered detained pending trial is “committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal,” and he must “be afforded reasonable opportunity for private consultation with counsel.” 18 U.S.C. 3142(i)(2) and (3). A magistrate judge’s order granting release or ordering detention under the Bail Reform Act is subject to review by the district court and then appeal to the court of appeals, by either the government or the defendant. See 18 U.S.C. 3145(c); *United States v. Delker*, 757 F.2d 1390, 1393

(3d Cir. 1985) (“[E]ither party is entitled to prompt appellate review of the order of the district court.”).

B. Factual Background

Applicant “is a self-professed member of Antifa—short for anti-fascist—based in Minneapolis, Minnesota.” Pet. App. 3a (footnote omitted). He “has stated that he’s willing to die in what ‘he views as’ an ‘ideological battle’ against ‘violent fascist government actions and [their] supporters.’” *Ibid.* (brackets and citation omitted). He “has failed to appear for state criminal proceedings multiple times, was once ‘listed as an absconder’ by a state court, and had an active warrant for his arrest in Iowa” at the time this case arose. *Id.* at 22a (brackets and citation omitted); see *id.* at 52a-53a (Bloomekatz, J., dissenting).

“Around January 2026, [applicant] undertook a series of escalating steps to oppose Immigration and Customs Enforcement’s actions in Minneapolis and broadcast his efforts to a social-media following.” Pet. App. 3a. “As the month progressed, [applicant’s] social-media posts transitioned into direct calls for violence against federal agents and their supporters.” *Ibid.* For example, he “proclaimed that the situation in Minneapolis was ‘kill or be killed’”; “encouraged his online followers to ‘hunt’ ICE by ‘sacrificing’ their ‘vehicles’”; “urged his followers to ‘f**king fight’ ICE and ‘put hands’ on law-enforcement agents and ‘take their f**king guns’”; “suggested that he and his followers should ‘have a little f**king fun’ by ‘identifying every single’ ICE agent, ‘at the barrel of a gun’ if necessary”; “lamented that protestors had yet to ‘march on f**king Whipple’—the federal building in Minneapolis—‘with guns’”; and stated “that he was ‘not talking about peaceful protests anymore’” and “that Minneapolis was ‘where ICE has come to die.’” *Id.* at 3a-4a (brackets and citations omitted).

Applicant “specifically requested funds” from his social-media followers “to

help him ‘evade’ detection by law enforcement,” and he received “between \$10,000 and \$15,000.” Pet. App. 4a-5a (citation omitted). “After [applicant] posted calls for ‘boots on the ground’ to a local intersection near ICE agents and urged his followers to ‘get your f**king guns and stop these f**king people,’ Instagram deleted [applicant’s] account.” *Id.* at 5a (brackets and citation omitted). “Yet he quickly resurfaced with a different account—employing the username ‘@antifa.kaos’—and a new series of online postings.” *Ibid.* (citation omitted).

“On January 29, 2026, [applicant] allegedly ‘doxxed’ J.S., ‘a pro-ICE individual,’ by publishing” on social media “what he claimed was J.S.’s name, phone number, birth month and year, and address,” as well as “what he thought was the address and phone number of J.S.’s parents.” Pet. App. 5a-6a (citation omitted). Applicant “described J.S. as a ‘bb nazi boy’ and said ‘we can all knock on strangers doors . . . See you soon kiddo—stay safe out here.’” *Id.* at 6a (citation omitted).

Two days before his eventual arrest, in a conversation on the messaging app Signal, applicant “pitched himself as able to assist in soliciting a murder.” Pet. App. 15a; see *id.* at 14a. Another Signal user “allegedly contacted [applicant] with a request to help ‘kill’ a man named J.P., a former high-ranking government official.” *Id.* at 5a (citation omitted). Applicant responded “in the chat that ‘we do stuff, me and my family of friends’ and ‘we like to know about people who deserve consequences,’” and “then asked for ‘credible verifiable information’ that he could pass onto his ‘team’ so it could ‘assess the situation.’” *Ibid.* (brackets and citations omitted).

C. Procedural History

The government charged applicant by complaint in the Eastern District of Michigan with one count of cyberstalking, in violation of 18 U.S.C. 2261A(2), and one count of transmitting interstate threats, in violation of 18 U.S.C. 875(c), both of which

related to his conduct with respect to J.S. Pet. App. 6a-7a. “During his arrest, [applicant] allegedly began ‘pushing’ agents and ‘spitting on them’ while stating that he would ‘beat’ them,” and “also told the arresting agents ‘don’t let me out.’” *Id.* at 6a (brackets and citation omitted). “During his booking photo, [applicant] flashed two middle fingers at the camera” and said, ““This is for the judge.”” *Ibid.* (citation omitted).

1. “Following a detention hearing, a magistrate judge in Minnesota ordered [applicant] detained pretrial under the Bail Reform Act.” Pet. App. 6a. The magistrate judge found “that [applicant] was ‘a danger to the community’ given his ‘implied threat to injure, harass or intimidate J.S. and his parents’ and his ‘voluminous’ social-media posts ‘encouraging his supporters to join him in obstructing, impeding, and assaulting officers.’” *Ibid.* (brackets and citation omitted). The magistrate judge also cited applicant’s “‘lack of job security,’ ‘admitted lack of stable housing,’ and expressed ‘desire to “evade” law enforcement,’” which “rendered him a flight risk.” *Ibid.* (citation omitted).

Applicant was transferred to the Eastern District of Michigan, where a grand jury indicted him for cyberstalking and interstate transmission of threats. Pet. App. 7a. He appealed the magistrate judge’s detention order to the district court, which held a hearing and then revoked the detention order. *Ibid.* The court acknowledged the “very serious” nature of “[c]yberstalking and threats on the internet,” associating that conduct with both “bullying * * * among little and high school students” and “people actually using it to be involved with serious crimes, including up to physically harming people in Federal Court.” *Id.* at 145a. And the court recognized that “the Government made a very strong argument that there was some protection of the public involved.” *Id.* at 143a. “[U]nfortunately,” the court continued, “in our nation at

this time, I think people are viewing the protection of the public kind of like a two-way street. It depends on what side of the street you're on whether or not an individual might feel they are protected or in need of protection." *Ibid.* And it stated that it had "looked at the entire case in regard to whether or not I could address that with conditions that might protect everyone." *Ibid.*

The district court ordered applicant to be released "to his mother's home in Minnesota subject to a series of conditions," including that he "submit to GPS monitoring"; "refrain from posting on social media"; "forgo accessing the internet with anything other than two approved devices (one phone and one computer)"; "not engage in assaultive, threatening, or harassing behavior or statements"; and remain at home "except for employment; education; religious services; medical, substance use or mental health treatment; attorney visits; court appearances; court-ordered obligations; or essential activities approved in advance by the court or pretrial services office or supervising officer." Pet. App. 7a, 71a (brackets and citation omitted).

2. The government appealed the district court's release order to the court of appeals and sought an emergency stay. Pet. App. 7a. A divided panel of the court of appeals granted the stay, *ibid.*, and subsequently reversed the release order, *id.* at 1a-64a.²

a. The court of appeals found that the Bail Reform Act "mandates [applicant's] pretrial detention" because "the Government has met its burden of proving [his] dangerousness" and "no condition or combination of conditions will reasonably assure the safety of J.S. and the community." Pet. App. 8a. As to the appellate stand-

² After issuance of the stay, the government "obtained a second grand jury indictment against [applicant] in the District of Minnesota" charging him "and several others with conspiracy to impede or injure a federal officer, solicitation to commit a crime of violence, and transmitting interstate threats." Pet. App. 7a-8a; see Indictment, *United States v. Sant*, No. 26-cr-115 (June 11, 2026).

ard of review of a pretrial release order, the court stated “that ‘mixed questions of law and fact’ and ‘legal conclusions,’” and “the ‘ultimate question whether pretrial detention is warranted,’” are subject to “‘de novo consideration.’” *Id.* at 9a. The court made clear, however, that “the district court’s factual findings” are reviewed “for clear error.” *Ibid.* (citations omitted). The court then considered the district court’s assessment of the factors set forth in the Bail Reform Act: “the nature and circumstances of the offense charged,” “the weight of the evidence against the person,” “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release,” and “the history and characteristics of the person.” 18 U.S.C. 3142(g).

First, the court of appeals observed that “[n]either [applicant] nor the dissent disputes that the charged offenses are serious.” Pet. App. 12a. The court described as “legally unsound” the suggestion “that the charged offenses could sweep in minor conduct like schoolyard ‘bullying.’” *Id.* at 13a (citation omitted). Second, the court observed that the weight of the evidence was strong, explaining that applicant’s numerous “threatening statements ‘weigh strongly in favor of dangerousness’” and rejecting applicant’s effort “to cast” those statements “as empty bravado” “[n]ow that [the] threats have come under legal scrutiny.” *Id.* at 14a, 17a (brackets and citation omitted). Third, the court observed that applicant’s release would pose a serious danger to the community in light of the “well-documented harms” of “Internet-based threats like those [applicant] is charged with making” and applicant’s “willingness to entertain targeted threats on specific individuals” like J.P. *Id.* at 19a. The court also explained that the “district court’s apparent attempt to draw equivalency between [applicant’s] threats and the actions of federal law enforcement” was legally erroneous because “[t]he Bail Reform Act focuses on the danger the *defendant* poses,” and

“[t]he district court’s views on the Executive Branch’s immigration policy have no bearing on that inquiry.” *Id.* at 19a-20a. And fourth, the court acknowledged that applicant’s “history and characteristics” weighed “‘slightly against dangerousness,’ as [applicant] has no violent criminal history,” but observed that “the Government ‘ha[d] met its burden’ of ‘proving dangerousness by clear and convincing evidence’” even without evidence of “a violent criminal history.” *Id.* at 20a (brackets and citation omitted).

The court of appeals further agreed with the government that “no condition or combination of conditions” short of detention would “‘reasonably assure’ the safety of J.S. and the community.” Pet. App. 21a (citation omitted). The court observed that the district court’s “conditions of release mostly ‘hinge on’ [applicant’s] ‘good faith compliance,’” while applicant’s “actions around the time of his arrest” and “pattern of failing to appear for prior judicial proceedings” in the past “point[ed] toward ‘an unacceptably high risk that’ [he] will disregard the conditions.” *Id.* at 21a-22a (citations omitted). The court of appeals also observed that “the online nature of [applicant’s] conduct further diminishe[d] the effectiveness of the district court’s conditions of release,” because, among other things, the “release order, which authorizes [applicant] to leave home confinement for ‘employment,’ ‘education,’ and various other reasons, would provide [him] with ample opportunities to ‘access the internet’ via unmonitored devices.” *Id.* at 22a (citations omitted).

b. Judge Bloomekatz dissented. Pet. App. 27a-64a. She agreed with the majority that “[t]he district court’s factual findings are reviewable only for clear error” and “its legal conclusions are reviewed de novo,” *id.* at 39a, and further stated that “the district court’s application of the facts to the pretrial detention standard” should be reviewed “with ‘due deference,’” *id.* at 43a (citation omitted). On the merits,

Judge Bloomekatz viewed applicant’s conduct as less serious and less indicative of dangerousness than did the majority. See *id.* at 43a-58a. For example, she understood applicant’s statement about his followers identifying ICE agents “at the barrel of a gun” as referring to the followers’ being “threatened at the ‘barrel of a gun,’” *id.* at 49a (citation omitted), and viewed applicant’s Signal exchange about murdering J.P. to weigh only “slightly in favor of a finding of dangerousness,” *id.* at 51a. Judge Bloomekatz also considered the district court’s conditions of release sufficient to ensure applicant’s appearance and to protect the community. *Id.* at 58a-64a.

3. On September 18, 2026, 37 days after the court of appeals’ decision, applicant filed a petition for a writ of certiorari (No. 26-391). Nearly a week after that, on September 24, he filed a motion in the court of appeals to recall the court of appeals’ mandate and stay its judgment pending the disposition of the certiorari petition. Appl. App. 1a. Judge Hermandorfer—the author of the majority opinion, to whom the motion was referred under circuit procedure—denied the motion. *Id.* at 1a-7a. In doing so, she highlighted applicant’s failure to “seek to justify his weekslong failure to seek any relief prior to the mandate’s issuance.” *Id.* at 3a-4a. And she observed that petitioner’s request for a stay did not “appear compelling on its own terms.” *Id.* at 4a.

Judge Hermandorfer explained that while applicant’s “cert petition principally rests the case for Supreme Court intervention on the presence of a circuit split over which standard of review governs district courts’ detention decisions under the Bail Reform Act,” she asserted conflict was decades-old and not “as lopsided or stark as [applicant’s] petition contends.” Appl. App. 5a. She further rejected applicant’s depiction of “the standard of review as outcome determinative” in this case, and explained that the “core objection” of Judge Bloomekatz’s panel dissent “boil[ed] down

to a factual disagreement that ‘does not implicate the circuit split’ asserted.” *Id.* at 6a (quoting *BP P.L.C. v. Mayor & City Council*, 593 U.S. 230, 246 (2021)).

In addition, Judge Hermandorfer noted “problems with [applicant’s] particular vehicle” for this Court’s review, including “the odds that his pretrial-detention claim will soon become moot” because “trial is currently set to begin in early November 2026.” Appl. App. 3a, 6a. She also indicated that the balance of equities favored the government, since it “appears that [applicant] has offered to voluntarily extend his detention to insulate his petition from mootness” and “law enforcement and public safety interests” weighed in favor of applicant’s detention pending trial. *Id.* at 6a (citation omitted).

4. On September 29, 2026, the day after his request to recall the mandate was denied, applicant filed his application for a stay pending the disposition of his petition for a writ a certiorari, along with an alternative motion to expedite consideration of the petition, in this Court. The motion noted that “[t]he parties have stipulated to a further 60-day extension on th[e] start date” of applicant’s trial but that “[a]t the conclusion of that trial, the Sixth Circuit’s pretrial detention order will have run its course” and the pretrial detention issue will “become moot.” Mot. 3. Applicant therefore urged the Court to “grant certiorari and decide the question presented expeditiously, before the trial in [his] case concludes.” *Ibid.* On September 30, the district court granted the 60-day extension, scheduling applicant’s trial to begin on January 12, 2027.

ARGUMENT

The application for a stay should be denied. To obtain a stay pending the disposition of a petition for a writ of certiorari, “an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant

certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In “close cases,” the Court will balance the equities and weigh the relative harms. *Ibid.* Applicant fails to make the requisite showings.

I. APPLICANT IS UNLIKELY TO SUCCEED IN OBTAINING CERTIORARI AND REVERSAL OF THE JUDGMENT BELOW

This Court is unlikely to grant applicant’s pending petition for certiorari, much less reverse the Sixth Circuit’s judgment. See *Hollingsworth*, 558 U.S. at 190. Applicant contends that certiorari is warranted to resolve a decades-old disagreement in the courts of appeals about the appellate standard of review for detention decisions, but the asserted conflict is overstated and amorphous—indeed, this Court denied a petition for certiorari raising the same conflict in 2022. See *Gray v. United States*, 143 S. Ct. 492 (2022) (No. 22-5113). Even if the posited conflict did warrant this Court’s intervention, this case would be a poor vehicle for resolving the question presented.

A. The Asserted Circuit Conflict Does Not Warrant This Court’s Review

Applicant’s certiorari petition (at i) presents the question “[w]hether an appellate court should review a district court’s order granting or denying pretrial release de novo * * * or whether the appellate court owes some deference to the district court’s determination.” He contends (Appl. 14-20) that this Court should grant review to resolve a three-way conflict among the circuits on that question. In his view, the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits “review pretrial detention orders de novo,” Appl. 14; see Appl. 14-16 (citing, *e.g.*, Pet. App. 9a; *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985); *United States v. Cook*, 87 F.4th 920, 921 (8th

Cir. 2023); *United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015); *United States v. Cisneros*, 328 F.3d 610, 613, 616 (10th Cir. 2003); *United States v. Hurtado*, 779 F.2d 1467, 1470, 1471-1472 (11th Cir. 1985)); the Second, Fourth, Fifth, and D.C. Circuits review “for clear error or abuse of discretion,” Appl. 16; see Appl. 17-19 (citing, *e.g.*, *United States v. Zhang*, 55 F.4th 141, 146 (2d Cir. 2022); *United States v. Vane*, 117 F.4th 244, 249 (4th Cir. 2024); *United States v. Flores*, 53 F.4th 313, 315 (5th Cir. 2022) (per curiam); *United States v. Vasquez-Benitez*, 919 F.3d 546, 551 (D.C. Cir. 2019)); and the First, Third, and Seventh Circuits “conduct[] independent review of the detention decision but temper[] that review with deference to the district court’s firsthand assessment of the defendant and the case,” Appl. 19; see Appl. 19-21 (citing, *e.g.*, *United States v. Tortora*, 922 F.2d 880, 882 (1st Cir. 1990); *United States v. Delker*, 757 F.2d 1390, 1400 (3d Cir. 1985); *United States v. Portes*, 786 F.2d 758, 763 (7th Cir. 1986)). But applicant significantly overstates the scope of any disagreement among the courts of appeals.

As a threshold matter, “[a]ll circuits”—not just the ones that applicant describes as the most deferential ones—“afford some deference to the district court’s factual determinations in ruling on pretrial release.” Br. in Opp. at 11, *Gray*, *supra* (No. 22-5113) (*Gray* Opp.) (citing cases).³ In particular, all five of the circuits—including the court below—that applicant characterizes as applying a de novo standard (Appl. 14-16) review district courts’ factual findings in this context for clear error. See Pet. App. 9a; *Cook*, 87 F.4th at 921; *Santos-Flores*, 794 F.3d at 1090; *Cisneros*, 328 F.3d at 613; *Hurtado*, 779 F.2d at 1472. The three circuits that applicant describes as conducting an “independent review” “tempered by a degree of deference,”

³ The government has served applicant with a copy of its brief in opposition in *Gray*, which is also available on this Court’s electronic docket.

Appl. 19 (citation omitted), are likewise deferential to the district court’s determination of the facts. See *United States v. O’Brien*, 895 F.2d 810, 813-814 (1st Cir. 1990); *United States v. Suppa*, 799 F.2d 115, 120 (3d Cir. 1986); *Portes*, 786 F.2d at 762. Thus, “[w]hile the characterization of the standard” of review among those eight circuits “is somewhat different,” “in practice the scope of review is the same under either approach.” *Hurtado*, 779 F.2d at 1471; accord *O’Brien*, 895 F.2d at 813 (“[T]he two independent standards are roughly equivalent, despite their apparent differences”). And because the legal assessment of the factors listed in the statute proceeds from “the available information,” 18 U.S.C. 3142(g), the universal practice of deference to a district court’s factual findings will minimize any actual differences in circuits’ approaches.

Any differences are further minimized by what appears to be general agreement that pure legal questions are reviewed de novo. See, e.g., *Vane*, 117 F.4th at 249 (reviewing a “question of statutory interpretation de novo”); *United States v. Moreno*, 857 F.3d 723, 725-726 (5th Cir. 2017) (“Absent an error of law, we review a pretrial detention order under ‘a deferential standard of review that we equate to the abuse-of-discretion standard.’”) (emphasis added; citation omitted); *United States v. Abuhamra*, 389 F.3d 309, 317 (2d Cir. 2004) (reviewing a “legal question *de novo*”).⁴ In the Second Circuit, for instance, even the “district court’s ‘ultimate finding may be subject to plenary review if it rests on a predicate finding which reflects a misperception of a legal rule applicable to the particular factor involved.’” *Zhang*, 55 F.4th at 146 (quoting *United States v. Shakur*, 817 F.2d 189, 197 (2d Cir.), cert. denied, 484

⁴ The D.C. Circuit appears not to have directly addressed the standard of review for legal aspects of a bail decision. See, e.g., *United States v. Munchel*, 991 F.3d 1273, 1282 (2021) (reviewing “the District Court’s dangerousness determinations for clear error”); *United States v. Hale-Cusanelli*, 3 F.4th 449, 454-455 (2021) (similar, and citing Second Circuit precedent with approval).

U.S. 840 (1987)). Accordingly, issues of, for example, what the statutory framework means would likely be reviewed in a similar fashion, notwithstanding the more general language that a court might use to describe its overall approach. And because similar (deferential) review of the facts and similar (de novo) review of the law are likely to create significant practical alignment in those overall approaches, “[t]he scope of any disagreement” among the courts of appeals on the standard of review for bail decisions “is narrow and unlikely to make a difference in a significant number of cases.” *Gray Opp.* at 11.

Applicant identifies no cases involving similar bail determinations in which the appellate standard of review yielded different results on similar facts. That is likely why the asserted circuit conflict, which applicant describes (Appl. 24) as having arisen “decades ago,” has never warranted this Court’s intervention to date. Indeed, the government—which is a party to all Bail Reform Act proceedings and would have a strong interest in the standard of review for bail decisions if variations in the circuits’ approaches were consequential—has opposed review of that issue. See *Gray Opp.* at 7-12. And if there were any meaningful variation in circuit approaches, it would not work to the uniform advantage of either the government or defendants, as either could be the appellant or the appellee in an appeal from an order concerning pretrial detention. The Court has never granted certiorari on the issue, and applicant cannot show that it is likely to do so here.

B. This Case Is An Unsuitable Vehicle For Resolving The Question Presented

This case is an unlikely candidate for this Court’s review, let alone reversal, for additional reasons.

1. The court of appeals’ decision is correct irrespective of the standard of

review. As explained above, the Bail Reform Act requires detention pending trial if “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community,” an inquiry that requires consideration of “the nature and circumstances of the offense charged,” “the weight of the evidence against the person,” “the history and characteristics of the person,” and “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.” 18 U.S.C. 3142(e)(1) and (g)(1)-(4). Based on those factors, the detention question here was not a close call.

A grand jury indicted applicant for cyberstalking and threat offenses that are undisputedly “serious.” Pet. App. 12a. The factual particulars of his conduct are disturbing and highly suggestive of danger to others and the community: in addition to doxxing J.S., applicant made numerous public statements urging his followers on social media to commit violence against ICE agents and “‘march on’ a federal building ‘with guns,’” and, among other things, “pitched himself as able to assist in soliciting a murder” of a former high-ranking government official. *Id.* at 15a, 17a (citation omitted); see *id.* at 13a. The district court appeared to “attempt to draw equivalency between [applicant’s] threats and the actions of federal law enforcement.” *Id.* at 19a; see *id.* at 143a. And the court granted conditions of release that would allow applicant to use the Internet—the means by which he carried out the charged offenses—and easily evade the stated limitations on such use. See *id.* at 71a, 74a-75a (conditions of release allowing applicant to use the Internet, subject to monitoring, and leave his residence for a litany of purposes). Experience shows that applicant is not easily deterred: when Instagram deleted his account based on his online activity, he promptly created a new one and resumed the same activity. See *id.* at 5a.

Furthermore, although the court of appeals had no need to reach the issue in light of applicant's dangerousness, Pet. App. 11a, applicant would also present a serious risk of flight or failure to appear if released. In the period leading up to his commission of the charged offenses, applicant "specifically requested funds [from his followers] to help him 'evade' detection by law enforcement," "provid[ing] the name of several financial-payment accounts for use in transferring him money" and ultimately receiving "between \$10,000 and \$15,000." *Id.* at 4a-5a (citation omitted). Moreover, as the court of appeals noted, applicant "has failed to appear for state criminal proceedings multiple times, was once 'listed as an absconder' by a state court, and had an active warrant for his arrest in Iowa" at the time this case arose. *Id.* at 22a (brackets and citation omitted); see *id.* at 52a-53a (Bloomekatz, J., dissenting). His aggressive conduct during his arrest and booking, *id.* at 6a, further exhibited a marked disrespect for law enforcement and the judiciary.

Thus, as Judge Hermandorfer noted in denying applicant's stay motion below, the appellate standard of review was not "outcome determinative" in this case. Appl. App. 6a. Indeed, this is not a case in which the district court's participation in the bail hearing is likely to have given it much, if any, special insight: the evidence about the need to detain applicant pending trial consisted largely of applicant's public conduct and statements, which were just as readily available to the court of appeals as they were to the district court. Contrary to applicant's contention, the court of appeals did not simply "re-weigh[] the evidence itself, giving no deference to the district court's situational awareness." Appl. 23; see Appl. 25. The court instead explained that it was reviewing the facts under a highly deferential clear-error standard, Pet. App. 9a; indeed, the dissent did not meaningfully dispute the majority's understanding of the facts. See, e.g., *id.* at 51a ("It is true that [applicant] responded to the

[Signal] messages [about killing J.P.] by requesting ‘credible verifiable information’ that he could send to his team.”); *id.* at 52a-53a (acknowledging applicant’s previous failures to appear for criminal proceedings); *id.* at 53a (noting applicant’s fundraising to evade law enforcement but characterizing it as “bravado and social media posturing”). And the court criticized certain aspects of the district court’s reasoning as “*legally* unsound,” *id.* at 13a (emphasis added), or involving legally irrelevant “views on the Executive Branch’s immigration policy,” *id.* at 20a.

Accordingly, even if this Court were to grant certiorari and reverse on the ground that the court of appeals applied an insufficiently deferential standard of review to the district court’s release order, the end result would likely be the same: applicant’s detention. This Court does not typically grant a writ of certiorari to “decide abstract questions of law * * * which, if decided either way, affect no right” of the parties. *Supervisors v. Stanley*, 105 U.S. 305, 311 (1882). Much less should it grant a stay under such circumstances.

2. Applicant’s case is also a poor vehicle for this Court’s review because it “will soon become moot.” Appl. App. 6a. As applicant explains (Appl. 4), “[p]retrial detention orders expire,” and appeals challenging such orders become moot under Article III, “when trial ends.” See *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (observing a “claim to *pretrial* bail [is] moot once [the defendant is] convicted”); cf. Pet. App. 40a (Bloomekatz, J., dissenting) (noting that appellate courts “seldom see” “pretrial detention issues”). Applicant’s pretrial detention will end at the conclusion of his trial, which is scheduled to begin on January 12 and expected to last (by the government’s estimate) only two to three days. See *Gray* Opp. at 14 (noting that the petitioner’s pretrial-detention claim would likely “be moot before any decision on the merits is possible”).

The imminency of trial would require this Court to grant applicant’s petition for certiorari, receive briefing, hold oral argument, and issue a decision all within approximately three months. See Appl. 5 (“request[ing] that the Court construe this stay application as a petition for certiorari, grant the stay application and certiorari, issue an expedited briefing schedule, and schedule the case for argument at the earliest opportunity”). That would be an exceptionally compressed schedule on which to decide any case, and an excessive strain to decide an issue that, as discussed above, is abstract and of little apparent practical importance. Applicant’s suggestion (Appl. 5; Mot. 3-4) that the Court proceeded similarly in *Nken v. Holder*, 556 U.S. 418 (2009), is incorrect. In *Nken*, the Court was able to take almost six months (from the petitioner’s filing of his stay application) to the issuance of its merits decision. See *id.* at 423. Unlike *Nken*, in which a stay of removal was itself enough to pause all of the relevant proceedings, a stay of pretrial detention here would do nothing to prevent his forthcoming trial from mooted the pretrial-detention issue. In addition, even if the Court took applicant’s proposed path and reversed the decision below, its typical course would be to remand for application of the “correct standard” of review in the first instance, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); see *Nken*, 556 U.S. at 436, by which point applicant’s challenge to his pretrial detention would even more likely be moot.

Applicant fails to explain why, if the appellate standard of review for bail decisions truly warranted this Court’s review, a case involving bail pending *appeal*—which would lack the exigency of a case involving bail pending trial, where speedy-trial concerns limit the duration of detention, see Appl. 22—would not be a more appropriate vehicle. Release or detention of a defendant pending appeal is governed by 18 U.S.C. 3143, and a decision on bail pending appeal is appealable, like a decision

on pretrial bail, under 18 U.S.C. 3145. See *Hurtado*, 779 F.2d at 1473 (“[T]he 1984 Act makes no distinction between pre- and post-conviction review of denial of bail”). Although that posttrial context differs from the pretrial context in that detention becomes the default, the inquiry in both contexts involves many of the same considerations. See, e.g., 18 U.S.C. 3143(b)(A) (requiring detention pending appeal unless, *inter alia*, there is “clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released”). And courts appear to describe the standards of review for each in similar terms. Compare, e.g., *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003), and *United States v. Shoffner*, 791 F.2d 586, 590 (7th Cir. 1986) (per curiam), with, respectively, *Santos-Flores*, 794 F.3d at 1090, and *Portes*, 786 F.2d at 762-763.

II. THE BALANCE OF THE EQUITIES STRONGLY FAVORS THE GOVERNMENT

Even beyond applicant’s inability to show a likelihood of certiorari and relief, the additional stay factors likewise do not support the emergency relief that he requests.

As a threshold matter, applicant cannot establish that he faces irreparable harm warranting a stay. See *Hollingsworth*, 558 U.S. at 190. Applicant appears to acknowledge that he has voluntarily delayed his trial date—and thereby voluntarily prolonged his own pretrial detention—“from April, to July, to September, to November,” and now to January, all to delay the pretrial-detention issue’s becoming moot with the conclusion of his trial. Appl. App. 6a; see Appl. 32 (representing that applicant “is willing to delay his trial in order to provide this Court an opportunity to resolve his petition for certiorari”). As Judge Hermandorfer noted in denying applicant’s stay motion below, such a “‘self-inflicted,’ strategic extension of detention”

should not be deemed irreparable harm for purposes of obtaining equitable relief. Appl. App. 6a (quoting *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003)); accord *Bennett v. Isagenix Int’l LLC*, 118 F.4th 1120, 1129-1130 (9th Cir. 2024); 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (3d ed. 2013). Applicant has been dilatory in other respects as well, having waited more than six weeks after the Sixth Circuit’s decision and allowing its mandate to issue before seeking stays from that court and this one. See pp. 12-13, *supra*.

Although applicant suggests (Appl. 32) that he needs pretrial release in order to adequately defend himself at trial, he describes no concrete ways in which his detention has prevented or impeded him from consulting with his counsel or otherwise preparing for trial. Rather, he offers only the general statement “that detained defendants are ‘hindered in their ability’ to ‘prepare their defense,’” quoting a 1972 decision of this Court involving a state prisoner, *ibid.* (quoting *Barker v. Wingo*, 407 U.S. 514, 533) (brackets omitted), and ignoring the subsequently enacted Bail Reform Act’s guarantee of federally detained defendants’ access to “private consultation with counsel,” 18 U.S.C. 3142(i)(3). It is quite common for a federal defendant to be placed in pretrial custody, receive assistance of counsel there, and be given a fair public trial, all without being released. Applicant presents no reason why the same cannot be true for him. To the contrary, particularly given that the evidence concerns public online activity, and that applicant’s trial will last (by the government’s estimate) only two to three days, it is exceedingly unlikely that applicant’s detention has prevented or will prevent him from sufficiently preparing for his trial.

In addition to the absence of imminent harm, the government’s and the public’s interests strongly support applicant’s continued detention pending his trial and outweigh applicant’s interest in release. See *Hollingsworth*, 558 U.S. at 190. The gov-

ernment has a compelling interest in protecting the public from individuals who engage in the criminal conduct with which applicant is charged. “Stalking can be devastating and dangerous”: “[h]arassers can hide behind online anonymity while tormenting others,” “[l]ives can be ruined, and in the most tragic instances, lives are lost.” *Counterman v. Colorado*, 600 U.S. 66, 89 (2023) (Sotomayor, J., concurring in part and concurring in the judgment). “Even isolated threatening speech can do real harm” by “disrupt[ing] lives” and “silenc[ing] the speech of others who become afraid to speak out.” *Ibid.* And “the internet has * * * made stalking and harassment even easier,” *ibid.*, as applicant has shown. Such conduct is particularly pernicious when, as here, it involves law enforcement or members of the public who have or are perceived as having particular political views or associations. Cf. *Doe v. Reed*, 561 U.S. 186, 242-243 (2010) (Thomas, J., dissenting) (noting the ease of threatening or harassing referendum signees).

Here, applicant has called for violence against federal agents and property; doxxed and threatened someone based on the person’s “pro-ICE” views, leading to his indictment for violating federal cyberstalking and threat laws; entertained a proposal to murder a former government official; aggressively resisted arrest; and expressed disdain for judicial authority. His separate indictment in the District of Minnesota for additional serious offenses (including conspiring to impede or injure a federal officer), see note 2, *supra*, reinforces his likely danger to the community. Applicant has also solicited money for the purpose of evading law enforcement and has a history of not appearing for judicial proceedings. Yet the district court ordered applicant’s release subject to conditions that would permit him to leave his residence for numerous reasons and would enable him easily to access the Internet in unmonitored ways.

Applicant’s release pending trial would pose unacceptably high risks to law

enforcement and the public. Particularly compared with the limited supposed harms of applicant's pretrial detention, the governmental and public interest in his continued detention—like the other stay factors—weigh strongly against this Court's issuance of a stay. This Court should not grant one.

CONCLUSION

The application should be denied.

Respectfully submitted.

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Solicitor General

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