

No.

IN THE
Supreme Court of the United States

CARLOS HERRERA, ET AL.,
Applicants,

v.

UNITED STATES OF AMERICA,
Respondent.

**APPLICATION FOR A 30-DAY EXTENSION OF TIME WITHIN WHICH TO
FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

Application to the Honorable Neil Gorsuch, as Circuit Justice for the Tenth Circuit

Pursuant to Supreme Court Rule 13.5, Applicants Carlos Herrera, Daniel Sanchez, and Anthony Ray Baca request a 30-day extension of time, to and including February 24, 2023, within which to file a petition for a writ of certiorari.

1. The decision below is *United States v. Herrera*, Nos. 19-2126, 19-2141, 19-2195 (10th Cir. 2022). The Tenth Circuit issued its judgment on October 27, 2022. *See* App. A. Unless extended, Applicants’ time to seek certiorari in this Court expires January 25, 2023. Applicants are filing this application more than ten days before that date. *See* S. Ct. R. 13.5. This Court’s jurisdiction would be invoked under 28 U.S.C. § 1254(1). Respondent has no objection to this extension request.

2. This case concerns whether a facial constitutional challenge to a federal criminal statute is “jurisdictional,” such that under Federal Rule of Criminal

Procedure 12 it may be raised to the district court in a post-trial motion, even if not raised in a pre-trial motion.

Applicants were convicted after a jury trial under the “position clause” of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. § 1959(a), in connection with crimes committed at a state correctional facility in New Mexico. Post-trial, Applicants joined a motion for acquittal filed by a co-defendant, arguing that VICAR’s “position clause” exceeds Congress’s Commerce Clause power. The district court rejected the motion on the merits, holding that Applicants’ facial constitutional challenge did not pass muster.

Applicants appealed, and the Tenth Circuit affirmed the judgment of conviction, addressing numerous issues. As to Applicants’ constitutional challenge, the Tenth Circuit did not address the merits, but instead focused on whether Applicants had waived the issue before the district court by failing to file a pre-trial motion under Federal Rule of Criminal Procedure 12(b).

The court explained that waiver “turns on whether we consider the challenge as [arguing] a perceived defect in the indictment or a lack of subject-matter jurisdiction.” App. A at 107. If the former, the court explained, Applicants’ facial challenge would be waived because it was not brought in a pretrial motion as required under Fed. R. Crim. P. 12(b)(3)(B). If the latter, the motion could be “made at any time” under Fed. R. Crim. P. 12(b)(2), and was therefore properly raised in a post-trial motion. The Tenth Circuit noted that the “courts are divided” on the question of “whether facial challenges are jurisdictional or nonjurisdictional.” App. A at 110. It

ultimately sided with those courts holding that facial constitutional challenges are not “jurisdictional” and, as a result, fall within the category of arguments that must be raised in a pre-trial motion under Rule 12(b)(3)(B). The Tenth Circuit thus declined to consider the merits of Applicants’ constitutional challenge.

3. A 30-day extension within which to file a certiorari petition is reasonable and necessary.

a. As the Tenth Circuit recognized, the courts of appeals are split on the question of whether a facial constitutional challenge counts as a “jurisdictional” challenge, such that it cannot be waived by failing to file a pre-trial motion. *See* App. A at 109-10 (comparing decisions of the First, Second, Sixth, and D.C. Circuits with decisions of the Third, Seventh, Eighth, Ninth, and Eleventh Circuits). An extension of time will help ensure that the petition thoroughly presents the divergent approaches in the different circuits.

b. Undersigned counsel has only recently been retained to represent the Applicants in this matter, and was not involved at any stage of the court of appeals or district court litigation. Thus, additional time is necessary for counsel to become fully familiar with the issues, the decision below and the decisions of other courts of appeals, the record, and otherwise relevant case law.

c. The request is further justified by counsel’s press of business on other pending matters. Among other things, counsel has an amicus brief due in this Court on January 19 in *Gonzalez v. Google*, No. 21-1333 (U.S.), an opening brief in *Pegasystems v. Appian*, No. 1399-22-4 (4th Cir.) due on January 23, ongoing

responsibilities to prepare for a meeting with the Solicitor General's office in connection with *ML Genius Holdings LLC v. Google LLC*, No. 22-121 (U.S.), following the Court's call for the Solicitor General's views, and ongoing responsibilities to prepare for oral argument in *Sonos, Inc. v. International Trade Commission*, Nos. 22-1421, 22-1573 (Fed. Cir.), *The Chamberlain Group, LLC v. International Trade Commission*, Nos. 22-1664, -1656 (Fed. Cir.), and *Gilead Sciences, Inc. v. Superior Court of the State of California (Gilead Tenofovir Cases)*, Case No. A165558 (Cal. Ct. App.).

The requested 30-day extension would cause no prejudice to Respondent, which has advised through counsel that it has no objection to the extension.

Respectfully submitted,

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