

No. 12-7515

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS ANDREW BURRAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MYTHILI RAMAN
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the provision of 21 U.S.C. 841(b)(1)(C) establishing an increased sentencing range when "death results" from trafficking in a controlled substance requires a showing of the defendant's mens rea with respect to the death.

2. Whether the provision of 21 U.S.C. 841(b)(1)(C) establishing an increased sentencing range when "death results" from trafficking in a controlled substance requires a showing that the death was the foreseeable result of the drug-trafficking offense.

3. Whether a "death results" from trafficking in a controlled substance within the meaning of 21 U.S.C. 841(b)(1)(C) if the controlled substance "was a contributing cause of [the] death," as the jury was instructed in petitioner's case.

4. Whether an officer's testimony explaining why he provided a photograph of petitioner to other officers investigating the victim's death was inadmissible hearsay requiring reversal of petitioner's conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-37) is reported at 687 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2012. A petition for rehearing was denied on September 13, 2012 (Pet. App. 38). The petition for a writ of certiorari was filed on November 27, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of distributing heroin and one count of distributing heroin resulting in death, both in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). The district court sentenced him to concurrent terms of 240 months of imprisonment on each count. The court of appeals affirmed. Pet. App. 21-37.

1. On November 17, 2009, petitioner distributed heroin to a confidential informant, Breanne Brown. Brown contacted Officer Jamie Miller of the Central Iowa Drug Task Force to inform him that she could purchase heroin that day from "Lil C," whom Officer Miller knew from earlier investigations to be petitioner. Officer Miller watched Brown conduct a controlled purchase of heroin from petitioner. Officer Miller recognized petitioner, and an electronic device in Brown's purse made an audio recording of the transaction. Pet. App. 22; Gov't C.A. Br. 2-3.

Petitioner also distributed heroin on April 14, 2010. Joshua Banka, accompanied by his wife, Tammy Noragon Banka (Noragon), purchased one gram of heroin from petitioner. Banka used some of the heroin almost immediately, became groggy, and fell asleep. After Noragon helped him home, Banka woke up around midnight complaining of pain. He used some more heroin then and again at around 5 a.m., when Noragon went to sleep. When she woke at about 10:30 a.m., Noragon found Banka's dead body seated on the toilet,

slumped into the shower. When officers responded to Noragaon's call for help, they found "drug paraphernalia and a number of narcotics and prescription medications, including alprazolam, clonazepam, oxycodone, baclofen, heroin, and marijuana." Pet. App. 22. According to Noragon, Banka "was a long-time, multiple drug user" and "she saw him use marijuana and oxycodone the day before he died." Ibid.; see Gov't C.A. Br. 4-6. Local officers provided Noragon's description of the person who sold heroin to Banka to the Central Iowa Drug Task Force. In response, Officer Miller sent petitioner's photograph to the local officers. Noragon identified petitioner in a photographic lineup and again at trial. Pet. App. 23.

2. A grand jury in the Southern District of Iowa returned a superseding indictment charging petitioner with the counts described above, arising out of the transactions on November 17, 2009, and April 14, 2010. Superseding Indictment 1. Petitioner proceeded to a jury trial.

a. At trial, two medical experts testified about the circumstances of Banka's death. Dr. Eugene Schwilke, a forensic toxicologist, examined blood and urine samples taken from Banka's body. His tests "detected multiple drugs, including morphine (a metabolite of heroin), 6-monoacetylmorphine (a metabolite of heroin), codeine (a likely impurity in the heroin), 7-aminoclonazepam (a metabolite of clonazepam), alprazolam,

marijuana metabolites, and oxycodone." Pet. App. 23 (footnote omitted). According to Dr. Schwilke, "heroin was a contributing factor to Banka's death, but he could not state that Banka would not have died if he had not taken heroin." Ibid.

Dr. Jerri McLemore, a state medical examiner, conducted Banka's autopsy. Based on her examination and the toxicology report, she "certified the cause of death as 'a mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam.'" Pet. App. 23. She also explained that "'morphine, the breakdown product of the heroin, was the only drug that was above the therapeutic range,'" ibid., and that it "was at a significantly high level." 6/28/11 Trial Tr. (Trial Tr.) 273. Dr. McLemore "could not state that Banka would not have died if he had not taken heroin, but she did describe death without the heroin as 'very less likely.'" Pet. App. 23.

b. Under 21 U.S.C. 841(b)(1)(C), a person convicted of distributing a schedule II controlled substance, including heroin, "shall be sentenced to a term of imprisonment of not more than 20 years and if death * * * results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life." With respect to the count charging him with distribution resulting in death, petitioner proposed instructing the jury that it was required to find "that

the distribution of the heroin was the proximate cause of death." Pet. App. 26 n.3. Petitioner proposed to define proximate cause as:

a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.

A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

Ibid.

The district court rejected those instructions and instead instructed the jury that it was required to find that: (1) the defendant intentionally distributed heroin; (2) at the time of the transfer defendant knew that it was heroin; and (3) "[a] death resulted from the use of the heroin." Pet. App. 24-25. The court further instructed: "For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by [petitioner] was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death[.]" Id. at 25. The district court overruled petitioner's objection to the "contributing cause" portion of that instruction. Tr. 394. The jury found petitioner guilty on both counts. Pet. App. 21.

c. At sentencing, the district court assigned petitioner a total offense level of 40 under the advisory Sentencing Guidelines, including a two-level enhancement for obstruction of justice based on petitioner's false trial testimony. The district court placed petitioner in criminal history category VI, yielding an advisory Sentencing Guidelines range of 360 months to life imprisonment. Sent. Tr. 14-15. The government advocated a 360-month sentence. Id. at 11. After noting that petitioner's offense resulted in "the untimely death of a very young person" and that petitioner's crime was among the "most serious" offenses prosecuted in district court, the court imposed concurrent terms of 240 months of imprisonment on each count. Id. at 15, 17-18

3. The court of appeals affirmed. Pet. App. 21-37. As relevant here, petitioner renewed his challenge to the jury instructions on the count charging him with distribution of a controlled substance resulting in death. He contended that the district court should have instructed the jury that, in order to find that Banka's death "result[ed]" from the heroin distributed by petitioner, the jury had to find that the use of the heroin was the proximate cause of Banka's death. Relying on its prior decision in United States v. McIntosh, 236 F.3d 968 (8th Cir.), cert. denied, 532 U.S. 1022 (2001), the court of appeals rejected petitioner's claim. Pet. App. 27 (concluding that "a showing of 'proximate cause' is not required" under 21 U.S.C. 841(b)(1)). The court

further noted that “[e]very circuit to address the issue agrees with McIntosh on this point.” Id. at 27 n.4.

Petitioner also contended “that the district court erred by using ‘contributing cause’ language to define the statute’s causation element.” Pet. App. 27. The court of appeals rejected that argument, explaining that the instruction was “consistent with this court’s statement that [Section] 841(b)(1)’s ‘results from’ requirement is met by a ‘contributing cause.’” Ibid. (quoting United States v. Monnier, 412 F.3d 859, 862 (8th Cir. 2005), cert. denied, 546 U.S. 1116 (2006)). The court noted that in Monnier, it had “defined ‘contributing cause’ as ‘[a] factor that -- though not the primary cause -- plays a part in producing a result,’” and therefore the district court did not abuse its discretion in including substantially similar language in its jury instruction. Id. at 28. The court acknowledged that the Seventh Circuit in United States v. Hatfield, 591 F.3d 945 (2010), had “rejected a jury instruction adopting the ‘contributing cause’ language from Monnier,” instead “endors[ing] a jury instruction using the statute’s language without embellishment,” but the court of appeals concluded that in petitioner’s case it was “bound by Monnier’s formulation of the ‘results from’ standard.” Pet. App. 28.

Relatedly, petitioner contended that the evidence was insufficient to show that Banka’s death resulted from the heroin distributed by petitioner. Petitioner relied on the evidence that

Banka's death "'resulted from' a mixed drug intoxication, not the heroin" and that the experts "could not testify that Banka would not have died if he had not used the heroin." Pet. App. 33. The court concluded that the evidence was sufficient because "both doctors testified that the heroin was a 'contributing cause' of [Banka's] death, which satisfies the Monnier standard." Ibid. The court further pointed out that "the heroin metabolite [morphine] was the only drug present in levels above the therapeutic range" and that one of the experts testified that "death without the heroin was 'very less likely.'" Ibid.

Petitioner also challenged the admission of Officer Miller's testimony about why he provided petitioner's photograph to local officers investigating Banka's death, contending that the testimony was inadmissible hearsay. The court found that the district court "did not abuse its discretion because (1) the part of Officer Miller's testimony [petitioner] attacks on appeal is not an out-of-court statement, (2) even if it was, the statement was not offered for its truth, and (3) any error was harmless." Pet. App. 36.

ARGUMENT

Petitioner principally challenges (Pet. 12-16) the district court's instructions to the jury on the sentencing enhancement in 21 U.S.C. 841(b)(1)(C) that applies when "death results" from the defendant's drug-trafficking crime. He contends that the court of appeals erred in sustaining his conviction in the absence of a

showing of "proximate cause, foreseeability, or mens rea." Pet. 13. He further contends that the lower courts erred in concluding that the "death results" factor was satisfied "when the heroin was merely a 'contributing cause' of the death by mixed drug intoxication, rather than the sole cause of death." Ibid. The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioner first contends that the court of appeals should have recognized a mens rea requirement in connection with the "death results" provision of 21 U.S.C. 841(b)(1)(C). As an initial matter, petitioner never argued in either the district court or the court of appeals that Section 841(b)(1)(C)'s "death results" provision requires proof of mens rea. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted). The Court should adhere to that rule here.

In any event, no mens rea requirement attaches to the "death results" provision. That question is a matter of statutory construction. Staples v. United States, 511 U.S. 600, 604 (1994). The "starting place [of the] inquiry" is "[t]he language of the statute." Id. at 605. The text of the statute does not require that the defendant have "knowingly" or "recklessly" caused the

death, and this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." Dean v. United States, 556 U.S. 568, 572 (2009) (quoting Bates v. United States, 522 U.S. 23, 29 (1997)). Congress's use of the passive voice ("if death * * * results," 21 U.S.C. 841(b)(1)(C)) also indicates that the provision does not require proof of mens rea. As Dean explained, "[t]he passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability. * * * It is whether something happened -- not how or why it happened -- that matters." 556 U.S. at 572.

Petitioner points to the principle that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Pet. 12 (quoting Staples, 511 U.S. at 604). But the presumption in favor of mens rea is designed to avoid criminalizing otherwise lawful conduct. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 72-73 (1994) (recognizing that presumption does not apply to each element of a criminal offense, but to "each of the statutory elements that criminalize otherwise innocent conduct"); see also Carter v. United States, 530 U.S. 255, 269-270 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.") (internal

quotation marks and citation omitted). No such concern arises with respect to 21 U.S.C. 841(b)(1)(C)'s "death results" provision because that provision applies only when the defendant is otherwise guilty of drug trafficking under 21 U.S.C. 841(a), which requires proof of mens rea; the enhanced penalties under the "death results" provision do not have the effect of criminalizing otherwise lawful conduct.

This Court rejected the same argument in Dean. There, the Court addressed whether the accidental discharge of a firearm -- i.e., discharge without mens rea -- during a crime of violence triggered enhanced minimum punishment under 18 U.S.C. 924(c)(1)(A)(iii). The Court concluded that it did, finding no basis to apply the presumption in favor of mens rea. "It is unusual to impose criminal punishment for the consequences of purely accidental conduct," the Court noted, "[b]ut it is not unusual to punish individuals for the unintended consequences of their unlawful acts." Dean, 556 U.S. at 575. Identical reasoning applies with respect to the "death results" provision here.

2. Petitioner also contends that the "death results" provision requires proof that the death was the foreseeable result of the drug-trafficking offense. Pet. 12-13.* That is incorrect,

* Petitioner does not distinguish the terms "foreseeability" and "proximate cause," and "foreseeability is widely defined as an element of proximate cause." United States v. Webb, 655 F.3d 1238, 1250 n.9 (11th Cir. 2011), cert. denied, 132 S. Ct. 1131 (2012).

and no disagreement exists in the circuits on that issue.

a. Every court of appeals to decide the issue agrees that the "death results" provision does not require proof that the death was foreseeable or that the defendant's conduct was the proximate cause of the death. See United States v. Webb, 655 F.3d 1238, 1254-1255 (11th Cir. 2011), cert. denied, 132 S. Ct. 1131 (2012); United States v. De La Cruz, 514 F.3d 121, 137 (1st Cir. 2008) cert. denied, 557 U.S. 934 (2009); United States v. Houston, 406 F.3d 1121, 1124-1125 (9th Cir.), cert. denied, 546 U.S. 914 (2005); United States v. McIntosh, 236 F.3d 968, 971-974 (8th Cir.), cert. denied, 532 U.S. 1022 (2001); United States v. Robinson, 167 F.3d 824, 830-832 (3d Cir.), cert. denied, 528 U.S. 846 (1999); United States v. Patterson, 38 F.3d 139, 144-145 (4th Cir. 1994), cert. denied, 514 U.S. 1113 (1995); see also United States v. Rebmann, 226 F.3d 521, 525 (6th Cir. 2000) (stating in dicta that Section 841(b)(1) "is, in effect, a strict liability statute with respect to the injury or death of another arising out of the distribution of drugs"), overruled on other grounds by United States v. Leachman, 309 F.3d 377, 385 n.9 (6th Cir. 2002).

b. Rather than a showing of proximate causation, "[w]hat is required under the death-enhancing statute is that the government prove cause-in-fact, that is, that the decedent's death was caused in fact by his or her use of drugs that were distributed either by the defendant himself or by others in a conspiracy of which the

defendant was a part." De La Cruz, 514 F.3d at 138; see Webb, 655 F.3d at 1254-1255 ("The statute requires a cause-in-fact connection between the victim's ingestion of the drugs and death.").

The text of Section 841(b)(1) makes clear that proximate cause or foreseeability is not required. See Houston, 406 F.3d at 1124 (Congress's use of the passive phrase "if death * * * results" "unambiguously eliminates any statutory requirement that the death have been foreseeable"); McIntosh, 236 F.3d at 972 ("[The provision] is unambiguous and [] giving effect to its plain meaning prohibits us from superimposing upon the statute a foreseeability or proximate cause requirement. From the statute's language, it is clear Congress intended to expose a defendant to a more severe minimum sentence whenever death or serious injury is a consequence of the victim's use of a controlled substance that has been manufactured or distributed by that defendant.") (emphasis in original); Robinson, 167 F.3d at 830-831 ("Where, as here, Congress' language is plain and unambiguous, we simply apply the language of the statute as written.") (internal quotation marks omitted); Patterson, 38 F.3d at 145 ("[T]he plain language of [Section] 841(b)(1)(C) does not require, nor does it indicate, that prior to applying the enhanced sentence, the district court must find that death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event."). As the Fourth Circuit explained:

The statute puts drug dealers and users on clear notice that their sentences will be enhanced if people die from using the drugs they distribute. Where serious bodily injury or death results from the distribution of certain drugs, Congress has elected to enhance a defendant's sentence regardless of whether the defendant knew or should have known that death would result. We will not second-guess this unequivocal choice.

Patterson, 38 F.3d at 145 (citations and footnote omitted).

Petitioner's reliance on United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010), is unavailing. In Hatfield, the Seventh Circuit did not hold that the parallel "death results" provision in 21 U.S.C. 841(b)(1)(A) required a finding of foreseeability or proximate cause. To the contrary, as part of its analysis of a jury instruction that defined the meaning of the "results from" provision, the Hatfield court noted that "[t]he death or injury need not have been foreseeable." 591 F.3d at 948; see also id. at 949 ("proximate cause usually implies foreseeability, which we know is not required in our case") (citations omitted). And although the court expressed some "misgivings" about Congress's choice to make the "death results" enhancement one of strict liability, the Hatfield court acknowledged:

[T]he cases are unanimous and emphatic that section 841(b)(1)(A) imposes strict liability.

A realistic consideration * * * supports the conclusion: strict liability creates an incentive for a drug dealer to warn his customer about the strength of the particular batch of drugs being sold and to refuse to supply drugs to particularly vulnerable people. And strict liability does not offend against the principle of marginal deterrence * * * because it does not give the seller an incentive to commit a more serious crime.

Id. at 950-951. Particularly given the lack of any conflict among the circuits, further review of the foreseeability question is unwarranted.

3. Petitioner also challenges (Pet. 13-16) the instruction that the jury could find that a death "resulted from" the heroin distributed by petitioner if the heroin was a "contributing cause" of Banka's death, and further instructing that "[a] contributing cause is a factor that, although not the primary cause, played a part in the death." Pet. App. 25. Although the court of appeals' endorsement of that instruction conflicts with Hatfield's rejection of a similar instruction, the narrow conflict over the precise wording of the causation instruction does not warrant further review.

a. The court of appeals endorsed the district court's jury instruction based on its decision in United States v. Monnier, 412 F.3d 859 (8th Cir.), cert. denied, 546 U.S. 1116 (2006). Pet. App. 27-28. In Monnier, the court of appeals rejected a challenge to the sufficiency of the evidence on a charge of distribution of methamphetamine resulting in death based on its conclusion that the jury necessarily found "contributory cause." 412 F.3d at 862. The court of appeals defined contributory cause as "[a] factor that -- though not the primary cause -- plays a part in producing a result." Ibid. (quoting Black's Law Dictionary 212 (7th ed. 1999)).

The court of appeals correctly sustained the district court's instructions. To prove that Banka's death resulted from the use of the heroin distributed by petitioner, the government had to prove that the heroin was a cause-in-fact of the death, which is sometimes referred to as "but-for causation." See Webb, 655 F.3d at 1254-1255; De La Cruz, 514 F.3d at 138. In this case, there were (even according to petitioner's theory of the case) multiple causes of Banka's death. Because Banka had ingested several drugs, the medical experts determined that death was a result of mixed-drug intoxication and, because of the presence of multiple drugs, the experts could not say that Banka would not have died if he had not taken the heroin, but opined that Banka's death without the heroin was "very less likely." Pet. App. 23.

The law has long understood how to address the conduct of multiple actors whose "combined conduct, viewed as a whole, is a but-for cause of the [harm]": When "application of the but-for rule to [each of the actors] individually would absolve all of them [of liability], the conduct of each is a cause in fact of the [harm]." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41 at 268 (5th ed. 1984). The district court's instructions were faithful to that principle. They required the jury to find that the heroin contributed to Banka's death to find petitioner liable under the "death results" provision, and they

prevented petitioner from escaping additional criminal sanction merely because multiple factors caused Banka's death.

b. In Hatfield, the Seventh Circuit "rejected a jury instruction adopting the 'contributing cause' language from Monnier, endorsed a jury instruction using the statute's language without embellishment, reversed, and remanded for a new trial." Pet. App. 28. Although that ruling conflicts with the decision below, further review at this time is not warranted. As an initial matter, the disagreement exists only between the Seventh and Eighth Circuits and it is very recent. Hatfield was decided in 2010 and, aside from the decision below, has been discussed in substance in only one other federal criminal appellate decision outside the Seventh Circuit: the Eleventh Circuit's decision in Webb, which agreed with Hatfield's discussion of proximate cause (see Webb, 655 F.3d at 1253; pp. 12-13, supra), and specifically noted that the challenge to the jury instructions in Webb did not present the Hatfield court's concern (see Webb, 655 F.3d at 1253 n.14).

Moreover, even though the Seventh and Eighth Circuits have reached differing views on the appropriateness of a particular jury instruction, it is not clear that the circuits disagree about the underlying legal standard. The Hatfield court's disapproval of the instructions in question rested on its concern that it "d[id]n't understand what a jury would make of" the instructions and its sense that "the statutory language [alone] * * * was a good

deal clearer than the addition[al instruction given] and probably clear enough." 591 F.3d at 949. Although the Seventh Circuit regarded those as sufficient grounds for disapproving the instructions given in Hatfield, the Seventh Circuit did not express a view on whether the "death results" provisions of 21 U.S.C. 841(b)(1) incorporate the ordinary legal rules assigning responsibility in the face of combined conduct that was the but-for cause of the harm, see pp. 16-17, supra. Nor did the decision below address that question, because the instructions had effectively been approved under the Eighth Circuit's precedent in Monnier. Because the narrow instructional disagreement may not turn on any substantive conflict, at the very least the scope of any conflict is insufficiently developed to warrant this Court's review at this time.

4. Petitioner also renews his contention (Pet. 16-17) that the district court erred in allowing Officer Miller to testify about why he provided petitioner's photograph to local officers investigating Banka's death. In particular, he asserts that the testimony constituted inadmissible hearsay. That factbound contention lacks merit. As the court of appeals explained, in the challenged testimony, Officer Miller was "recit[ing] his work in narcotics as the foundation for identifying [petitioner] as a possible suspect in Banka's death," and "[t]here is no suggestion that Miller relied on" -- much less offered -- "an out-of-court

statement for that conclusion." Pet. App. 36. Moreover, to the extent petitioner challenges the admission of Officer Miller's explanation for his conduct in the investigation, any statements that influenced Officer Miller were not hearsay because they were offered not for their truth, but for their effect on Officer Miller's investigation. See ibid. Accordingly, the challenged testimony was not hearsay. Fed. R. Evid. 801(c).

Petitioner's reliance on Michelson v. United States, 335 U.S. 469, 475-476 (1948), suggests his true contention is not that the testimony was hearsay, but rather that the testimony should have been excluded as improper character or propensity evidence, or as otherwise prejudicial. See Pet. 17. Petitioner failed to object on that basis, however, in the district court. Cf. Pet. App. 36 (noting that petitioner "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value") (internal quotation marks omitted). In any event, the court of appeals correctly found that any error in admitting the testimony was harmless because "other evidence to the same effect was properly before the jury." Id. at 37 (internal quotation marks and citation omitted); see ibid. (other trial evidence "explained [Officer Miller's] investigation and identification of [petitioner] as a potential heroin dealer").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MYTHILI RAMAN
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

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