NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILTY AND
ETHICS IN WASHINGTON, *et al.*,
Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

and

AMERICAN ACTION NETWORK,
Intervenor Defendant-Appellant.

APPELLEES CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON'S AND MELANIE SLOAN'S OPPOSITION TO APPELLANT AMERICAN ACTION NETWORK'S MOTION FOR SUMMARY REVERSAL AND VACATUR

This Court already dismissed an appeal brought by the appellant here, American Action Network ("AAN"), challenging a decision below remanding an action back to the Federal Election Commission ("FEC"). *See CREW v. FEC*, No. 16-5300, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017). Despite this fact, AAN

brought an identical appeal here and now asks for the extraordinary remedy of summary adjudication of that improper appeal.

AAN, however, hardly comes close to meeting its "heavy burden" of showing the sole precedent it cites—a nonfinal opinion issued only weeks ago, *CREW v. FEC*, No. 17-5049, 2018 WL 2993249 (D.C. Cir. June 15, 2018) ("*CREW/CHGO*") (Randolph, J.)—"so clear[ly]" commands a different result below that expedited review is justified. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). First, while AAN argues the opinion clearly shows that an agency decision was unreviewable, AAN ignores the fact that the agency decision it references is not, in fact, the agency decision reviewed below or at issue in this appeal. Second, AAN's motion raises a number of questions of first impression in this Circuit: (1) whether a private party can revive a superseded agency explanation in an appeal of a judgment remanding a case back to an agency where the judgment was based on the superseding explanation; (2) whether and how *CREW/CHGO* can be reconciled with a contrary decision by the Supreme Court; (3) how to apply *CREW/CHGO*, which distinguished between purportedly unreviewable discretionary dismissals and reviewable dismissals based on legal interpretation, where the statement explaining the rationale devoted thirty-four pages to legal analysis but also contained a single terse footnote referencing

discretion; and (4) how to apply a non-final judgment for which a mandate has not issued in a proceeding for summary adjudication.

AAN provides no answers to any of these questions. It provides no grounds to think *CREW/CHGO* "so clear[ly]" applies that "expedited action is justified." *Taxpayers Watchdog, Inc.*, 819 F.2d at 297. In fact, it provides no basis to show this Court even has jurisdiction to entertain its motion. Accordingly, AAN's motion should be denied.

BACKGROUND

I. CREW's Administrative Complaint and the First Dismissal

In June 2012, CREW filed an administrative complaint with the FEC alleging AAN violated the Federal Election Campaign Act ("FECA"). *CREW v. FEC*, 209 F. Supp. 3d 77, 83 (D.D.C. 2016) ("*CREW I*"). CREW alleged that AAN met the legal qualifications for a political committee—an organization on which the FECA imposes certain disclosure obligations—because "the majority of its spending throughout [2009 to 2012] was on election-related advertising." *Id.* Accordingly, AAN exceeded the FECA's political committee registration threshold of $1,000 in election related expenditures in a year and AAN was not excused from reporting under the "major purpose" test imposed by *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). *CREW I*, 209 F. Supp. 3d at 82, 83.

Based on CREW's complaint and AAN's response, the FEC's Office of General Counsel ("OGC") recommended finding reason to believe AAN was a political committee and that it had violated the Act, and therefore recommended that the FEC pursue enforcement. *Id.* at 83. Despite this recommendation, the Commission—comprising six members—divided three-to-three, deadlocking any further action and leading the agency to dismiss CREW's complaint. *Id.*

The three commissioners who rejected the OGC's recommendations issued a thirty-four-page statement of reasons explaining their disagreement. *Id.*; *see also* Statement of Reasons of Chairman Lee E. Goodman and Comm'rs Caroline C. Hunter and Matthew Petersen, MUR 6589 (July 30, 2014) [hereinafter First Dismissal SoR] (attached as Exhibit 1). "First, the Commissioners found . . . that [AAN] 'crossed the statutory threshold for political-committee status by making over $1,000 in independent expenditures,' in at least one calendar year." *CREW I*, 209 F. Supp. 3d at 83–84. "However, after considering [AAN's] statements of purpose and evaluating [AAN's] spending on campaign activities as compared to its spending on activities unrelated to the election or defeat of a federal candidate, the Commissioners concluded that [AAN's] major purpose was [not] the nomination or election of a federal candidate." *Id.* (internal quotation marks omitted); *see also* First Dismissal SoR ("In this matter, [AAN]'s major purpose was not the nomination or election of a federal candidate."). To reach that

conclusion, the three commissioners spent dozens of pages reviewing judicial precedent to interpret *Buckley*'s "major purpose" test and the First Amendment, *see* First Dismissal SoR 1–34, to mandate that "only spending on express advocacy was considered indicative of the relevant 'major purpose.'" *CREW I*, 209 F. Supp. 3d at 84; *see also* 11 C.F.R. § 100.22 (defining express advocacy as ads that explicitly use phrases like "vote for" or "re-elect"). Consequently, the commissioners concluded AAN's spending on so-called "electioneering communications"—ads regulated by federal law as election activity though they lack express advocacy, *see* 52 U.S.C. § 30104(f)—could not constitutionally be considered to weigh in favor of subjecting AAN to political committee disclosure obligations. *CREW I*, 209 F. Supp. 3d at 80.

II. *CREW I* and the Dismissal of AAN's First Premature Appeal

CREW sought judicial review of the reasoning of the three controlling commissioners under 52 U.S.C. § 30109(a)(8). *CREW I*, 209 F. Supp. 3d at 84. On September 19, 2016, Judge Christopher Cooper issued summary judgment to CREW, holding that the controlling commissioners' analysis was legally erroneous, and thus that the dismissal was "contrary to law." *Id.* at 95. In relevant part, the district court found the commissioners had misinterpreted case law and exhibited an "erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in

the context of disclosure." *Id.* at 93. Judge Cooper remanded the action to the FEC with an order to conform with the declaration within thirty days, stating that the failure to appeal or conform would authorize CREW to bring a civil suit against AAN under the statute. *Id.* at 95 (citing 52 U.S.C. § 30109(a)(8)(C)).

The FEC elected not to appeal Judge Cooper's judgment. *See* Ltr. from Kathleen Guith to Noah Bookbinder and Melanie Sloan Re. 6589R (Oct. 12, 2016) (attached as Exhibit 2).

On October 19, 2016, AAN appealed Judge Cooper's judgment in *CREW I*. *See* Notice of Appeal by Intervenor-Defendant Am. Action Network, *CREW v. FEC*, No. 16-5300, Doc. #1642533, at ECF p. 10. On April 4, 2017, this Court dismissed AAN's appeal, holding that "[t]he district court order remanding the case to the [FEC] is not a final, appealable order." *CREW*, 2017 WL 4957233, at *1 (citing *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000)).

III. Remand and *CREW II*

On remand, the Commission reconsidered whether to find reason to believe AAN violated the law. *CREW v. FEC*, 299 F. Supp. 3d 83, 90 (D.D.C. 2018) ("*CREW II*"). As before, the same three commissioners blocked enforcement, leading to a new dismissal of CREW's complaint. *Id.* The three commissioners thereafter issued a new statement of reasons to justify their dismissal. *Id.*; *see also* Statement of Reasons of Chairman Matthew S. Petersen and Comm'rs Caroline C.

Hunter and Lee E. Goodman, MUR 6589R (Oct. 19, 2016) [hereinafter Second Dismissal SoR] (attached as Exhibit 3). Despite the judicial reversal, the three commissioners continued to adhere to their "conclu[sion] that AAN did not have the requisite major purpose of nominating or electing a candidate." *Id.* at 91. As before, they reached that conclusion based on their interpretation of judicial precedent, though they now interpreted it to manufacture a new multi-factor test that still ensured that little-to-no spending on non-express advocacy would be considered relevant to consideration of a group's major purpose. *Id.* at 90. Applying this legal test, they found that, of AAN's twenty electioneering communications, only "four of the ads indicated an election-related major purpose." *Id.*

CREW again sought judicial review of the FEC's dismissal on remand. *Id.* at 92. On March 20, 2018, Judge Cooper again issued summary judgment to CREW, finding that the FEC's dismissal on remand was also contrary to law. *Id.* at 101. Judge Cooper found the controlling commissioners' test did not properly interpret the "major purpose" doctrine from the Supreme Court's decision in *Buckley*. *Id.* Judge Cooper found that electioneering communications are "presumptively" intended to influence elections, *id.* at 93, and therefore that they presumptively count towards finding that a group's major purpose is to nominate or elect candidates, *id.* at 101. As in *CREW I*, after declaring the dismissal

contrary to law, Judge Cooper remanded the action to the FEC for conformity within thirty days and notified the FEC that failure to conform would result in authorization for CREW to bring a civil suit against AAN directly. *Id.*

The thirty days for the FEC to conform with *CREW II* expired on April 19, 2018. The sixty days for the FEC to appeal expired on May 21, 2018. On May 4, 2018, AAN filed the instant notice of appeal. *See* Notice of Appeal by Intervenor-Defendant Am. Action Network, Doc. #1730129, at ECF p. 8.

STANDARD OF REVIEW

"Summary reversal is rarely granted and is appropriate only where the merits are 'so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decisions.'" *D.C. Circuit Handbook of Practice & Internal Procedures* 36 (2018) (quoting *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793–94 (D.C. Cir. 1985)). It is an "extraordinary remedy, for which the proponent has a 'heavy burden of demonstrating both that his remedy is proper and that the merits of his claim so warrant relief as to justify expeditious action.'" *Vietnam Veterans Against the War/Winter Soldier Org. v. Morton*, 506 F.2d 53, 56 n.7 (D.C. Cir. 1974). (quoting *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969)). Cases involving issues of first impression are not proper vehicles for summary adjudication. *D.C. Circuit Handbook* 36. Further, in deciding a request for

summary adjudication, the Court is "obligated to view the record and the inferences to be drawn therefrom in the light most favorable to [the non-moving party.]" *Taxpayers Watchdog, Inc.*, 819 F.2d at 298 (internal quotation marks omitted).

ARGUMENT

I. AAN's Appeal is Premature

AAN filed the instant appeal challenging Judge Cooper's March 20 judgment remanding proceedings to the FEC. *CREW II*, 299 F. Supp. 3d at 101. "The district court order remanding the case to the [FEC]," however, "is not a final, appealable order." *CREW*, 2017 WL 4957233, at *1. As discussed in CREW's pending motion to dismiss, the clear authority bearing on this appeal shows that the Court lacks jurisdiction over it. *See* CREW Mot. to Dismiss, ECF No. 1737570. For the same reasons, this Court has no jurisdiction over AAN's motion for summary reversal. AAN's request must therefore be denied and this appeal dismissed.

II. It is Neither Clear, Nor Correct, That *CREW/CHGO* Governs Here

The entirety of AAN's request for summary adjudication relies on its assumption that the decision *CREW/CHGO*, 2018 WL 2993249, recently authored by Judge Randolph, governs here and requires reversal. That decision—issued only a few weeks ago and for which a mandate has not yet issued and the deadline

to seek further review has not yet elapsed—affirmed a dismissal of CREW's suit against the FEC over another organization, CHGO. *CREW/CHGO*, 2018 WL 2993249, at *6. The decision concluded that the FEC dismissed the complaint because the commissioners believed enforcement "did not warrant further use of Commission resources" and thus "exercised the agency's prerogative not to proceed with enforcement." *Id.* at *2. Accordingly, the decision held that, notwithstanding the plain text of 52 U.S.C. § 30109, the dismissal was an "unreviewable" exercise of "prosecutorial discretion" under *Heckler v. Chaney*, 470 U.S. 821 (1985). *Id.* at *2–3. The decision acknowledged, however, that Supreme Court authority permits judicial review of FEC dismissals, though it limited that authority to decisions where "the Commission declines to bring an enforcement action on the basis of its interpretation" of law. *Id.* at *7, n.11.

Leaving aside the merits of the decision, its application here is at least unclear, if not entirely inapplicable. First, the commissioners' justification for the dismissal of *CREW II*, the subject of this appeal, was entirely based on legal analysis and made no reference to discretion. Second, while AAN points the Court towards the commissioners' superseded justification reviewed in *CREW I*, it provides no reason for this Court to conclude that the superseded justification is properly under review here. Moreover, that decision was also based on legal analysis, not agency discretion. Third, it is unclear what authority *CREW/CHGO*

currently has as a non-final pre-mandate decision. Rather, these questions are all matters of first impression before this Court. Accordingly, AAN cannot meet its burden to show that summary dismissal is appropriate and its motion should be denied.

A. The Agency Decision Below Rested Solely on an Interpretation of the Law

The decision in *CREW/CHGO* to which AAN points concerns judicial review of FEC decisions that are based on prosecutorial discretion, not legal analysis. However, the agency decision at issue here rests solely on the FEC's interpretation of the law. In *CREW II*, the District Court reviewed the statement of reasons issued by the FEC on October 19, 2016. *CREW II*, 299 F. Supp. 3d at 90; Second Dismissal SoR. As Judge Cooper recognized in his opinion, that dismissal was based the commissioners' interpretation of *Buckley* and their application of that legal interpretation to the facts. *CREW II*, 299 F. Supp. 3d at 90–91. A review of the October 19 statement of reasons confirms that the sole subject of that statement, and the sole reason given for dismissal, was that the commissioners interpreted *Buckley* in such a way as to "conclude that AAN was not a political committee under the Act . . . because it did not have as its major purpose the nomination or election of candidates." Second Dismissal SoR at 2. At no point did the commissioners suggest any question remained as to AAN's legal status that might leave room for a discretionary choice—rather they reached a definitive

conclusion on the merits that AAN "was not a political committee under the Act." *Id.* Indeed, the words "discretion," "Commission resources," "Heckler," or "Chaney" never appear in the statement of reasons. *See generally id.*

Accordingly, it is unlikely, and certainly far from clear, that *CREW/CHGO*'s decision regarding judicial review of discretionary dismissals is applicable to review of a dismissal based on legal interpretation, as is the case here.

B. AAN Provides No Authority to Support the Contention that the Court Can Review a Superseded Dismissal and it is Far From Clear that *CREW/CHGO* Would Apply to that Superseded Agency Decision

Perhaps sensing the incongruity in trying to apply *CREW/CHGO* to an agency statement which makes no reference to discretion, AAN simply ignores the operative statement of reasons and cites only to the first superseded statement of reasons. AAN Mot. for Summ. Rev. at 4–5. Indeed, in asking this Court to reverse *CREW II*, AAN cites only language from the decision in *CREW I* regarding the superseded statement of reasons, even though *CREW I* is not on appeal here. *See id.* at 11 (citing *CREW I*, 209 F. Supp. 3d at 88 n.7). AAN has no basis to seek judicial review of a now defunct, superseded agency action.

A complainant may not challenge a superseded agency action. *See Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014) (stating agency's issuance of new explanation for action would moot challenge to prior explanation); *Ctr. for Sci. in the Pub. Int. v. Regan*, 727 F.2d 1161, 1171 (D.C. Cir. 1984)

(holding review of prior version of agency regulation would be "pointless"). When the FEC decided not to appeal *CREW I* and rather issue a new explanation, the new statement of reasons superseded any prior agency explanation. In issuing a new justification for their refusal to find reason to believe AAN could have violated the law, the three commissioners chose to disclaim any discretionary basis for dismissal and instead chose to justify their vote solely based on their interpretation of the law. *See generally* Second Dismissal SoR. While AAN seeks to go back and revive a now defunct statement of reasons, its ability to do so would appear to be one of first impression, and hardly clear.

Indeed, AAN's ability is at least doubtful since the one party who could have appealed *CREW II*—the FEC—would itself not have the opportunity in any such appeal to challenge the decision in *CREW I* as AAN seeks to do here. "The [FEC] [does] not have an opportunity to appeal the district court's legal ruling after proceedings on remand." *Occidental Petro. Corp. v. SEC*, 873 F.2d 325, 331 (D.C. Cir. 1989). That is why the FEC can appeal even nonfinal remand judgments, as otherwise "the district court's legal ruling will never be reviewed by the court of appeals, notwithstanding the agency's conviction that the ruling is erroneous." *Id.* at 330. But if the FEC forgoes that opportunity, the FEC's interests are "irretrievably lost in the absence of an immediate appeal." *Id.* at 329. As the FEC's interest in correcting any purported error in *CREW I* was

irretrievably lost when it failed to appeal that judgment, it is at least unclear how AAN could somehow recover the irretrievable and seek judicial review of a decision on a now superseded explanation.[1]

Moreover, even if AAN could somehow obtain review of the superseded statement, it is entirely unclear how *CREW/CHGO* would apply to it. As noted, *CREW/CHGO* held that the FEC dismissal was "unreviewable" because it was purportedly solely based on the commissioners' desire to preserve resources. *CREW/CHGO*, 2018 WL 2993249, at *2. *CREW/CHGO* noted that the rationale given by the commissioners included the concern that the "association named in CREW's complaint no longer existed," that "the 'defunct' association no longer had any agents who could legally bind it, and that any action against the association would raise 'novel legal issues that the Commission had no briefing or time to decide." *Id.* In contrast, *CREW/CHGO* recognized that the Supreme Court permitted review of a FEC dismissal in *FEC v. Akins*, 524 U.S. 11, 26 (1998). *See*

[1] This is a distinct issue from whether AAN may seek "judicial review, including review in the court of appeals, . . . [of] all those [issues] on which it got no satisfaction" in defending against a future agency enforcement action. *Lakes Pilots Ass'n, Inc. v. United States Coast Guard*, 359 F.3d 624, 625 (D.C. Cir. 2004). In the event of such action, the issue of whether *CREW I* was correctly decided, or whether the enforcement proceeding was improper because the administrative matter was lawfully dismissed, would be relevant. *See Mall Prop., Inc. v. Marsh*, 841 F.2d 440, 443 (1st Cir. 1988). Whether *CREW I* was correctly decided, however, has no bearing on the issue here—whether *CREW II* was correct that the second statement of reasons failed to justify the dismissal.

CREW/CHGO, 2018 WL 2993249, at *5 n.11. In *Akins*, the Supreme Court reviewed an FEC dismissal based on its interpretation of the FECA's membership communication rules and *Buckley*'s "major purpose" test. *See Akins*, 524 U.S. at 17–18.

Thus, any review of *CREW/CHGO*'s application to this case at least requires reconciliation of its holding with that of the Supreme Court in *Akins*. This will involve careful consideration to decide when a dismissal is based on legal analysis, as in *Akins*, and when it is based solely on discretion, as Judge Randolph found in *CREW/CHGO*. How to reconcile these opinions is an issue of first impression for this Court, and the analysis is not one for which the answer is clear.

The application of that analysis to a statement like the one used to justify the first dismissal—even if it were the proper subject of this appeal—is also far from clear. That statement, spanning thirty-four pages, devotes only four lines of text, in footnotes, to the issue of discretion. First Dismissal SoR at 24 n.137, 27 n.153.[2] After discussing about a dozen judicial decisions, *id.* at 5–16, reaching the legal conclusion the Constitution permitted application of disclosure regimes only to organizations based on their express advocacy communications, *id.* at 16, and devoting further pages to rejecting the legal interpretation of their own OGC, *id.* at

[2] Footnote 153 consists of only nine words: "*See Heckler* at 831; *see also supra note* 137." First Dismissal SOR at 27 n.153.

21–24, the commissioners came to a firm legal conclusion: AAN was not a political committee under the law, *id.* at 1. That conclusion evinces no discretion. Indeed, in later recounting the basis for dismissal contained in their first statement, the three commissioners said simply that "we concluded that AAN did not have as its major purpose the nomination or election of a candidate and, thus, voted against finding reason to believe AAN violated the act." Second Dismissal SoR at 1.

AAN, however, ignores this admission and treats the lengthy legal analysis in the commissioners' first statement as irrelevant dicta, asserting that the basis for dismissal, instead, is found solely in a single sentence in one footnote out of the 153 footnotes in the statement. *See* AAN Mot. to Dismiss 5. That statement reads in its entirety: "Moreover, the constitutional doubts raised here militate in favor of cautious exercise of our prosecutorial discretion." First Dismissal SoR at 24 n.137. AAN would have those sixteen words render the remainder of the thirty-four pages of analysis beyond the reach of any court. AAN's reading, however, treating those few words as the reason for dismissal and the remaining thirty-four pages as dicta, is implausible. Indeed, on this motion, the Court must view the record in the "light most favorable" to CREW, which here bars the gloss AAN attempts. *Taxpayers*, 819 F.2d at 298. In any event, whether such a terse reference to discretion would render the statement unreviewable—and could do so consistently with *Akins*—is a matter of first impression before this Court. Thus, again, AAN has failed to meet

its "heavy burden of establishing that the merits of [its] case are so clear that expedited action is justified." *Id.* at 297.[3]

C. The Legal Effect of a Non-Final Judgment Is Unclear

Finally, beyond the legal particularities of *CREW/CHGO* and the posture of this appeal, the application of the legal precedent is unclear for yet another reason: *CREW/CHGO* is not final.

The decision on which AAN solely relies was issued only a short time ago. The deadline to petition for rehearing or for certiorari has not yet expired. *See* Fed. R. App. P. 35, 40; Rules of the Supreme Ct. 13. The mandate has not yet issued. *See* Fed. R. App. P. 41. "A court of appeals' judgment or order," however, "is not final until issuance of the mandate." Fed. R. App. P. 41(c) advisory committee's note to 1998 amendment. Parties and lower courts may not rely on decisions until the mandate issues. *See Carver v. Lehman*, 558 F.3d 869, 878 n.16 (9th Cir. 2009)

[3] AAN also places significant emphasis on the discussion in *CREW I* of the FEC's argument for prosecutorial discretion. AAN Mot. for Summ. Reversal at 6 (citing *CREW I.*, 209 F. Supp. 3d at 88 n.7. But AAN misrepresents the import of this discussion. The FEC had asserted in its briefs that, regardless of the reason supplied by the commissioners, "'the challenged dismissal decisions are independently justified by the Commission's broad prosecutorial discretion.'" *CREW I.*, 209 F. Supp. 3d at 88 n.7 (quoting FEC's brief). It was in rejecting that argument, which was also squarely rejected by the Supreme Court in *Akins*, that *CREW I* held the agency's passing reference to prosecutorial discretion did not alter the district court's duty to review the dismissal. *Id.* In contrast to AAN's representation, *CREW I* found that, as a matter of fact, the dismissal was not premised on any discretion but rather on the commissioners' "erroneous understanding of the First amendment." *Id.* at 93.

("Until the mandate issues, an opinion is not fixed as settled Ninth Circuit law, and reliance on the opinion is a gamble."); *cf. Indep. Petro. Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596-97 (D.C. Cir. 2001) (noting lower court has no power to "deviate from the mandate issued by an appellate court").

Given the fact that a decision is not final prior to issuance of the mandate, it is at least unclear what weight, if any, this Court should give to *CREW/CHGO*'s non-final judgment, particularly on a request for the "extraordinary remedy" of summary adjudication. *Vietnam Veterans*, 506 F.2d at 56 n.7. That is particularly true since the exact legal effect of this non-final judgment is far from clear and analysis of its impact would require the Court to grapple with several issues of first impression, assuming the Court even had jurisdiction over AAN's appeal, which it does not.

CONCLUSION

For the foregoing reasons, this Court should deny AAN's motion for summary reversal.

Dated: July 5, 2018.

Respectfully submitted,

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I hereby certify, on this fifth day of July, 2018, that:

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CERTIFICATE OF SERVICE

I hereby certify that, on July 5, 2018, a true and correct copy of Plaintiffs' notice of cross appeal was filed and served electronically through the Court's CM/ECF system upon the following counsel of record:

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