

22-5143

ORIGINAL

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MALIA ARCIERO,

Petitioner-Appellant.

Supreme Court, U.S.
FILED

APR - 7 2022

OFFICE OF THE CLERK

*On Petition for a Writ of Certiorari to the United States
Court of Appeals For The Ninth Circuit*

PETITION FOR A WRIT OF CERTIORARI

MALIA ARCIERO
REG. NO. 16101-022
FCI VICTORVILLE MEDIUM II
FEDERAL CORR. INSTITUTION
P.O. BOX 3850
ADELANTO, CA 92301
APPEARING *PRO SE*

QUESTIONS PRESENTED

- I. Whether the United States Court of Appeals for the Ninth Circuit abused its discretion in denying Arciero's Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) and Motion for Reconsideration.

PARTIES TO THE PROCEEDINGS

Petitioner-Appellant, MALIA ARCIERO (“Arciero”), was a criminal defendant in the United States District Court for the District of Hawaii, Honolulu Division, in USDC Criminal No. 1:13-cr-01036-SOM-1; and as Appellant in the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) in USCA No.21-10177. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is non-published, *USA v. Malia Arciero*, No. 21-10177 (9th Cir. 2021), is attached in the Appendix at 1a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 16, 2021. jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254, in its pertinent part, provides:

“(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

STATEMENT OF THE CASE

On June 19, 2014, a federal grand jury sitting in the United States District Court for District of Hawaii, returned a four (4) count federal First Superseding Indictment charging Arciero. See Doc. 90.¹ Count 1s charged Arciero with Conspiracy to Possess with Intent to Distribute 50 Grams or More of Methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A). *Id.* Count 2s charged Arciero with Distribution of Methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). *Id.* Counts 3s and 4s charged Arciero with Distribution of 50 Grams or More of Methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). *Id.*

On December 10, 2014, jury trial commenced. See Doc. 215.

On January 8, 2015, the jury returned a verdict of guilty as to Arciero on Counts 1s, 2s, 3s, and 4s of the First Superseding Indictment. See Doc. 249.

¹

“Doc.” refers to the Docket Report in the United States District Court for the District of Hawaii, Honolulu Division in Criminal No. 1:13-cr-01036-SOM-1, which is immediately followed by the Docket Entry Number.

On September 21, 2015, Arciero was sentenced to a total term of 172 months imprisonment, 5 years of supervised release, and a Mandatory Special Assessment Fee of \$400. See Doc. 280.

On October 5, 2015, Arciero timely filed a Notice of Appeal. See Doc. 284.

On March 3, 2017, the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) affirmed Arciero’s conviction and sentence. See Doc. 307.

On March 12, 2018, Arciero timely filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (“§ 2255 Motion”), which was denied on January 28, 2019. See Docs. 309, 350.

REASONS FOR GRANTING THE PETITION

As a preliminary matter, Arciero respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The United States Court of Appeals for the Ninth Circuit Abused Its Discretion in Denying Arciero’s Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) and Motion for Reconsideration.

Arciero contends that the Ninth Circuit abused its discretion when it denied her Motions for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) and Reconsideration, for the following facts and reasons:

The Ninth Circuit's Order dated June 9, 2021, denying Arciero's Motion for Reconsideration reads:

First, the district court did not err by finding that Arciero's motion to reconsider was untimely as to the court's previous orders denying Arciero's post-judgment motions for an order directing the government to produce purported *Brady* material and for recusal. The reconsideration motion, filed on June 14, 2021, was filed more than two months after the entry of these orders, and the district court did not abuse its discretion by denying the motion as untimely under the applicable federal and local rules. See *United States v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979) ("Only in rare cases will we question the exercise of discretion in connection with the application of local rules."). Accordingly, we decline to consider Arciero's other allegations of error by the district court with regard to the *Brady* and recusal orders.

Second, the district court did not abuse its discretion by denying Arciero's motions for compassionate release and for reconsideration of the district court's denial of compassionate release. See *United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021). The record reflects that the district court considered Arciero's chronic medical conditions, lack of violent history, and efforts at post-sentencing rehabilitation, but concluded that she had not established extraordinary and compelling circumstances warranting relief, given her relatively young age, the low infection rate at her facility, and her inconsistent explanations

for why she declined to be vaccinated. The court also found that a reduced sentence was not warranted under the 18 U.S.C. § 3553(a) sentencing factors, including the seriousness of the underlying conviction, Arciero's history of untruthfulness to the court regarding her allegations of abuse by a government agent, and the fact that she had only served about half of her sentence. Finally, the court concluded that Arciero's request for reconsideration was not accompanied by any new evidence. The district court's conclusions are supported by the record, and it did not abuse its discretion in denying Arciero's motions. See *United States v. Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018) (district court abuses its discretion only if its decision is illogical, implausible, or without support in the record).

See Appendix at 1a.

The Ninth Circuit concluded: (1) that Arciero had not established “extraordinary and compelling” circumstances warranting relief, given her relatively young age, the low infection rate at her facility, and her inconsistent explanations for why she declined to be vaccinated; (2) that a reduced sentence was not warranted under the 18 U.S.C. § 3553(a) sentencing factors, including the seriousness of the underlying conviction; and (3) the fact that she had only served about half of her sentence.

1. “Extraordinary and Compelling” Circumstances Warranting Relief

Arciero’s Vulnerability to COVID-19 Due to Her High Medical Risk Is an Extraordinary and Compelling Reason That Warrants a Sentence Reduction.

Arciero, age 40, suffers from incurable, progressive disease, from which she will never recover, to wit: Asthma Diabetes, and Chronic Kidney Disease. Arciero's COVID-19 vulnerability, in accordance with CDC guidelines: chronic bronchitis, smoking status, history of cervic cancer, arthritis in the neck, seizures, infection in vagina cyst, ovarian cysts, breast cysts, anxiety state, planter wart, migraine, hypermetropia, Post-Traumatic Stress Disorder ("PTSD"), presbyopia, dermatitis, acne, cervicalgia, Urinary Tract Infection ("UTI"), headache, chronic pain syndrome, mental disorder, allergic rhinitis, bladder issues, genitourinary system, corns and callosities. Arciero also suffers from inflammation of vagina and vulva (blocking uretha causing infections), autoimmune and immune system deficiencies, and psychosis due to PREA by BOP staff. See Exhibit 1.

Factually, the District Court does not deny Arciero's suffering from any of the health conditions she identifies. More so, Arciero's enumerated diagnosed medical conditions are chronic health conditions that "technically involve an increased risk of severe illness from COVID-19, as set forth by the Centers for Disease Control." "People with Chronic kidney disease . . . chronic lung disease or moderate to severe asthma . . . Diabetes (type 1 or type 2) . . . Immunocompromised state (weakened immune system)." See CDC, People Who are at Increased Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html> (last updated March 29, 2021) (last accessed March 7, 2022).

Other district courts have found asthma, hypertension, diabetes, chronic kidney disease and obesity individually and as comorbidities constitute medical conditions that increase the risk of severe illness from coronavirus warranting compassionate release. The medical records Arciero submitted corroborate her medical diagnoses of asthma and other medical condition. *Id.*

Arciero contends “incarcerated individuals tend to be in poorer health than those in the general population, justifying the use of an earlier [age] cutoff in classifying people deemed vulnerable to COVID-19.” While the Court does not adopt the categorical rule defendant suggests regarding age, the court finds as it did before in *United States v. Bradley*, “defendant’s combination of serious health conditions weighs heavily in favor of a sentence reduction.” No. 2:14-CR-00293-KJM, 2020 WL 3802794, at *5 (E.D. Cal. July 7, 2020). Here, as well, the Court should have found that Arciero’s combination of serious health conditions weighs heavily in favor of a sentence reduction.

Considering the totality of the record, this Court should find Arciero’s living conditions and the situation at her institution are such that defendant is likely unable to engage in the self-care required to protect herself against contracting COVID-19, as prescribed by reputable public health authorities. These living conditions, and Arciero’s comorbidities, including asthma, diabetes, and a long list of medical condition, put her at high risk of serious illness or death if she contracts COVID-19. Additionally, this Court should find this suffices to show an “extraordinary and compelling reason” to grant defendant compassionate release.

Vaccine Can’t Stop COVID’s Spread

The COVID-19 pandemic has spurred a remarkable stream of scientific investigation, but that knowledge isn’t translating into better public policy. One example is a zealous pursuit of public mask wearing, a measure that has had, at best, a modest effect on viral transmission. Or take lockdowns, shown by research to increase deaths overall but nonetheless still considered an acceptable solution. This intellectual disconnect now extends to COVID-19 vaccine mandates. The policy is promoted as essential for

stopping the spread of COVID-19, though the evidence suggests it won't.

Mandates infringe on personal autonomy, which can lead to political strife and unintended consequences, but they have value in some situations. In general, however, wise policy making respects the intrinsic value of personal autonomy and seeks the least burdensome path to achieve social gains.

The common argument for vaccine mandates is: You have no right to infect me. But cases are partly driven by asymptomatic and presymptomatic spread—people who are unaware that they even are infected. It isn't practical to punish adults who have no symptoms. This is why other diseases that can be spread by people without symptoms—such as influenza, genital herpes and hepatitis C—are met with policies like voluntary vaccination drives, screening protocols for sexually transmitted diseases, and clean needle exchange programs for intravenous drug users. Doctors and public health officials used to understand that stopping spread is usually not practical.

Here's another problem: The vaccines reduce but don't prevent transmission. Protection from infection appears to wane over time, more noticeably after three to four months, based on a large study of more than 300,000 people in the United Kingdom. As clinical studies from the U.S., Israel, and Qatar show—and many Americans can now personally attest—there is substantial evidence that people who are vaccinated can both contract and contribute to the spread of COVID-19.

This trend has been exacerbated by the Delta variant. The data show that vaccine effectiveness for infection protection fell from roughly 91% to 66% after emergence of the Delta variant, according to a recent CDC report. Data from Israel show rates of protection have declined to less than 40% for some patients.

Vaccine mandates can't end the spread of the virus as effectiveness declines and new variants emerge. So how can they be a sensible policy? Is it sensible to consign tens of millions of people to an indeterminate number of boosters and the threat of job loss if it isn't clear more doses will stop the spread, either?

Vaccines are not 100% effective at preventing infection, some people who are fully vaccinated will still get COVID-19. See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effective-ness/breakthrough-cases.html#:~:text=Most%20people%20who%20get%20COVID,%E2%80%9Cbreakthrough%20infection.%E2%80%9D>. An infection of a fully vaccinated person is referred to as a “vaccine breakthrough infection.”

It's Unclear Whether Vaccines Prevent Transmission

The key to herd immunity is that, even if a person becomes infected, there are too few susceptible hosts around to maintain transmission — those who have been vaccinated or have already had the infection cannot contract and spread the virus. The COVID-19 vaccines developed by Moderna and Pfizer–BioNTech, for example, are extremely effective at preventing symptomatic disease, but it is still unclear whether they protect people from becoming infected, or from spreading the virus to others. That poses a problem for herd immunity.

A vaccine's ability to block transmission doesn't need to be 100% to make a difference. Even 70% effectiveness would be “amazing”, says Samuel Scarpino, a network scientist who studies infectious diseases at Northeastern University in Boston, Massachusetts. But there could still be a substantial amount of virus spread that would make it a lot harder to break transmission chains. See <https://www.nature.com/articles/d41586-021-00728-2>.

2. Applicable Factors Under 18 U.S.C. § 3553

The district court is required to consider any applicable factors under 18 U.S.C. § 3553 in deciding whether a sentence modification is “warranted in whole or in part under the particular circumstances of the case.” *Dillon*, 130 S.Ct. at 2692. “Because reference to § 3553 is appropriate only at the second step of this circumscribed inquiry, it cannot serve to transform the proceedings under § 3582(c)(2) into preliminary re-sentencing proceedings.” *Id.* Thus, even if Arciero qualifies for sentence modification under the first step of the analysis, the decision whether to ultimately grant a modification is left to the sound discretion of the trial court. See *Dillon*, 130 S.Ct. at 2692.

The Sentencing Guidelines instruct “the court should consider the sentencing factors set forth in 18 U.S.C. § 3553(a) when deciding a motion for compassionate release, and the [c]ourt should not grant a sentence reduction if the defendant poses a risk of danger to the community, as defined in the Bail Reform Act.” *Esparza*, 2020 WL 1536155, at *3 (citing U.S.S.G. § 1B1.13); see also 18 U.S.C. § 3582(c)(1)(A).

3. Courts Have Granted Compassionate Release in Light of the Instant Pandemic.

Arciero urges the Court to consider the following compassionate release grants:

- *United States v. Williams and Austin*, 2020 WL 6940790, at *1 (N.D. Ill. Nov. 25, 2020)
 - Williams and Austin have served approximately fourteen years of their fifty-seven year sentences
 - Big Sandy, FCI Pollock

- Have served 14 years of 57-year sentences for armed bank robbery
- Granting compassionate release application where defendant with an underlying health condition had contracted COVID-19 but recovered because “it [was] uncertain whether [defendant] [could] contract COVID-19 more than once, and the potential long-term effects of the illness are still undetermined” when factoring his health condition.

- *United States v. Rodriguez, No. 3:17-CR-4477-BTM, 2020 WL 4592833, at *1 (S.D. Cal. Aug. 5, 2020)*
 - Asthma and obesity
 - Granting motion for compassionate release for petitioner suffering from asthma and obesity.
- *United States v. Gardner, 2020 WL 6576756, at *2 (N.D. Cal. Nov. 9, 2020)*
 - 235 months for crack, has served 137 months
 - FCI Mendota, release date in 5 years
 - No disciplinary incidents
 - Release under both (c)(1)(A) and (c)(1)(B)
 - Asthma
- *United States v. Daley, 2020 WL 5350346, at *1 (M.D. Fla. Sept. 4, 2020)*
 - CI D. Ray James
 - Charged in November 2018 with 500 grams or more of cocaine

- 21 months in prison; release date March 2021
- Asthma, albuterol
 - ◆ Says this is not 1B1.13, but has discretion under catch-all
 - ▶ Under catch-all, finds risk of COVID-19 is reason

- *United States v. Collins, 2020 WL 7263896, at *1 (D. Kan. Dec. 10, 2020)*

- FCI Butner Medium I
- Diabetes, chronic kidney failure, hypertension, minority race, prior COVID-19 infection
- In an unpublished decision, the Tenth Circuit implicitly recognized that in addition to the BOP, courts now can make such a determination
- Finds extraordinary and compelling reasons under catch-all
- 292 months for drugs, has served 122 months

- *United States v. Pierce, 2020 WL 7406794, at *1 (D. Nev. Dec. 14, 2020)*

- 121-months imprisonment for child pornography, release date in 2023
- FCI Lompoc
- Type 2 diabetes, hypertension, hyperlipidemia, hyperthyroidism, chronic kidney disease

- *United States v. Norris, 2020 WL 6583084, at *1 (S.D. Ind. Nov. 10, 2020)*

- 172 months, extensive criminal history, has served 126 months
- FCI Ashland
- Hypertension, obesity, chronic kidney disease, 58 years old

- “The Government argues that Mr. Norris’s early release would minimize the seriousness of his offense, not provide adequate deterrence, and not promote respect for the law. These concerns might weigh more heavily were it not for the fact that Mr. Norris is set to be released in one and a half years if this motion were denied. His ten years of incarceration are significant and serious by any measure. Hopefully, that decade will also deter him from future criminal conduct.
- Norris has served approximately 126 months of his 172-month sentence. As we have noted, such a sentence represents a severe punishment. His educational successes reflect his intention and efforts to rehabilitate himself. That he will be on supervised release for five years and subject to increased drug monitoring as well as home detention with GPS monitoring during his first year following his release assuage some of our concerns. Presumably, he will be focused on meeting his various health challenges as well and avoiding the onset of COVID-19.”

4. BOP’s Deliberate Indifference

“Deliberate indifference has two components to it: objective and subjective.” *Villegas v. Metro. Govt. of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). “[T]he objective component ... is met upon a showing that a detainee faced a substantial risk of serious harm and that such a risk is one that society chooses not to tolerate.” *Id.* at 569. The subjective component is satisfied when an

official has “(1) subjectively perceived facts from which to infer substantial risk to the prisoner, (2) did in fact draw the inference, and (3) then disregarded that risk.” *Santiago v. Ringle*, 734 F.3d 585, 591 (6th Cir.2013) (citations and internal quotation marks omitted). Such indifference may be “infer[red] from circumstantial evidence, including ‘the very fact that the risk was obvious,’ that a prison official knew of a substantial risk.” *Id.* (quoting *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009)). With respect to an impending infectious disease like COVID-19, deliberate indifference is satisfied when corrections officials “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33, 36 (holding that a prisoner “states a cause of action … by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health”); see also *Hutto v. Finney*, 437 U.S. 678, 682-685 (1978) (recognizing the need for a remedy where prisoners were crowded into cells and some had infectious diseases).

The decision to release prisoners cannot be made lightly. But arguments against it discount a reality recognized over two centuries ago: The health of prisoners and communities are inextricably linked. Coronavirus confirms that prison walls do not, in fact, separate the welfare of those on the inside from those on the outside.

In this case, the BOP has been refusing to provide Arciero with psychological services, which leads to her severe mental problems, including but not limited to anxiety. See also Exhibit 2– Arciero’s filed Administrative Remedies and Email Correspondence to get a picture of how difficult it has been for her to cope up during these trying times.

5. Arciero's Remarkable Rehabilitation

It is essential to also note that since Arciero's incarceration began, she has taken numerous steps to attempt to improve herself in "post-conviction rehabilitation." Throughout the time she has spent in prison, Arciero has worked long and hard and diligently at her rehabilitation. Hence, there can be no genuine safety concerns on her release. Her extraordinary rehabilitation shows that she is ready for re-entry.

- Section 1B1.13 has not been updated to reflect pursuant to the 2018 First Step Act, hence, defendants now have the ability to bring such motions directly. This anomaly has given rise to a debate concerning whether and to what extent § 1B1.13 applies to motions filed by defendants, with several circuits recently holding that § 1B1.13 applies only to motions filed by the Bureau of Prisons, and not to motions filed by defendants on their own behalf. See *United States v. McCoy*, Nos. 20-6821, 20-6869, 20-6875, 20-6877, 2020 WL 7050097, at *6-7 (4th Cir. Dec. 2, 2020); *United States v. Jones*, No. 20-3701, 2020 WL 6817488, at *8-9 (6th Cir. Nov. 20, 2020); *United States v. Gunn*, No. 20-1959, 2020 WL 6813995, at *2 (7th Cir. Nov. 20, 2020); *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020).

Factoring in Arciero's rehabilitation and impeccable conduct in prison, her continued risk to the public if released appears to be markedly reduced, particularly when tempered by significant rehabilitation. Given her personal rehabilitation, and deeply felt remorse, the Court must conclude that deterrence and public protection are no longer strong § 3553(a) factors weighing in favor of continued detention.

Under 18 U.S.C. § 3582(c)(2), to modify Arciero’s sentence, taking into account the advisory nature of the guidelines after *Booker* and the considerations set forth in 18 U.S.C. § 3553(a). The court should find that a sentence of time served is sufficient, but not greater than necessary, and accounts for the sentencing factors the court must consider pursuant to 18 U.S.C. § 3553(a), specifically deterrence, protection of the public, and respect for the law.

Based on her medical condition and the world’s take on the global pandemic right now, and good time credits he has served, Arciero have met all the requirements for compassionate release. Further, since Arciero’s incarceration began, she has taken numerous steps to attempt to improve herself in “post-conviction rehabilitation.” See Exhibit 3. See *United States v. Parker*, No. 2:98-CR-00749-CAS-1, 2020 WL 2572525, at *11 (C.D. Cal. May 21, 2020) (finding evidence of defendant’s rehabilitation weighed in favor of granting motion for compassionate release; collecting cases).

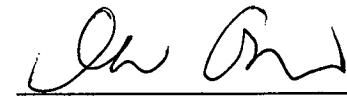
Ultimately, no factor or combination of factors precludes the requested remedy here, particularly given Arciero’s evidence of rehabilitation. In light of the foregoing, this Court should find that Arciero does not present a risk of danger to the community as contemplated by 18 U.S.C. § 3142(g). Accordingly, this Court should exercise its discretion to reduce Arciero’s sentence because extraordinary and compelling reasons support the reduction.

CONCLUSION

For the above and foregoing reasons, Arciero’s petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: July 11, 2022



MALIA ARCIERO
REG. NO. 16101-022
FCI VICTORVILLE MEDIUM II
FEDERAL CORR. INSTITUTION
P.O. BOX 3850
ADELANTO, CA 92301
APPEARING *PRO SE*

No. 22-_____

IN THE
Supreme Court of the United States

MALIA ARCIERO,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PROOF OF SERVICE

I, Malia Arciero, do swear or declare that on this date, July 11, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D. C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 11, 2022



MALIA ARCIERO
Pro Se Petitioner