

No. 26A446

IN THE
Supreme Court of the United States

KYLE WAGNER,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

**REPLY SUPPORTING STAY PENDING DISPOSITION OF
PETITION FOR A WRIT OF CERTIORARI**

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The government does not deny that the courts of appeals are divided three ways over the standard of review for pretrial detention decisions. The government does not deny that the division dates to the Bail Reform Act's first year and that every circuit with criminal jurisdiction has now taken a side. And the government makes no real effort to square the Sixth Circuit's de novo approach with this Court's precedents, which call for deference where the district court is better positioned to make a determination.

The government's opposition to a stay is, instead, grounded in the government's assertions that the split does not matter, that the Court once before declined to review this issue, and that Wagner has only himself to blame for his detention. None of those arguments hold up.

The split matters. The government (at 1, 3, 16-17, 21) calls the split "narrow," "abstract," and "of little apparent practical importance." But judges and commentators have long seen it differently. Leading treatises and the federal judiciary's own research arm have flagged the division. *See, e.g.,* Stern & Gressman, *Supreme Court Practice* § 17.16, at 774 n.81 (11th ed. 2019); Jefri Wood, *The Bail Reform Act of 1984* § VII, at 57-58 (Fed. Jud. Ctr. 4th ed. 2022). As have judges on both sides of the split, including the author of the opinion below. Pet. App. 9a-11a. The government's main point—that every circuit reviews facts for clear error and law de novo—is true of appellate review generally, and does not reduce the importance of the division of authority on how mixed questions should be reviewed.

Opportunities to resolve the split are rare. The government cannot argue that the issue has been oft- and recently denied. So, instead, the government notes (at 3) that it was once denied. *See Gray v. United States*, 143 S. Ct. 492 (2022) (No. 22-5113). But that one case was a poor vehicle. The court of appeals there issued a one-sentence order and “did not indicate which standard of review it applied.” Brief for the United States in Opposition at 7, *Gray v. United States*, No. 22-5113 (U.S. Oct. 28, 2022). This case does not share that problem. Here, the Sixth Circuit devoted pages of analysis to explaining why the court felt it must apply de novo review, then re-weighed the evidence itself, giving no deference to the district court’s analysis.

This is an ideal vehicle. The government suggests (at 21) that this case is a poor vehicle because the pretrial detention issue becomes moot when trial ends. But Wagner has presented this Court with a workable timeline for resolving the question before his trial begins. And here, the standard of review makes the difference: the case for detaining Wagner rests almost entirely on statements he posted online. After a two-day hearing, the district court concluded that release conditions could address concerns raised by those online statements. As the dissent below explained, deferring to that judgment would have meant affirming Wagner’s release.

The equities favor a stay, too. Wagner’s prosecution is largely based on speech critical of government actions, and the public has a strong interest in ensuring that pretrial detention is not used as punishment in advance of an uncertain conviction. And while the government insists (at 22-23) that Wagner’s harm is self-inflicted, the record shows that he agreed to delay trial so that he could prepare his defense. *See*

United States v. Wagner, No. 2:26-cr-20059-DPH-APP (E.D. Mich. Sept. 30, 2026), Dkt. No. 44 at 2, 5 (granting trial continuance based, in part, on the obstacles to preparation caused by “Wagner’s out-of-district incarceration”); *see also* 10/6/2026 Wagner Letter, at 1 (drawing this Court’s attention to the district court’s order).

This case gives the Court a rare opportunity to settle an important, recurring question that has divided federal courts for decades, but almost never reaches this Court while still live. The application should be granted.

I. The Circuits Are Openly And Intractably Divided On An Important Question That Routinely Determines Whether Defendants Are Detained Pretrial.

The split is widely recognized, it routinely determines whether defendants are detained pending trial, and only this Court can resolve it. The government does not dispute that the circuits are split. Instead, it attempts (at 1, 3, 14-17) to cast the split as unimportant. Those arguments fail.

A. The government argues (at 3, 16-17) that the split is “narrow” and “abstract” because every circuit reviews factual determinations for clear error and legal conclusions *de novo*. But that is true of appellate review in virtually every legal context: “Generally, questions of law are reviewed *de novo* and questions of fact, for clear error.” *Monasky v. Taglieri*, 589 U.S. 68, 83 (2020). Yet this Court has repeatedly granted certiorari to decide “the appropriate standard of appellate review” for the “mixed question” of a district court’s *application* of law to fact. *Id.* That is because “[m]ixed questions are not all alike,” *U.S. Bank Nat’l Ass’n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 395-396 (2018), and there is a

“practical difference in outcome depending upon which standard is used,” *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999). *See also* Pet. 31-33. Whether a given defendant’s circumstances warrant detention under the Act is a textbook mixed question, and on that question, the circuits “have long been split.” *United States v. Wilks*, 15 F.4th 842, 847 (7th Cir. 2021). That divide cries out for this Court’s review.

Nor is this some obscure disagreement. The Federal Judicial Center—the judiciary’s research arm, chaired by the Chief Justice—has noted and exhaustively discussed the division. *See* Wood, *supra*, at 57-58. So have numerous federal judges. *See, e.g., Wilks*, 15 F.4th at 847 (Sykes, C.J.); Pet. App. 39a (Bloomekatz, J., dissenting); Stay. App. 5a (Hermandorfer, J.). As have multiple law review articles. *See, e.g.,* Michael Edmund O’Neill, Note, *A Two-Pronged Standard of Appellate Review for Pre-trial Bail Determinations*, 99 Yale L.J. 885 (1990). The leading treatise on Supreme Court Practice describes the courts of appeal as “in considerable disarray as to the appropriate standard of review of release and detention determinations under the 1984 Act,” and lays the blame for that confusion at this Court’s door, noting that “the more searching standard of review can be traced back to reliance on [certain] in-chambers decisions issued by Circuit Justices.” Stern & Gressman, *supra*, at 774 n.81. A disagreement “of little apparent practical importance,” Stay Opp. at 1, would not draw this much attention.

B. The government is also wrong to suggest (at 17-18) that the standard of review rarely drives detention outcomes. In circuits applying clear-error review, courts affirm detention orders even while acknowledging that the record could have

supported release. *See, e.g., United States v. English*, 629 F.3d 311, 318-322 (2d Cir. 2011) (affirming detention despite “extraordinarily strong” evidence supporting release); *United States v. Hale-Cusanelli*, 3 F.4th 449, 455, 457 (D.C. Cir. 2021) (affirming detention even though “[r]easonable minds might disagree,” because the court would not “substitute [its] judgment for that of the District Court”). Under a *de novo* standard, those kinds of cases would come out the other way—and in circuits on the other side of the split, they do.

In *United States v. Cirkseña*, for example, the district court detained a defendant charged with serious firearm and drug-trafficking offenses, citing his criminal history and his admitted unlawful activity while on probation. 749 F. App’x 488, 488 (8th Cir. 2019) (*per curiam*). The Eighth Circuit found “no clear error in the district court’s factual findings” but reversed anyway, faulting the district court for not giving more weight to evidence it believed “militat[ed] against pretrial detention.” *Id.* at 488-490; *see also, e.g., United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985) (reversing detention of an alleged Iranian government agent charged under the Arms Export Control Act with illegally exporting military items, because the circuit court believed the defendant’s relationship to Iran did “not tip the balance either for or against detention”).

The government’s suggestion (at 17) that the split does not “work to the uniform advantage of either the government or defendants” is a reason to grant review, not deny it. Resolving the question presented would bring uniformity to federal law, give courts clearer guidance, allow litigants to better anticipate outcomes on appeal,

and ensure that similarly situated defendants are treated alike. This Court’s certiorari docket exists to vindicate those very principles. *See* Sup. Ct. R. 10(a). Whether a defendant awaiting trial is detained or released should not turn on the happenstance of geography.

C. Retreating further, the government repeatedly invokes (at 1, 3, 15, 17, 20) this Court’s denial of review in *Gray v. United States*, 143 S. Ct. 492 (2022) (No. 22-5113). But as the government itself told the Court, *Gray* was an exceedingly poor vehicle. The court of appeals there affirmed in a one-sentence summary order and “did not indicate which standard of review it applied.” *Gray* BIO at 7; *id.* at 12-13. And the defendant had admitted to molesting two minors and possessing child pornography, so the district court’s dangerousness finding “would be upheld under any standard.” *Id.* at 13. Even so, this Court called for a response before denying review, suggesting it considered review.

II. This Case Is The Ideal Vehicle To Resolve This Important Question.

The government does not attempt to reconcile the Sixth Circuit’s de novo review of Wagner’s release order with this Court’s precedent. Nor can it. That standard plainly contravenes this Court’s repeated instruction to apply deferential review where, as here, “the text of the [governing] statute ‘emphasizes that [a] determination is for the district court’ or when “the district court ‘is better positioned’ to decide” the issue. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 (2014) (quoting *Pierce v. Underwood*, 487 U.S. 552, 559-560 (1988)). And contrary to what

the government claims, this Court is both likely to grant review here and reverse the decision below because this case presents an ideal vehicle to clarify that standard.

A. To start, the government’s assertion that Wagner is so dangerous that he would be detained under any standard overstates the facts considerably. Wagner has no violent criminal history and does not own a gun. Rather, as the dissent noted below, Wagner’s detention is “based almost entirely on his online speech—namely, his anti-ICE posts.” Pet. App. 28a. The commentary that the government highlights was “no doubt fiery.” *Id.* But it stands alongside Wagner regularly “disavow[ing] any intent to commit physical aggression.” Pet. App. 4a, 28a. And in selectively quoting Wagner’s social media posts, the government pointedly omits the parts where he called on his social media followers to “[k]eep your heads” and explained “[w]e’re not the violent ones.” *Compare* Pet. App. 169a-170a *with* Stay Opp. at 2.

Notably, the government has never pointed “to a single harmful action [Wagner’s] speech has incited.” Pet. App. 28a (Bloomekatz, J., dissenting). Indeed, the government’s response neither asserts that Wagner’s speech or expressive conduct amounted to “[t]rue threats’ of violence” nor alleges that it was “‘intended’ (not just likely) to produce imminent disorder.” *Counterman v. Colorado*, 600 U.S. 66, 74, 76 (2023) (citations omitted). J.S., the alleged victim of Wagner’s “cyberstalking,” evidently saw things similarly. Stay Opp. at 18. As the dissent noted, “[d]uring Operation Metro Surge, J.S. posted a video of himself knocking on the door of a Minnesota journalist covering anti-ICE protests.” Pet. App. 34a-35a (Bloomekatz, J., dissenting). And “Wagner contends that his statement ‘we can all knock on strangers doors’” and

his repost of what he believed to be J.S.'s name, phone number, and address “was a response to J.S.'s own post.” Pet. App. 34a-35a (Bloomekatz, J., dissenting). J.S. replied not in fear, but by sending Wagner a direct message challenging him to a “cage fight.” Pet. App. 6a, 92a, 187a. As the district court found, Wagner’s posts “could be viewed in more than one way” and “might not be as specific a threat” as the government alleges. Pet. App. 141a.

In this context, it is revealing that the only two judges who have actually heard from Wagner, and weighed all the facts as they were presented, ordered him released. The district judge below did so after a two-day hearing. Pet. App. 80a-159a. And a Minnesota magistrate judge did so in the government’s other prosecution just last week. *See United States v. Wagner*, No. 0:26-cr-00115-007, ECF No. 283, at 6 (D. Minn. Oct. 2, 2026). In doing so, these judges concluded that any dangerousness and risk of non-appearance could be appropriately mitigated with release conditions. Pet. App. 145a-150a; *see also* 18 U.S.C. § 3142(a), (c) (creating a statutory presumption that defendants “shall” be released before trial either upon “personal recognizance” or upon conditions that “the judicial officer determines” will “assure” trial appearance and public safety).

Given all this, the government’s claim (at 18) that the “detention question here was not a close call” is untenable. The standard of review decided this case. As Judge Bloomekatz explained in dissent, deferring “to the district court’s judgment” would result in “affirm[ing] the district court’s pretrial release order.” Pet. App. 29a. That is because—contrary to what the government suggests (at 19)—such deference is due

not just to the district court’s finding of individual facts: It also extends to the overall weighing of those facts and their probative value. *See, e.g., Lakeridge*, 583 U.S. at 397 (deference is due when a trial court “takes a raft of case-specific historical facts, considers them as a whole, [and] balances them one against another”) (footnote omitted). Further, such deference would give weight to the district court’s experience with similar release conditions in analogous circumstances—experience which the district court expressly invoked in crafting Wagner’s release order. Pet. App. 143a-144a.

B. The government separately insists (at 21) that this case is a poor vehicle because Wagner’s pretrial detention will be rendered moot at the conclusion of his January 2027 trial. But the fact that a detention decision often proves too short “‘to be fully litigated’ * * * prior to its ‘expiration’” is likely why the circuit split has gone unresolved for 40 years. *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (citations omitted). Not surprisingly, the government made the same mootness argument against review in *Gray*. *See Gray* BIO at 14. If an upcoming trial is enough to make a case a bad vehicle, this split will never be resolved.

In fact, this petition easily avoids mootness concerns. The timeline Wagner proposes for resolving this issue is workable; this Court has reached decisions on shorter timelines in more complex cases. *See, e.g., Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109 (2022) (22 days between application for emergency relief and decision); *Trump v. New York*, 592 U.S. 125 (2020) (87 days between grant of certiorari and decision); *TikTok Inc. v. Garland*, 604 U.S. 56 (2025) (30 days between grant of certiorari and decision). And the government’s

concern about the length of time it might take the Sixth Circuit to apply the correct standard on remand (Stay Opp. at 21) only highlights why Wagner is seeking emergency relief from his detention order now. Indeed, if the Court does not resolve the question presented here, where Wagner has sought certiorari three months in advance of his trial, it is hard to imagine another case in which it could.

The government's suggestions (at 21-22) that the legal issues would be better resolved in a dispute about bail pending *appeal* (rather than in a dispute about bail pending *trial*) are similarly unconvincing. Those are different analyses. When the presumption of innocence falls away, it is no longer necessary to ensure that detention decisions fall within "the carefully limited exception" that applies before trial. *United States v. Salerno*, 481 U.S. 739, 755 (1987). Moreover, after trial, the defendant must show that the appeal "raises a substantial question of law or fact likely to result in" relief, 18 U.S.C. § 3143(b), meaning that the degree of deference due to the district court's factual findings is less relevant.

III. Wagner Is Irreparably Harmed By His Continued Detention, And The Equities Favor A Stay.

The government's arguments on the equitable factors fare no better. It insists (at 3) Wagner's harm from detention is self-inflicted because he has "voluntarily delayed his trial." But Wagner is not delaying anything; he is diligently preparing for trial. And contrary to what the government now claims (at 23) in this Court about Wagner failing to offer "concrete ways" in which his detention has hindered trial preparation, the government has previously conceded that Wagner's detention has delayed his trial. *See United States v. Wagner*, Order, ECF No. 44 at 2, 5 (E.D. Mich.,

Sept. 30, 2026); *see also* 10/6/2026 Wagner Letter, at 1 (drawing the Court’s attention to this order).

As Wagner and the government explained in a joint stipulation filed in the district court, although Wagner is detained pursuant to the Sixth Circuit’s order, he is held in a Minnesota county jail, so his Detroit-based Assistant Federal Defender must “mail documents to Mr. Wagner and then coordinate phone calls to discuss them,” which “takes more time and coordination than normally needed for an in-district client.” *United States v. Wagner*, Order, ECF No. 44 at 2 (E.D. Mich., Sept. 30, 2026). In granting the parties’ joint request for a continuance, the district court also expressly noted that the continuance was necessary because of Wagner’s “out-of-district incarceration.” *Id.* at 5; *see also id.* (finding that “failure to grant this continuance would unreasonably deny the defendant and his counsel the time necessary for effective preparation, considering the exercise of due diligence”). These same obstacles stood in the way of Wagner seeking relief from the Sixth Circuit’s detention decision. *Contra* Stay Opp. at 23. It is perverse for the government to treat delays caused by Wagner’s detention as an indication that the detention does him no harm.

Meanwhile, the government’s arguments (at 23-24) that Wagner’s detention is in the public interest repeat the Sixth Circuit’s error of disregarding the district court’s careful and reasoned judgment, rendered on the basis of its extensive experience, that Wagner’s dangerousness could appropriately be mitigated by release conditions. And the government’s repeated emphasis on Wagner’s politics, *see* Stay Opp. at 1, 6; Pet. at 8-9, is not a proper consideration under the Bail Reform Act. Wagner

must be presumed innocent at this stage of litigation. *See Salerno*, 481 U.S. at 747 (the “Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals”). The government may not secure a conviction at all. *See, e.g., Jaimie Ding & Claire Rush, AP analysis: Justice Department went after protesters for felony assault, but juries and judges were unconvinced*, PBS (Sept. 12, 2026), <https://perma.cc/D8JX-NGDU>. Wagner is entitled to a stay.

CONCLUSION

The application for a stay should be granted.

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