

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

**ABU AGILA MOHAMMAD
MAS'UD KHEIR AL-MARIMI,**

Defendant.

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:
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:
:

Case No. 22-cr-392 (DLF)

UNDER SEAL

GOVERNMENT'S MOTION FOR A RULE 15 DEPOSITION OF [REDACTED]

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully moves this Court, pursuant to Federal Rule of Criminal Procedure Rule 15, to order the deposition of a foreign-national witness, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] is beyond the subpoena power of the United States and is substantially likely to be unavailable to testify in person at trial. The government further requests that this deposition be taken under seal. In support of this motion, the government states the following:

BACKGROUND

A. The Bombing of Pan Am Flight 103

On December 21, 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland, while *en route* from London's Heathrow Airport to John F. Kennedy International Airport in New York City. The explosion resulted in the deaths of 270 people, 259 of whom were aboard the flight, with another 11 residents of Lockerbie killed in an inferno caused by falling airplane debris that destroyed an entire city block instantaneously.

Debris and wreckage covered an area of 845 square miles, with thousands of items collected for examination to determine the cause of the crash. The ensuing investigation revealed that the destruction of Pan Am Flight 103 was caused by the detonation of an explosive device (*i.e.*, “an improvised explosive device,” or “IED”), that was placed inside a copper-colored suitcase (“the IED suitcase”) stored within the aircraft’s forward cargo compartment. The government anticipates that the evidence at trial will prove that the Defendant built the bomb that brought down Pan Am Flight 103, and that he did so on behalf of the Libyan External Services Organization (ESO), which was part of the Libyan intelligence apparatus.

B. Procedural History

On November 29, 2022, a federal grand jury in the District of Columbia returned a three-count indictment charging the defendant with destruction of an aircraft resulting in death, in violation of 18 U.S.C. §§ 32(a)(2), 34, and 2; destruction of an aircraft resulting in death, in violation of 18 U.S.C. §§ 32(a)(1), 34, and 2; and destruction of a vehicle used in foreign commerce by means of an explosive, resulting in death, in violation of 18 U.S.C. § 844(i). Trial is scheduled for April 20, 2026.

C. [REDACTED] Expected Testimony

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

¹ Abdel Baset Ali Al-Megrahi and Lamin Khalifah Fhimah were tried in 2000-01 in Camp Van Zeist, The Netherlands, by a panel of three Scottish judges applying Scots law.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. Conditions Bearing on [REDACTED] Future Availability

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The government thus seeks, pursuant to Federal Rule of Criminal Procedure 15, to preserve the testimony of this important witness through the use of a deposition.

[REDACTED]

[REDACTED]

E. Proposed Procedures

The government proposes that the deposition of [REDACTED] be carried out in the following manner:

1. The deposition should be held in the late fall of 2025, at a time convenient to the parties and the Court, in [REDACTED]. This will allow the government time to confirm the witness's availability through the [REDACTED] authorities, and to litigate this Motion (and others like it). The proposed date will also provide both parties sufficient time to prepare for the deposition.⁴
2. The government will take the following steps to ensure that the defendant will be able to meaningfully participate in the deposition:
 - a. Members of the defense team will be able to directly participate in the deposition. The government will facilitate the travel of members of the defense team to the location of the deposition for the duration of the deposition.
 - b. The defendant, who remains in custody, as well as other members of the defense team will be able to meaningfully participate in the deposition from a courtroom in the United States District of Columbia Courthouse. The government will coordinate with the FBI and courthouse personnel, to include the U.S. Marshal Service, to ensure that there is a two-way contemporaneous video/audio link between the witness and the defendant.

⁴ Consistent with Rule 15(e)(3), the vast majority of statements made by this witness related to the subject matter of the witness's anticipated testimony that are in the government's possession have already been turned over in discovery. The government will turn over any remaining statements to which the defendant would be entitled ahead of any deposition.

The defendant, along with U.S.-based members of the defense team will be able to view the deposition live from the courtroom and will be able to participate by video/ audio link. The government will also set up a separate secure means of communication so that the foreign-based defense team and U.S.-based defense team (which includes the defendant) will have a separate means of communicating privately during the deposition.

3. The deposition will be taken under oath to impress upon the witness the seriousness of the matter and to ensure that there are consequences in the event the witness is untruthful and to render it admissible, if necessary, under Fed. R. Evid. 804(b)(1).
4. The deposition should be videotaped. This measure will accurately preserve the testimony of the witness. Also, if admitted at a future court proceeding, the videotape will allow the fact-finder to observe the witness during the testimony, and thus, provide a sound basis for evaluating the credibility of the witness.
5. This Court should preside over the deposition, making rulings as if the witness were testifying at trial. The presence of the Court will also ensure that the deposition is conducted fairly. The government suggests that the Court preside over the deposition from the courtroom.

The government will continue to collect any and all material in its possession relevant to the cross-examination of the witness, including any *Brady*, *Giglio* or other discoverable material, and to provide it to the defense in advance of the scheduled deposition. The video deposition will similarly remain under seal and subject to the protective order, if and until offered into evidence at trial, or upon further order of the Court.

LEGAL ANALYSIS

A. A Deposition Pursuant to Federal Rule of Criminal Procedure Rule 15 is Warranted

A party may move that a prospective witness be deposed to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.” Fed. R. Crim. P. 15(a)(1). “The word ‘may’” in Rule 15(a)(1) “signifies that the district court retains broad discretion in granting a Rule 15(a) motion and that the court should review these motions on a case-by-case basis, examining whether the particular circumstances of each case constitute ‘exceptional circumstances.’” *United States v. Dillman*, 15 F.3d 384, 389 (5th Cir. 1994).

“While the Rule neither defines nor elucidates the ‘exceptional circumstances’ and ‘interest of justice’ standards, some guidance in this regard is found in the Advisory Committee’s note, which states that a court may permit a party to depose a witness in a criminal case if (a) the witness will be unavailable to testify at trial, (b) the testimony is material to the moving party’s case, and (c) the testimony is necessary to avoid an injustice.” *United States v. Hajbeh*, 284 F. Supp. 2d 380, 382 (E.D. Va. 2003); *accord United States v. Kelly*, 36 F.3d 1118, 1125 (D.C. Cir. 1994) (“Critical factors toward meeting [movant’s] burden include (1) the materiality of the testimony; and (2) the unavailability of the witness to testify at trial.”) (citing *United States v. Ismaili*, 828 F.2d 153, 159 (3d Cir. 1987)).⁵

⁵ See also, *United States v. Johnpoll*, 739 F.2d 702, 709 (2nd Cir. 1984) (“It is well-settled that the ‘exceptional circumstances’ required to justify the deposition of a prospective witness are present if the witness’ testimony is material to the case and if the witness is unavailable to appear at trial.”); *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993) (“When a prospective witness is unlikely to appear at trial and his or her testimony is critical to the case, simple fairness requires permitting the moving party to preserve that testimony – by depositing the witness – absent significant countervailing factors which would render the taking of the deposition unjust.”); *United States v. Bello*, 532 F.2d 422, 423 (5th Cir. 1976) (court held that when a witness is an unservable deponent unlikely to return to the U.S., extraordinary circumstances exist to justify the Rule 15 deposition of that witness).

1. Materiality

“In assessing whether testimony is material for Rule 15(a)(1) purposes, courts have used the standards developed for applying and interpreting *Brady v. Maryland*, 373 U.S. 83 (1963).” *United States v. Vo*, 53 F. Supp. 3d 77, 81 (D.D.C. 2014) (Bates, J.). “[E]vidence is “material” within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Id.* (citation omitted). “A ‘reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.” *Id.* “So, the witness need not provide totally unique testimony; nor does she need to be a ‘critical’ witness.” *Id.*; *see also Drogoul*, 1 F.3d at 1553-54 (government demonstrated materiality of prospective Italian witnesses where evidence necessary “directly to refute” defendant’s defense); *United States v. Cooper*, 947 F. Supp. 2d 108, 112 n.2 (D.D.C. 2013) (“[As the victims of the alleged fraud and participants in relevant communications with [defendant], [witnesses] are likely to provide testimony that is highly material to the charges in the indictment.”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Unavailability

“A potential witness is unavailable for purposes of Rule 15(a) . . . whenever a substantial likelihood exists that the proposed deponent will not testify at trial.” *Drogoul*, 1 F.3d at 1553. This inquiry mandates a focus on the trial, and not the deposition; “[T]o resolve a motion under Rule 15, courts need only look to the witness’ unavailability ‘for trial’ and not to whether they have actually consented to make themselves available for the deposition.” *United States v. Vilar*, 568 F. Supp. 2d 429, 439 (S.D.N.Y. 2008).

The moving party need not conclusively demonstrate trial unavailability. “It would be unreasonable and undesirable to require the government assert with certainty that a witness will be unavailable for trial months ahead of time, simply to obtain authorization to take his deposition.” *United States v. Sines*, 761 F.2d 1434, 1439 (9th Cir. 1985). Thus, “[w]hen the

[REDACTED]

question is close a court may allow a deposition in order to preserve a witness' testimony, leaving until trial the question of whether a deposition will be admitted into evidence." *United States v. Mann*, 590 F.2d 361, 366 (1st Cir. 1978); *see also Vo*, 53 F. Supp.3d at 81 ("Courts do not require a very strong showing of unavailability").

In applying the flexible "unavailability" standard, courts have considered factors such as: whether a witness is a foreign national located outside the United States (and thus beyond the subpoena power of the United States);⁷ whether a foreign-national witness has declared his or her unwillingness to testify at trial;⁸ whether any treaty obligations concerning witness compulsion emanate from the witness's home country;⁹ and whether there is a likelihood that the witness will die before the scheduled trial.¹⁰

⁷ Rule 17 of the Federal Rules of Criminal Procedure provides that "[i]f the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service." However, Section 1783(a) only authorizes a federal court to issue a subpoena to "a national or resident of the United States who is in a foreign country," a principle that recognizes that "[a]liens who are inhabitants of a foreign country . . . owe no allegiance to the United States" and therefore "cannot be compelled to respond to a subpoena." *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950).

⁸ *See, e.g., United States v. Warren*, 713 F. Supp. 2d 1, 4 (D.D.C. 2010) ("Evidence that a witness specifically refuses to testify at trial is 'potent proof of unavailability for purposes of Rule 15(a).'" (citation omitted)); *Vilar*, 568 F. Supp. 2d at 439 (granting Rule 15 deposition on basis of, among other factors, "representations of the witness' counsel that they have reached a 'final' decision to decline to testify at trial").

⁹ *See, e.g., Drogoul*, 1 F.3d at 1553 ("Under a treaty between the United States and Italy, potential witnesses may be ordered by the Italian government to testify in the United States, but one who refuses to do so may not be removed to this country.").

¹⁰ *See, e.g., In re Grand Jury Proceedings*, 697 F. Supp. 2d 262, 273 (D.R.I. 2010) (granting Rule 15 motion where "the potential witnesses are all at varying stages of terminal illness"); *but see United States v. Nuss*, 2010 WL 1484715, at * 2 (S.D. W. Va. 2010) (denying Rule 15 motion where unavailability argument was based on "nothing more than unfounded speculation that the witnesses may be harmed").

3. The interest of justice favors a deposition.

“In addition to the ‘exceptional circumstances’ requirement, Rule 15(a)(1) permits depositions only ‘in the interest of justice.’” *Vo*, 53 F. Supp. 3d. at 82. Courts assessing this factor have looked to “countervailing considerations” that might weigh against the requested deposition. *Id.* For example, parties opposing Rule 15 motions have argued that the deposition would prejudice the prospective deponent, *id.* at 83-85; that the deposition testimony would be unreliable or inadmissible, *United States v. Ramos*, 45 F.3d 1519, 1523 (11th Cir. 1995), that the location of the deposition would be unsafe, *id.*; that the deposition might be inaccurately translated from a foreign language, *United States v. Drogoul*, 1 F.3d 1546, 1554 (11th Cir. 1993), and that the moving party was untimely in seeking the deposition, *id.* at 1555-56.

No countervailing considerations are present here, especially in light of the procedures that the government proposes above.

First, because the defendant would be virtually present for the deposition, his rights would not be affected. *See* Fed. R. Crim. P. 15(c)(3) (permitting foreign depositions without the defendant’s physical presence where certain conditions are met and the defendant can meaningfully participate through other means);¹¹ *see also United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989) (upholding admission of a foreign deposition taken without the defendant’s physical presence prior to the amendments to Rule 15 that added subpart (c)(3)); *Maryland v. Craig*, 497 U.S. 836 (1990) (upholding state statute that permitted certain child victims to testify via CCTV); *United States v. Gigante*, 166 F.3d 75, 79-82 (2d Cir. 1999) (allowing live testimony via CCTV in lieu of a Rule 15 deposition).

Second, because the deposition would be videotaped, the factfinder would not be deprived of the opportunity to observe the witness’s demeanor. *Cf. United States v. Milian-Rodriguez*, 828 F.2d 679, 686 (11th Cir. 1987) (noting that, in criminal cases, depositions without such opportunity are “disfavored”).

And third, because the Court would preside over the deposition and make evidentiary rulings in real time, there would be little risk that the deposition would result in a legally defective record or require the Court to revisit any objections lodged during the testimony.

On the other side of the balance, the importance of preserving [REDACTED] testimony for trial weighs heavily. The bombing of Pan Am 103 was a crime of extraordinary magnitude. It extinguished 270 lives, caused dramatic geopolitical consequences, and remains one of the most notorious acts of terrorism in modern history. It is therefore profoundly important to the litigants and the public that the case be decided with the benefit of all relevant and admissible

¹¹ The government addresses those factors as they apply to [REDACTED] in Part B, *infra*.

evidence, including [REDACTED]
[REDACTED]

In sum, the interests of justice counsel in favor of the requested Rule 15 deposition.

B. The deposition should take place outside the United States

Rule 15 provides that a deposition may be taken outside the United States without the defendant's presence if the Court finds all of the following factors:

- (A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;
- (B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
- (C) the witness's presence for a deposition in the United States cannot be obtained;
- (D) the defendant cannot be present because:
 - (i) the country where the witness is located will not permit the defendant to attend the deposition;
 - (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
 - (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
- (E) the defendant can meaningfully participate in the deposition through reasonable means.

Fed. R. Crim. P. 15(c)(3). For the reasons stated above, [REDACTED] testimony would provide substantial proof of a material fact in a felony prosecution, and there is a substantial likelihood that [REDACTED] attendance at trial cannot be obtained and that [REDACTED] presence in the United States for a deposition cannot be obtained.

The defendant in this case cannot travel to [REDACTED]. The U.S. Marshals Service (USMS) has informed undersigned counsel that because, among other reasons, it does not have authority to maintain custody of a prisoner in a foreign country, the defendant cannot be securely

transported abroad and kept in custody for the duration of the deposition.¹² Moreover, the procedures proposed by the United States above will assure the defendant's meaningful participation in the proceedings. He will be physically present in the courtroom here in the United States, with a video-link to the deposition of [REDACTED], and an ability to hold private conversations with his counsel as the deposition progresses. This satisfies Rule 15(c)(3)(E)'s meaningful-participation requirement. *See United States v. Trabelsi*, 2023 WL 4341429 at *5 (D.D.C. April 5, 2023) (granting request for a foreign Rule 15 deposition with a *pro se* in-custody defendant); *United States v. Cooper*, No. 12-cr-211 (JDB), ECF 20 (D.D.C. 2012) (permitting a foreign Rule 15 deposition without the defendant's physical presence where the United States would arrange for the defendant to observe the proceedings remotely and communicate privately with defense counsel). The proposed procedures would also fully vindicate the defendant's right under the Confrontation Clause to a full and effective cross examination. *See United States v. Abu Khattallah*, 282 F. Supp. 3d 279, 283 (D.D.C. 2017) (rejecting Confrontation Clause argument against admission of Rule 15 deposition because "[m]embers of [the] defense team were physically present both at the deposition in Cairo and with the Defendant in Washington, and the Defendant could view the proceedings and communicate with his counsel abroad").

C. The deposition can and should be sealed

Rule 15(e) directs that a deposition "must be taken and filed in the same manner as a deposition in a civil action." The Rulemakers' decision to treat criminal Rule 15 depositions like civil depositions supports closure in two ways.

¹² The government expects to file a declaration from a representative of USMS explaining its position in greater detail.

First, civil depositions have traditionally been closed proceedings. As the Supreme Court has noted, “pretrial depositions and interrogatories are not public components of a civil trial.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). Thus, “[s]uch proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice.” *Id.*; see also *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) (“Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private.”); *Kimberlin v. Quinlan*, 145 F.R.D. 1, 2 (D.D.C. 1992) (declining to permit CNN to attend deposition of, among others, Richard Thornburgh: “Depositions . . . are not a judicial trial, nor a part of a trial, but a proceeding preliminary to a trial, and neither the public nor representatives of the press have a right to be present at such taking”) (citation omitted); see generally Wright & Miller, Federal Practice and Procedure § 2041 (3d ed.) (“it should be noted that it has been held that neither the public nor representatives of the press have a right to be present at the taking of a deposition”).

Second, in adjudging the access rights of the press and public, federal courts distinguish between discovery materials that have been filed with the court and those materials which have not. “The rights of the public kick in when material produced during discovery is filed with the court.” *Bond v. Utreras*, 585 F.3d 1061, 1075 (1st Cir. 2009). And, Fed. R. Civ. P. 5(d)(1) -- which, pursuant to Rule 15(e), governs the “filing” of any Rule 15 criminal deposition -- directs that depositions are among the types of discovery requests and responses that “must not be filed until they are used in the proceeding or [until] the court orders filing.” Thus, until -- and if -- the Rule 15 deposition is introduced as evidence, the Rules forbid its pretrial filing.

This, in turn, means that there is no presumptive right of access to the deposition. *See United States v. Kravetz*, 706 F.3d 47, 55 (1st Cir. 2013) (“courts of appeals have uniformly held that the public has no common law or constitutional right of access to materials that are gained through civil discovery but neither introduced as evidence at trial nor submitted to the court as documentation in support of motions or trial papers”); *United States v. Smith*, 985 F. Supp. 2d 506, 518 (S.D.N.Y. 2013) (“[d]ocuments that play no role in the performance of Article III functions’ are accorded little weight as presumptively accessible”) (citation omitted).

Thus, Rule 15’s directive that criminal depositions be “taken and filed in the same manner” as civil depositions supports sealing in two ways: (1) civil depositions have traditionally been closed to the public; and (2) civil depositions may not be filed with the court until they are used in the judicial proceeding or the court so orders it, which, in turn, limits the public’s or press’s right of access to such unfiled materials.

In addition, the limited federal case law addressing Rule 15 sealings confirms our reading of that Rule. *In re Associated Press*, 162 F.3d 503 (7th Cir. 1998), considered the propriety of a district court’s closure of the courtroom during an Illinois governor’s Rule 15 deposition. In the midst of a defendant’s multi-week fraud trial, a juror became sick and the court had to temporarily adjourn the trial. However, this adjournment conflicted with the planned testimony of a defense witness: Illinois Governor James Edgar, who was scheduled to leave the next day for a three-week overseas business trip. Accordingly, the parties agreed “that his testimony would be taken by video deposition” in a closed courtroom. *Id.* at 505. The district court overruled the Associated Press’s subsequent objection to this closure, reasoning that the Governor was not giving testimony, but was “provid[ing] ‘a videotaped deposition for possible use at trial.’” *Id.* at 511. The district court also concluded that it would “keep the

videotape sealed until such time as it would be played for the jury.” *Id.* The Governor’s testimony was then “videotaped in the courtroom . . . with only the parties, the district judge, court personnel and the Governor’s attorneys in attendance.” *Id.* at 505-06. The Associated Press appealed, claiming that “the district court improperly allowed Governor Edgar to testify in private” and asserting that “the Governor’s testimony was actually trial testimony that was merely disguised as a Rule 15 deposition.” *Id.* at 512. The government disagreed, contending that the district court “properly excluded the public and press from Governor Edgar’s deposition” and arguing that, “[u]ntil admitted into the record, potential evidence is not ordinarily within the scope of public access.” *Id.* The Seventh Circuit rejected the Associated Press’s objection to the closed Rule 15 proceeding. Noting that “it is well established that discovered but not-yet-admitted evidence is not ordinarily within the scope of press access,” the Seventh Circuit reasoned that “the taping of the Governor’s testimony was permissible pursuant to Rule 15(g) of the Federal Rules of Criminal Procedure,” which permits the taking of a potential witness’s testimony by deposition upon the agreement of the parties. *Id.* at 512-13. “Under these circumstances, it appears that the district court acted well within its discretion in permitting the testimony of the Governor to be taken by videotape.” *Id.* at 513.

Similarly, in *United States v. McDade*, 1994 WL 161243 (E.D. Pa. 1994), defendant McDade (a congressman) sought the depositions of two defense witnesses “in order to preserve their testimony for use at trial, should direly ill health or fading memory befall them.” *Id.* at *1. The district court found that the requisite “exceptional circumstances” had been met and granted defendant’s Rule 15 motions. *Id.* at *2. The district court judge additionally suggested that the depositions be videotaped and conducted in his courtroom “with the players situate[d]

as at trial.” *Id.* at *3. The court also resolved an issue that the parties disagreed on: “whether the depositions should be open to the public.” *Id.* Noting that the depositions “will only be offered as substantive evidence at trial if the witnesses become unavailable,” the court rejected any suggestion that the Rule 15 depositions were like typical pretrial proceedings. “Unlike situations where a pretrial proceeding is sought to be closed to the public, and only the result revealed after the fact, here, if the deposition testimony is offered, it will be made part of the public record at that time.” *Id.* at *3. Additionally, the court reasoned that opening the depositions to the public “would unnecessarily risk tainting the venue and could deprive Congressman McDade or the government . . . of a fair trial.” *Id.* “Avoidance of these risks constitutes good cause for restricting public access to the deposition testimony until it is offered at trial.” *Id.*

CONCLUSION

For the foregoing reasons, the Court should order that [REDACTED] be deposed according to the procedures described above.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: /s/ Erik Kenerson
ERIK M. KENERSON (OH Bar No. 82960)
BRITTANY KEIL (D.C. Bar No. 500054)
CONOR MULROE (NY Bar No. 5289640)
Assistant United States Attorneys
JEROME J. TERESINSKI (PA Bar No. 66235)
Special Assistant United States Attorney
National Security Section
United States Attorney's Office
601 D Street NW
Washington, D.C. 20530
(202) 821-7533
Brittany.Keil@usdoj.gov

KATHLEEN CAMPBELL (MD Bar No. 9812170031)
JENNIFER BURKE (MD Bar No. 9706250061)
Trial Attorneys
Counter Terrorism Section
National Security Division
950 Pennsylvania Avenue NW
Washington, D.C. 20530

I hereby certify that on this the 17th day of July, 2025, I will cause a copy of this pleading and associated documents to be served on counsel for the defendant via email.

/s/ Erik M. Kenerson
Erik M. Kenerson
Assistant United States Attorney