No. 19-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

RESPONSE TO PETITION FOR REHEARING EN BANC

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July 9, 2021

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GLOSSARY

APA	Administrative Procedure Act
Complainants	Citizens for Responsibility and Ethics in Washington and Noah Bookbinder
CREW	Citizens for Responsibility and Ethics in Washington
FEC or Commission	Federal Election Commission
FECA or Act	Federal Election Campaign Act

STATEMENT

In 2018, a panel of this Court considered a question that it perceived had never been squarely addressed in any of this Court's prior cases: Whether to review a Federal Election Commission ("FEC" or "Commission") dismissal of an administrative complaint alleging violations of the Federal Election Campaign Act ("FECA"), where the controlling rationale justified that dismissal based on prosecutorial discretion. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*Comm'n on Hope*"), *pet. for reh'g en banc denied*, 923 F.3d 1141 (D.C. Cir. 2019). In *Commission on Hope*, this Court resolved that question by holding that FEC dismissals that are based on prosecutorial discretion are "committed to the agency's discretion" and, therefore, "there can be no judicial review for abuse of discretion, or otherwise." 892 F.3d at 441. In doing so, the Court distinguished between dismissals justified in whole or in part by prosecutorial discretion and those "based entirely on [the Commission's] interpretation of the statute." *Id.* at 441 n.11. Those latter dismissals are subject to review under FECA; the former are not.

The panel decision under review here correctly concluded that *Commission on Hope* "forecloses review of the" controlling reasoning of a group of FEC Commissioners that invoked prosecutorial discretion as "a basis for the Commission's action." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 993

F.3d 880, 884, 889 (D.C. Cir. 2021) ("*New Models*"). That decision explained that *Commission on Hope* "follows from and fits within" this Circuit's precedent. *Id.* at 895. Accordingly, the petition of Citizens for Responsibility and Ethics in Washington ("CREW") and Noah Bookbinder (collectively, "Complainants") should be denied.

1. Complainants filed an administrative complaint with the Commission alleging that an entity known as New Models had failed to register and report as a political committee under FECA. *See* 52 U.S.C. §§ 30102-30104. FECA permits any person to file an administrative complaint alleging a violation and sets forth detailed enforcement procedures the Commission must follow when considering such allegations. *Id.* § 30109(a). The statute requires obtaining the "affirmative vote of 4" Commissioners to proceed through each stage in the enforcement process; four votes are required if the Commission chooses to find that there is "reason to believe" an administrative respondent committed a violation of FECA or find that there is "probable cause to believe" a violation occurred. *Id.* § 30109(a)(2), (a)(4)(A)(i); *compare id.* § 30106(c) (majority vote). These two stages are framed as conditional. That is, "[i]f" the Commission makes the relevant determination, it "shall" take a specified act. *Id.* § 30109(a)(2) ("If the Commission [determines] that it has reason to believe . . . the Commission shall . . . notify the person [and] shall make an investigation."); *id.* § 30109(a)(4)(A)(i)

(requiring that "the Commission shall attempt" to conciliate "if the Commission determines . . . that there is probable cause to believe."). After satisfying all other procedural requirements, the Commission "*may* . . . institute a civil action for relief," a decision which also requires four affirmative votes. *Id.* § 30109(a)(6)(A) (emphasis added).

2. Here, a motion to find reason to believe that New Models violated FECA failed by a vote of 2-2 with one recusal. Lacking the necessary four votes to continue enforcement proceedings, the Commission voted 4-0 to close its file. Under long-standing Circuit law, the Commissioners who voted against proceeding "constitute a controlling group" whose rationale "necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). The controlling group first explained their view that New Models was not a political committee under FECA and relevant case law. In addition, they explained that they had voted not to pursue the New Models matter "in exercise of [their] prosecutorial discretion." (J.A. 133 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).) Because "the organization appears no longer active," as well as "the age of the activity," the controlling Commissioners concluded that "proceeding further would not be an appropriate use of Commission resources." (J.A. 133 n.139.)

3.a. Complainants sought judicial review. FECA generally permits any

"party aggrieved" by a Commission dismissal to file suit, but the statute limits judicial review to a determination whether the dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(A), (C). If a court so declares, FECA affords the Commission thirty days to conform with that declaration, absent which the original complainant may file a civil action on its own behalf. *Id.* § 30109(a)(8)(C).

b. In *Commission on Hope*, this Court held that, unlike a dismissal explained solely on a controlling group's interpretation of FECA, a dismissal explained, in whole or in part, on prosecutorial discretion is "not subject to judicial review." 892 F.3d at 440. As the Court explained, *Chaney* established that an agency's decision not to enforce is generally committed to an agency's absolute discretion and is therefore unreviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2). *Comm'n on Hope*, 892 F.3d at 438-39. The Court recognized that such decisions were only "presumptively unreviewable" and that the presumption could be rebutted by the substantive statute. *Id.* at 439 (quoting *Chaney*, 470 U.S. at 832). However, *Commission on Hope* found that FECA provided no "meaningful standard against which to judge the [Commission's] exercise of discretion." *Id.* (quoting *Chaney*, 470 U.S. at 830). This Court denied *en banc* review. *CREW v. FEC*, 923 F.3d 1141 (D.C. Cir. 2019).

c. The district court in this case held that *Commission on Hope* was "directly on point" and granted summary judgment for the Commission. *CREW v.*

FEC, 380 F. Supp. 3d 30, 40 (D.D.C. 2019). That court concluded that the controlling Commissioner's "invocation of prosecutorial discretion . . . did not rely on their interpretation of FECA or case law," and was, therefore, not reviewable. *Id.* at 42.

d. A panel of this Court affirmed, agreeing that *Commission on Hope* is not "materially distinguishable" from this case and "forecloses review of the Commission's nonenforcement decision against New Models." *New Models*, 993 F.3d at 884-85. As the panel concluded, the controlling Commissioners' statement of reasons "explicitly relies on prosecutorial discretion" and cites "considerations at the heart of *Chaney*'s holding, such as concerns about resource allocation, the fact that New Models is now defunct and likely judgment proof, and the fact that the events at issue occurred many years prior." *Id.* at 885. Because "FECA provides 'no "law" to apply in reviewing the Commission's weighing of practical enforcement considerations," there was "no basis on which to assess whether" the controlling group's reasoning was "'contrary to law.'" *Id.* (quoting *Comm'n on Hope*, 892 F.3d at 440).

The panel rejected Complainants' argument that the controlling Commissioners' inclusion of legal analysis transformed an otherwise unreviewable decision into one which could be reviewed. *Id.* at 885-86. As *Commission on Hope* determined, a court is "unable to review the Commission's exercise of its

enforcement discretion, irrespective of the length of its legal analysis." *New Models*, 993 F.3d. at 887.

Finally, the panel found unconvincing Complainants' arguments that *Commission on Hope* was incompatible with the APA and prior precedent. *Id.* at 889-95. Rather, the panel concluded that *Commission on Hope* "follows from and fits within [Circuit] precedents." *Id.* at 895. Although bound by *Commission on Hope*, the panel noted that Complainants' arguments were "unavailing even if we were able to decide this case on a clean slate." *Id.* at 889.

Judge Millett dissented, concluding that the controlling Commissioners' statement was insufficient to bring this case within the rule of *Commission on Hope*. *See id.* at 903-06 (Millett, J., dissenting).

ARGUMENT

In adhering to *Commission on Hope*, the panel decision applied longstanding principles regarding the unreviewability of agency nonenforcement decisions supported by prosecutorial discretion. Rehearing *en banc* is "not favored," and available only where *en banc* determination is "necessary" to "maintain uniformity of the court's decisions," or where "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Because the panel decision does not conflict with any prior decisions of the Supreme Court or this Court, and because Complainants' speculation about future Commission actions are improper,

the petition should be denied.

I. THE PANEL DECISION DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR THIS COURT

The panel decision here, and by extension *Commission on Hope*, does not conflict with any of the decisions Complainants cite. (Pet. 8-12.) Initially, Complainants repeatedly invoke the opinions of dissenting or concurring judges. These sources are not, however, Circuit law and do not establish any conflict of precedents.

Of the operative opinions Complainants cite, none reviewed a Commission decision not to proceed with an enforcement matter "when the controlling Commissioners provide[d] a statement of reasons explaining the dismissal turned in whole or in part on enforcement discretion" or invoked the "practical enforcement considerations" that underlie *Chaney*, as the panel decision recognized. *New Models*, 993 F.3d at 885, 894; *see also FEC v. Akins*, 524 U.S. 11, 25 (1998) (reviewing a dismissal based on a "no probable cause to believe" finding); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*") (reviewing an unexplained Commission dismissal); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (reviewing a challenge to a Commission rule); *Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986) (reviewing a dismissal based on a "no reason to believe" finding). Complainants have thus failed to identify any conflicting authority that would support its petition

for *en banc* review.

A. The Panel Decision Does Not Conflict with *FEC v. Akins*

Complainants argue that *Akins* stands for the proposition that FECA provides for judicial review of any Commission dismissal "without exception" (Pet. 10), but the Supreme Court's discussion of prosecutorial discretion was much more limited. *Akins*, 524 U.S. at 25-26. The Commission had declined to proceed on the sole administrative claim at issue in *Akins* based on its conclusion that the group at issue "was not subject to the disclosure requirements" because it did not meet the legal definition of a "political committee" under FECA. *Id.* at 18. That is, the Commission "based its decision entirely on legal grounds" that a reviewing court could evaluate under FECA's contrary to law standard. *New Models*, 993 F.3d at 893 (citing *Akins*, 524 U.S. at 25); *see also Comm'n on Hope*, 892 F.3d at 441 n.11. The dismissal of that claim did not invoke prosecutorial discretion, and thus the Supreme Court had no occasion to consider the availability of judicial review of such a dismissal.

The only question addressed by the Supreme Court involved the administrative complainants' standing to sue. *Akins*, 524 U.S. at 18. The Commission argued that the complainants' injury was not fairly traceable to the Commission's alleged legal error because it was "possible" that the FEC *could have* declined to pursue enforcement in exercise of its prosecutorial discretion

"even had [it] agreed with [the complainants'] view of the law." *Id.* at 25. In rejecting that argument, the Court reasoned that the mere *possibility* of a prosecutorial-discretion dismissal did not defeat standing because the Court could not "know that the FEC would have exercised its prosecutorial discretion that way." *Id.* Here, by contrast, the controlling Commissioners "expressly" invoked prosecutorial discretion when explaining their votes against pursuing enforcement. *New Models*, 993 F.3d at 893-94.

To be sure, *Akins* also rejected the Commission's argument that *all* Commission decisions "not to undertake an enforcement action" were unreviewable under *Chaney* because FECA "explicitly indicates" that review is available. *Akins*, 524 U.S. at 26. The Court confirmed, however, that judicial review to correct legal errors did not eliminate the Commission's authority to "decid[e] to exercise prosecutorial discretion" and cited *Chaney* for that view. *Id.* at 25; *see also New Models*, 993 F.3d at 895 (noting that *Akins* "emphasized that the reviewability of the Commission's action depended on the existence of a legal ground of decision").

Complainants argue that the Commission "invoke[d] prosecutorial discretion" in *Akins* as a basis for its dismissal decision (Pet. 9), but that is incorrect. The cited footnote argued the Commission "should be accorded deference" for the "discretionary judgment" about how to apply the "major

purpose test" — a reviewable legal determination. Reply Br. for Pet'r, *FEC v. Akins*, 524 U.S. 11 (1997) (No. 96-1590), 1997 WL 675443, at *9 n.8.

B. The Panel Decision Does Not Disturb the Uniformity of This Circuit's Decisions

For similar reasons, the supposed conflict between the panel decision and the Circuit authority Complainants cite is illusory. (*See* Pet. 10-12.)

In *DCCC*, this Court rejected the Commission's argument that dismissals resulting from the inability of any position to garner four Commission votes are *per se* "immunized from judicial review because they are simply exercises of prosecutorial discretion." 831 F.2d at 1133. The Court reasoned that the mere fact that a split vote occurred did not necessarily mean that the Commission intended to invoke its prosecutorial discretion. *Id.* at 1133-35. Because the controlling Commissioners had not explained the rationale for their vote in the matter at issue, this Court remanded the case for an explanation. *Id.* at 1133.

Although *DCCC* "presum[ed]" that a properly explained decision invoking prosecutorial discretion would be reviewable, it did not definitively conclude that was the case. *Id.* at 1134; *see also id.* at 1135 n.5 ("arguendo, assuming reviewability"). As the panel decision recognized, *DCCC* did not "'answer . . . for all cases' the question of whether a Commission dismissal due to deadlock is 'amenable to judicial review.'" *New Models*, 993 F.3d at 894 (quoting *DCCC*,

831 F.2d at 1132). Unlike *DCCC*, the controlling Commissioners here and in *Commission on Hope* expressly invoked prosecutorial discretion.

The panel opinion is also consistent with *Chamber of Commerce*. That case considered whether an evenly divided Commission vote on whether to issue an advisory opinion regarding a regulation deprived a group of standing for its pre-enforcement First Amendment challenge because there was no "present danger of . . . enforcement." 69 F.3d at 603. The Court held that the threat of enforcement remained because nothing prevented "the Commission from enforcing its rule at any time." *Id.*

The Court also posited a hypothetical challenge to a dismissal of an administrative complaint against the group, which could be successful because the "refusal to enforce would be based . . . on the Commission's unwillingness to enforce its own rule." *Id.* But that hypothetical was predicated on a controlling Commissioner's explanation that her vote was based on her view that the regulation was legally unenforceable, not prosecutorial discretion. *Id.* at 603; Statement of Comm'r Lee Ann Elliott Regarding Advisory Op. Req. 1994-4 (Oct. 26, 1994), https://www.fec.gov/files/legal/aos/1994-04/1079290.pdf (explaining that membership rule was "without statutory support"). This hypothetical dismissal thus was based solely on a legal determination and also reviewable under the panel decision's logic.

There is likewise no conflict between the panel decision and *Orloski*. *Orloski* did not, as Complainants contend, find "*all* FEC dismissals are subject to review" or that dismissals based on prosecutorial discretion are reviewable for abuse of discretion. (Pet. 12 (emphasis added).) Nor could it, because the FEC dismissal under review in that case was based entirely on the Commission's interpretation of FECA. *Orloski*, 795 F.2d. at 160-61; *see also New Models*, 993 F.3d at 894-95. As the panel decision recognized, *Orloski* merely stands for the proposition that "the Commission cannot apply an otherwise permissible interpretation of FECA in an unreasonable way — which is the same review that courts regularly conduct under Section 706 of the APA." *New Models*, 993 F.3d at 894; *see also Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (considering whether the Commission's application of FECA to respondent's conduct was "arbitrary or capricious, or an abuse of discretion" (quoting *Orloski*, 795 F.2d at 161)).

Finally, *Campaign Legal Center v. FEC*, 952 F.3d 352 (D.C. Cir. 2020), provides no contrary Circuit authority. This Court merely elected a path of review that was simpler in that case than revisiting the contested issue of reviewability. *Id.* at 356. That approach was permitted because nonreviewability is not a jurisdictional issue. *Id.* The Court expressed no disagreement, however, with *Commission on Hope*.

C. The Panel Decision Is Consistent with Basic Administrative Law Principles

The panel decision and *Commission on Hope* are rooted in the principle that judicial review of an agency action is unavailable where there is "no law to apply." *New Models*, 993 F.3d at 885 (quoting *Comm'n on Hope*, 892 F.3d at 440). *Chaney* emphasized that a court generally has no "meaningful standards" by which to review an agency exercise of prosecutorial discretion. 470 U.S. at 834. Such decisions are, therefore, generally "committed to agency discretion by law" under the APA. *Id.* Courts have applied *Chaney* even when, like FECA, the underlying statute provides procedures for judicial review separate from the APA. *E.g., Steenholdt v. FAA*, 314 F.3d 633, 638-39 (D.C. Cir. 2003).

While it is also true that Congress may by statute provide meaningful limits on an agency's prosecutorial discretion that could be enforced by judicial review, *see id.*, FECA's text does not "set substantive enforcement priorities nor does it establish standards to guide enforcement discretion." *New Models*, 993 F.3d at 890; *see also Comm'n on Hope*, 892 F.3d at 440. Rather, FECA simply directs that the Commission "shall" take specific actions "[i]f" it makes certain predicate legal determinations, 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i); it does not require the Commission "to make those legal determinations in the first instance." *Comm'n on Hope*, 892 F.3d at 439. And its ultimate decision whether to institute a civil enforcement action "is explicitly vested in the Commission's discretion" by

providing only that the "'Commission *may*'" file suit. *New Models*, 993 F.3d at 890 (quoting 52 U.S.C. § 30109(a)(6)(A)). Congress determined that challenges to FEC dismissals would be available only to the extent the dismissals were "contrary to law." 52 U.S.C. § 30109(a)(8)(C). But it provides no guidance to a court in determining whether a particular enforcement action "fits the agency's overall policies" or within the agency's budget. *Chaney*, 470 U.S. at 831.

Complainants' arguments that the panel decision is not consonant with administrative law precedent (Pet. 12-16) simply misstate the record. There is no "uncertainty" regarding the independence of prosecutorial discretion as a basis for the controlling Commissioners' vote in this matter. (Pet. 13.) The controlling Commissioners' statement invoked prosecutorial discretion "in addition to its legal analysis" of FECA's requirements, and rested "squarely on prudential and discretionary considerations" separate from the merits of the legal question at issue. *New Models*, 993 F.3d at 886; *see also CREW*, 380 F. Supp. 3d at 42 ("[T]he Controlling Commissioners' invocation of prosecutorial discretion here did not rely on their interpretation of FECA or case law."). The controlling Commissioners plainly intended to dismiss regardless of their statutory determination. *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) (reviewing court will affirm so long as one independent ground for decision is

valid, unless it is demonstrated that the agency would not have acted on that basis in absence of alternative ground).

Complainants' argument that the controlling Commissioners did not rationally connect their vote against finding reason to believe and prosecutorial discretion similarly misstates the record. (Pet. 15.) The controlling Commissioners did not vote "that there was no 'reason to believe that New Models' violated the FECA," as Complainants suggest. (*Id.*) Rather, the controlling Commissioners voted *against* a motion to *find* reason to believe — a statutory finding that would trigger an investigation and further enforcement. (J.A. 101.)

Indeed, the Commission routinely takes votes to definitively find that there is "no reason to believe" a violation occurred, which itself is a reviewable legal determination that the law was not violated. *See, e.g.*, *Hagelin*, 411 F.3d at 239-40. A Commissioner's vote against finding reason to believe does not necessarily mean that the Commissioner has concluded that no FECA violation occurred. Such a vote may instead indicate that the Commissioner would exercise discretion not to pursue the matter due to agency priorities, the age of the alleged conduct, or other non-merits considerations.

Given these varied potential grounds for the agency's decision, this Court has understandably required the controlling group of Commissioners to provide a

statement of reasons when it does not accept staff recommendations. *Common Cause v. FEC*, 842 F.2d 436, 449-50 (D.C. Cir. 1988). Circuit law makes clear that this explanation "necessarily states the agency's reasons for acting," even when provided by a non-majority of Commissioners. *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476. Complainants' argument that a Commission invocation of prosecutorial discretion must command four Commissioner votes (Pet. 13) is inconsistent with this Circuit's guidance.[1]

II. CLAIMS ABOUT FUTURE COMMISSION DISMISSALS DISTORT THE PANEL DECISION AND IMPROPERLY ASSUME BAD FAITH BY COMMISSIONERS

Complainants' remaining arguments exaggerate the implications of the panel decision and improperly presume the bad faith of certain Commissioners in future enforcement actions. The panel decision merely extends the same deference to the Commission's prosecutorial discretion enjoyed by nearly every other federal agency under the APA. Unlike those other agencies, however, judicial review

[1] The policy statement Complainants cite to suggest that four votes are required for the FEC to exercise enforcement discretion (Pet. 4) provides: "Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a matter . . . when the Commission lacks majority support for proceeding with a matter." FEC, *Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enf't Process*, 72 Fed. Reg. 12,545, 12,546 (2007). Moreover, by its own terms it is not "an agency regulation" and "does not bind the Commission or any member of the general public." *Id.*

remains available for nonenforcement decisions based on Commission interpretations of FECA. *See New Models*, 993 F.3d at 891.

Any suggestion that the panel opinion will lead to pretextual claims of prosecutorial discretion turns the presumption of regularity on its head. Agency adjudicators are accorded the "presumption of honesty and integrity." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Complainants assume the opposite in suggesting that certain Commissioners will lie about the true bases of their votes by hiding behind unreviewable prosecutorial discretion. (Pet. at 1, 17-18 & n.5.) But courts "must presume an agency acts in good faith" absent strong evidence to the contrary. *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008).

Complainants' previous prediction in seeking rehearing in *Commission on Hope* that "the commissioners . . . will cite prosecutorial discretion among their reasons to decline enforcement of every complaint" has proven incorrect. Appellants' Pet. for Reh'g *En Banc*, *CREW v. FEC*, No. 17-5049, Doc. 1742905, at 14 (D.C. Cir. filed July 27, 2018). One of Complainants' own *amici* here calculate that a third of the more serious enforcement allegations dismissed since *Commission on Hope* did not make such a reference. Br. of Campaign Legal Ctr. as *Amicus Curiae* in Supp. of Appellants' Pet. for Rehearing *En Banc*, Doc. 1904625, at 9 (filed June 30, 2021). Judicial review remains available if the agency "consciously and expressly adopt[s] a general policy that is so extreme as

to amount to an abdication of its statutory responsibilities," a showing Complainants did not make. *Comm'n on Hope*, 892 F.2d at 440 n.9 (quoting *Chaney*, 470 U.S. at 833 n.4).

CONCLUSION

For the foregoing reasons, Complainants' petition should be denied.

Respectfully submitted,

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July 9, 2021

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I hereby certify, on this 9th day of July, 2021, that:

1. This document complies with the word limit set forth in the Court's June 24, 2021 Order (Doc. # 1903833) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e), this document contains 3,879 words.

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/s/ *Haven G. Ward*
Haven G. Ward

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2021, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Haven G. Ward*
Haven G. Ward