[ORAL ARGUMENT HELD OCTOBER 16, 2012]

No. 12-5004

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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLEE

STUART F. DELERY
Principal Deputy Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

MICHAEL S. RAAB
SARANG V. DAMLE
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

* Authorities chiefly relied upon are marked with an asterisk.

Legislative Materials:

Other Authorities:

GLOSSARY

eFOIA	Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048.
FEC	Federal Election Commission
FOIA	Freedom of Information Act
GAO	United States Government Accountability Office
Source Book	House Committee on Government Operations and Senate Committee on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book: Legislative History, Texts, and Other Documents*, 94th Cong., 1st Sess.(Joint Comm. Print 1975)[1]

[1] Available at http://www.loc.gov/rr/frd/Military_Law/FOIA-1974.html.

Pursuant to the Court's order of October 16, 2012, the Department of Justice respectfully submits this supplemental brief expressing the government's views in this Freedom of Information Act (FOIA) case.[2] As explained below, we concur in the legal arguments raised by the Federal Election Commission.

I. Because the FEC made clear that it intended to release records in response to plaintiff's FOIA request, plaintiff was required to exhaust its administrative remedies before filing suit.

A. FOIA requires an agency to "*determine* . . . w*hether* to comply" with a request within 20 days, and thereafter obligates the agency to actually release records "promptly."

1. Ordinarily, a FOIA requester must exhaust its administrative remedies before bringing suit. *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003). FOIA, however, provides a limited exception to this exhaustion requirement where the agency fails to comply with statutory time limits. *See* 5 U.S.C. § 552(a)(6)(C). One such time limit requires an agency, upon receiving a request for records, to "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination." 5 U.S.C. § 552(a)(6)(A)(i).

[2] We have styled this filing as a supplemental brief for the Federal Election Commission because the FEC has been litigating this matter pursuant to a case-specific delegation of authority from the Department of Justice.

As the text indicates, section 552(a)(6)(A)(i) only obligates the agency to provide, within the statutory time limit, an up-or-down determination that it will comply with the FOIA request by providing at least some responsive records. As petitioner recognizes, section 552(a)(6)(A)(i) does *not* require the agency to "comply" with the request—*i.e.*, actually produce all responsive records—within twenty days. *See* Reply Br. 9 n.7. An agency's responsibility to actually produce responsive records is addressed by a separate provision: "Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request." 5 U.S.C. § 552(a)(6)(C)(i).[3] An agency's failure to fulfill that prompt production requirement does not excuse the requester from exhausting its administrative remedies.

Thus, as an official from the Government Accountability Office (GAO)—a component of the legislative branch—explained in 2005 testimony before Congress, "[t]he 20-day requirement is actually not a requirement to supply the records, as I understand it. It is really a requirement to get back to the requester and say we are going to comply with your request or not." *Information Policy in the 21st Century: A*

[3] While this sentence is located in a separate subparagraph of 5 U.S.C. § 552(a)(6)—subparagraph (C)—it obviously refers back to the "determin[ation] . . . to comply" made pursuant to subparagraph (A). Indeed, these complementary provisions were located in close proximity to each other in the version of the bill passed by the House of Representatives in 1974. *See* H.R. 12471, 93rd Cong., 2d Sess. § 1(c) (1974) (as passed by House of Representatives, Mar. 14, 1974). Although the Senate added additional language to the bill before its passage, these provisions remained, and are part of the statute today. *See* 5 U.S.C. § 552(a)(6)(A)(i), (C)(i).

Review of the Freedom of Information Act: Hearing Before the Subcomm. on Gov't Mgmt., Fin., & Accountability of the Comm. on Gov't Reform, 109th Cong. 119 (May 11, 2005) (testimony of Linda D. Koontz, Director, Information Policy Issues, U.S. GAO).

The distinction between the requirement to provide an initial determination whether to provide records, which is subject to the 20-day time limit in section 552(a)(6)(A)(i), and the actual production of responsive records, which is not subject to that time limit, is reinforced by this Court's decision in *Spannaus v. U.S. Dept. of Justice*, 824 F.2d 52 (D.C. Cir. 1987). In that case, the Court, in finding that the FBI had failed to comply with the then-10-day time limit in section 552(a)(6)(A)(i), distinguished an earlier decision, *Dettmann v. Department of Justice*, 802 F.2d 1472 (D.C. Cir. 1986), on the ground that in *Dettman*, there was "no indication that the FBI failed to meet the 10-day deadline for initial response." *Spannaus*, 824 F.2d at 58. The Court noted that although its earlier opinion "reveals . . . that Dettmann requested the documents in January 1977 and received the first batch of them by September 1977," the opinion "said nothing about when the FBI 'determine[d] whether to comply with' Dettman's request." *Id.* at 59 n.7. Thus, in *Spannaus* this Court recognized that the response required by section 552(a)(6)(A)(i) is merely an "initial response," *id.* at 58, and does not require the immediate production of responsive records. *See also Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) (holding that "a reply from the agency indicating that it is responding to [a] request" is sufficient to trigger exhaustion requirement).

That reading of the relevant statutory provisions is also consistent with FOIA's legislative history and the established Executive Branch understanding of FOIA. The administrative time limits in section 552(a)(6) were first added to FOIA in 1974. *See* Pub. L. No. 93-502, § 1(c), 88 Stat. 1561, 1562. The amendments imposed a ten-day time limit for agencies to determine "whether to comply" with a FOIA request out of concern that agencies were taking too long to provide even an initial response to information requests. *See* 118 Cong. Rec. 9949 (1972) (Rep. Moorhead)[4] ("The major Government agencies took an average of 33 days to even respond to a request for public records under the Freedom of Information Act."); *see also, e.g.,* S. Rep. No. 93-854, at 24 (1974), *reprinted in* Source Book, *supra*, at 176 (same).[5] The legislation thus imposed strict time limits for agencies to provide an initial determination whether to comply a FOIA request, and separately required records to be produced "promptly." That understanding of the Act was reinforced by a 1995 House Report explaining that, under then-existing time limits, "[e]ach agency is required to determine within 10 days * * * after the receipt of a request whether to comply with

[4] *Reprinted in* House Committee on Government Operations and Senate Committee on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book: Legislative History, Texts, and Other Documents*, 94th Cong., 1st Sess., 99 (Joint Comm. Print 1975) (hereinafter "Source Book").

[5] Although the time limit for the agency's determination whether to comply was originally ten days, it was increased to twenty days in the Electronic Freedom of Information Act Amendments of 1996 ("eFOIA"), Pub. L. No. 104-231, § 8(b), 110 Stat. 3048, 3052.

the request," and that "[t]he actual disclosure of documents is required to follow promptly thereafter." H.R. Rep. No. 104-156, at 10 (1995).[6]

Similarly, the Attorney General explained in a contemporaneous guidance memorandum on the 1974 FOIA amendments that the amendments "contemplate that an initial determination to furnish records will be dispatched within the [statutory] time limits . . ., and that the records will be furnished either at the same time or 'promptly' thereafter." *See* Attorney General, *Memorandum: Preliminary Guidance Concerning the 1974 Freedom of Information Act Amendments*, Dec. 11, 1974, at 2, *reprinted in* Source Book, *supra*, at 545 (hereinafter "Preliminary Guidance Memorandum");[7] *see also ibid.* (stressing that the amendments "call for an initial determination to be made on [a] request within 10 working days (usually two weeks) after its receipt," and that "[a]fter any agency determination to comply in whole or part with a request for records . . . the records shall be made available 'promptly'").

2. As noted, plaintiff does not contend that FOIA requires agencies to actually produce documents within the statutory time limit set forth in section 552(a)(6)(A)(i).

---

[6] *See also Information Policy in the 21st Century: A Review of the Freedom of Information Act: Hearing Before the Subcomm. on Gov't Mgmt., Fin., & Accountability of the Comm. on Gov't Reform*, 109th Cong. 101 (May 11, 2005) (prepared testimony of Linda D. Koontz, Director, Information Management Issues, U.S. GAO) ("FOIA does not require agencies to make records available within a specific amount of time. . . . Agencies, however, are required to inform requesters within 20 days of receipt of a request as to whether the agency will comply with the request.").

[7] This memorandum was incorporated in the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Feb. 1975), *reprinted in* Source Book, *supra*, at 508.

Reply Br. 9 n.7 ("To be clear, CREW is not arguing that the requisite determination 'whether to comply' must be accompanied by a production of all documents the agency has decided to release[.]"). But at the same time as it acknowledges that fact, plaintiff urges that the FEC in this case "was not capable of making" the required determination whether to comply "until the parties had agreed on the scope of the initial search, the agency had completed its search for responsive documents, and had reviewed all responsive documents to determine whether it would redact any information under claims of exemption." Reply Br. 2. In other words, plaintiff contends that FOIA requires agencies to determine with specificity what records it will and will not produce, and what redactions it will make in those records, within the statute's 20-day time limit.

That interpretation of FOIA is contrary to the text of the statute. The phrase "determine . . . whether to comply" does not mean "determine the extent to which to comply." The statute's use of the word "whether" signals a binary choice—here, whether the agency will "comply" by providing such responsive records, or not "comply" by refusing to provide any records. *See* THE RANDOM HOUSE COLLEGE DICTIONARY 1499 (rev. ed. 1980) ("whether" is "used to introduce a single alternative, the other being implied or understood, or some clause or element not involving alternatives: . . . *See whether he has come.*"); Brian A. Garner, GARNER'S MODERN AMERICAN USAGE 857 (3d ed. 2009) ("Despite the superstition to the contrary, the words *or not* are usually superfluous, since *whether* implies *or not.*"). Nor

does the statute require the agency to determine whether to "comply with the request in full" by releasing all the records requested without exception or redaction. *See* Reply Br. at 1, 7. As plaintiff appears to acknowledge, *id.* at 2, providing such a determination would likewise require the agency to determine what documents to produce, and what redactions to make within those documents, all within 20 days. Indeed, if plaintiff's reading of FOIA were correct, there would have been no need for Congress to separately and specifically admonish agencies to complete the additional task of making "records . . . promptly available," since the agency would presumably have completed all of the steps necessary to produce records save the additional ministerial step of actually delivering records to the requester.

The government's understanding is supported by the Attorney General's contemporaneous guidance on the 1974 FOIA amendments, which emphasized that "[a]t the time of the initial determination there may be some uncertainty on the part of the requester, or even on the part of the agency, as to the precise extent of the materials being made available and being denied." Preliminary Guidance Memorandum, *supra*, at 7. The guidance thus distinguished between two types of denials—"denials of an entire request" that occur as part of the "initial determination," and "partial denials" that occur upon "receipt of any records being made available pursuant to the initial determination." *Ibid.* Similarly, the Department of Justice explains in its current FOIA guide that the initial determination whether to release any records is distinct from the later determination about what records to

release. *See* Department of Justice, *Guide to the Freedom of Information Act* 59 & n.150 (2009) (explaining that "[a]n agency is not necessarily required to release the records within [the] statutory time limit" and citing with approval case authorizing release of records on a rolling basis).

3. As the FEC's brief explains (at 26-29), the government's interpretation of section 552(a)(6)(A)(i) is reinforced by other FOIA provisions. For example, expedited processing of FOIA requests is governed by a separate provision, 5 U.S.C. § 552(a)(6)(E).[8] Under that provision, agencies must determine whether to provide expedited processing within ten days of the request, and thereafter release responsive records "as soon as practicable." *Id.* § 552(a)(6)(E)(ii), (iii). Such expedited processing, however, requires requesters to demonstrate a "compelling need" for the records. *Id.* § 552(a)(6)(E)(i)(I). "Compelling need" is defined by statute to encompass requests that, if denied, "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," or requests characterized by an "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* § 552(a)(6)(E)(v).

FOIA's expedited processing provision would be rendered superfluous by plaintiff's reading of the statutory time limit in section 552(a)(6)(A)(i), which applies to all FOIA requests. *See United States. v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330

[8] This provision was added to FOIA in the 1996 eFOIA amendments. *See* Pub. L. No. 104-231, § 8(a), 110 Stat. at 3051.

(2011) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." (internal quotation marks and citation omitted)). By design, Congress imposed "[n]o specific number of days for compliance" with the expedited processing requirement. *See* S. Rep. No. 104-272 at 17 (1996). The Senate report accompanying the 1996 amendments explained that "depending upon the complexity of the request, the time needed for compliance may vary." *Ibid.* Thus, the report stressed, "[t]he goal is not to get the request for expedited access processed within a specific time frame, but to give the request priority for processing more quickly than otherwise would occur." *Ibid.* Plaintiff's position here is that under the statutory time limit that applies to *all* FOIA requests, agencies must fully and completely process such requests within a strict twenty-day time limit. That position cannot be reconciled with Congress's clear intent that the sub-class of *expedited* requests, including those involving "an imminent threat to the life or physical safety of an individual," 5 U.S.C. § 552(a)(6)(E)(v), need not be "processed within a specific time frame," S. Rep. No. 104-272 at 17.

In short, the FOIA's text, purpose, and legislative history, together with this Court's decisions and the Attorney General's longstanding guidance, all support the conclusion that section 552(a)(6)(A)(i) only obligates the agency to provide, within the statutory time limit, an up-or-down determination whether it will comply with the

FOIA request by releasing at least some records, to be followed "promptly" thereafter with a more granular determination about what records to actually release.

B. The FEC "determine[d] . . . . whether to comply" with plaintiff's request within the statutory time limit, and plaintiff was thus required to exhaust its administrative remedies.

Applying the principles above to the record in this case, it is plain that the FEC fulfilled its obligation to provide a determination "whether to comply" within the statutory time limit. Plaintiff submitted its FOIA request to the FEC on March 7, 2011, seeking a variety of communications between three Commissioners and outside individuals and entities. JA6-7. As the district court observed, two days later "the FEC agreed to produce responsive documents on a rolling basis." JA67; *see also* JA17-18 (uncontroverted declaration of FEC official). By April 4, twenty days after receiving the plaintiff's FOIA request, the FEC had engaged in at least three conversations to discuss the precise scope of a more limited initial search, *see* JA17-18, and reached a final agreement regarding the scope of the agency's document review, *see* JA18-19, JA25-26. Throughout this process, the FEC reiterated its committment to release records on a rolling basis. *See* JA18-19.

The FEC's response to plaintiff's FOIA request, which made clear that the agency would be producing responsive records, epitomizes the sort of response that fulfills FOIA's requirement to "determine . . . whether to comply" with a FOIA request within the statutory time limit. *See* Department of Justice, *Guide to the Freedom of Information Act*, at 59 & n.150 (explaining that "[a]n agency is not necessarily

required to release the records within [the] statutory time limit" and citing with approval a case authorizing release of records on a rolling basis).

Plaintiff's assertion that "while the FEC agreed to produce responsive documents, it never did so before CREW filed suit" is entirely beside the point. Pl. Br. 24. Similarly inapposite is plaintiff's statement that the FEC did not "commit to provide CREW with any specific document by any specific date." *Ibid.* As noted, FOIA permits requesters to avoid exhaustion of administrative remedies only if an agency fails to comply with the time limit in section 552(a)(6)(A)(i)—*i.e.*, if the agency fails to "determine . . . whether to comply" within 20 days of receiving the request. The FEC fulfilled that requirement. Although the actual production of records must be done "promptly," 5 U.S.C. § 552(a)(6)(C)(i), an agency's alleged failure to fulfill that separate requirement does not excuse the requester from exhausting its administrative remedies.

II. Plaintiff's contrary position is flawed and would increase FOIA litigation that could otherwise be resolved as part of the ordinary administrative appeals process.

1. Plaintiff's legal arguments are mistaken. Plaintiff invokes (Pl. Br. 16) FOIA's provision requiring agencies to "notify the person making such request of [its] determination the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552(a)(6)(A)(i). But that provision sheds no light on the scope of the required "determination." Plaintiff's argument that the agency's failed to provide notice of its appeal rights is incorrect. *See*

Reply Br. 3. As this Court has explained, an agency must provide the requester notice of the right to administratively appeal only "if the initial agency decision is adverse." *Oglesby*, 920 F.2d at 61. The "initial agency decision" here was not "adverse"; it was a determination that the agency would comply with the request by releasing records on a rolling basis.

Plaintiff also urges (Pl. Br. 16-17) that the notification of the "the reasons therefor" must include the full results of the agency's processing of a requester's FOIA request, including "the reasons for the agency's determination of what it will and will not release," because "only such a determination that would yield 'reasons' susceptible to administrative review." But that is not the most sensible reading of the statutory language. The phrase "reasons therefor" is best understood to refer to the reasons for an "adverse determination"—an initial determination that no records will be produced in response to the request. Preliminary Guidance Memorandum, *supra*, at 7 (referring to "denials of an entire request" as occurring upon an "initial determination"). Indeed, it makes little sense to speak of the "reasons" for a determination *to comply* with a FOIA request. In contrast, a requester needs to know the reasons for an adverse determination to take an administrative appeal.. *Cf. Oglesby*, 920 F.2d at 65 (explaining that the agency must provide "notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse").

Plaintiff also invokes the provision of FOIA that permits the agency to extend the time limit for determining whether to comply with a request when presented with

specific "unusual circumstances." *See* Pl. Br. 27-28 (citing 5 U.S.C. § 552(a)(6)(B)(iii)(I)-(III)). As the FEC brief correctly explains (at 36-37), however, that provision addresses the common situation where even determining "whether to comply" with an information request—*i.e.*, whether the agency will be able to release any responsive records—requires the agency to "search for and collect the requested records from field facilities" or other disparate offices, to "search for, collect, and appropriately examine a voluminous amount of separate and distinct records," or to "consult[] * * * with another agency having a substantial interest in the determination of the request." 5 U.S.C. § 552(a)(6)(B)(iii)(I)-(III).

Plaintiff also erroneously relies on FOIA's provision for *Open America* stays, *see* Pl. Br. 31-32, which permit a court to "retain jurisdiction and allow the agency additional time to complete its review of the records" after a lawsuit is filed before the completion of administrative proceedings. *See id.* § 552(a)(6)(C)(i). The government's position would not, as plaintiff argues, "rob[] the congressionally created *Open America* stay of any utility" or otherwise render this provision superfluous. *See* Pl. Br. 32. To the contrary, the provision would apply in situations where the agency has failed to provide even an initial determination whether to comply with a FOIA request within the required timeframe.

Plaintiff's reliance on the legislative history of FOIA is also misplaced. As an initial matter, whatever the legislative history might suggest as the motivating purpose of the FOIA amendments, a straightforward reading of the language of FOIA alone

requires rejection of plaintiff's suggestion that the Act compels agencies to complete all of the steps necessary to produce records save the actual physical production of records within 20 days. *See U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quoting *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004)).

In any event, the legislative history does not support plaintiff's position. Plaintiff urges that the 1996 amendments to FOIA were motivated by Congress's concern that "agencies had largely failed *to produce records* within the ten-day time limit." Pl. Br. 29. In fact, the portions of the legislative history that plaintiff cites speak only of concern regarding delays in the agency's ability to "*process*" requests within the existing ten-day time limits. *See, e.g.*, S. Rep. No. 104-272, at 16 (1996). When read together with other portions of the legislative history, the "processing" that is being referred to is best understood as simply the processing necessary to provide the initial determination contemplated by section 552(a)(6)(A)(i). *See, e.g., ibid.* ("Currently the FOIA allows agencies 10 working days to make *initial* determinations on requests for information possessed by the Government. . . . The bill . . . doubles the allowable time period for making an *initial* determination to 20 working days . . . ." (emphases added)); *see also Federal Information Policy Oversight: Hearing Before the Subcomm. on Gov't Mgmt., Info., and Tech. of the H. Comm. on Gov't Reform and Oversight*, 104th Cong.

422 (1996) (agency letter explaining that "it is a common practice for agencies to provide requesters with initial determination letters prior to the actual release of responsive records"). And, in any event, to the extent Congress wanted agencies to actually produce records within a short timeframe, it enacted the expedited processing provisions described above, which do not apply to this case and which impose "[n]o specific number of days for compliance." *See* S. Rep. No. 104-272 at 17 (1996).

2. Plaintiff's position is also contrary to the efficient administration of FOIA and the interests of judicial economy. As the Supreme Court has explained, Congress intended FOIA "to provide workable rules of . . . disclosure." *See U.S. Dept. of Justice v. Landano,* 508 U.S. 165, 180 (1993) (internal quotation marks omitted) (quoting *U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 779 (1989)). But when faced with a sweeping FOIA request like the one here, agencies would find it difficult (if not impossible) to "search for responsive documents" and "review[] [them] to determine whether it would redact any information under claims of exemption" within 20 days, as plaintiff urges. Reply Br. 2. As a result, plaintiff's position, if adopted by this Court, is virtually certain to pretermit the orderly agency review process for complex FOIA requests, and lead to a predictable increase in district court FOIA litigation as requesters file suit without having to exhaust their administrative remedies.

Plaintiff's position would thus place the district courts in the position of adjudicating record disputes that might otherwise be resolved during the agency

review process. As this Court has stressed, FOIA's administrative review scheme gives agencies "an opportunity to exercise [their] discretion and expertise on the matter and to make a factual record to support [their] decision." *Oglesby*, 920 F.2d at 61. The ordinary agency review process also enables the "top managers of an agency" to "correct mistakes at lower levels," thus obviating "unnecessary judicial review." *Ibid.* Indeed, as the district court recognized, this very case highlights the risks in reading the statutory time limits as broadly requiring the type of determination that plaintiff posits. The FEC "has not had the opportunity to address any of the objections [plaintiff] lodges to the scope of production, adequacy of the searches, or claimed exemptions and withheld documents" or the "time to correct any errors alleged by CREW." JA72.

In sum, the FEC fulfilled its obligation to make a determination whether it would comply with plaintiff's FOIA request within the 20-day time limit imposed section 552(a)(6)(A)(i). Plaintiff was therefore required to exhaust its administrative remedies prior to filing suit, something which it failed to do. The district court thus properly dismissed this lawsuit.

CONCLUSION

For the foregoing reasons, and those stated in the brief filed by the Federal Election Commission, the district court's judgment should be affirmed.

Respectfully submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

MICHAEL S. RAAB

/s/ Sarang V. Damle
SARANG V. DAMLE
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

NOVEMBER 2012

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that the certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief contains fewer than twenty pages, in compliance with this Court's order of October 16, 2012.

/s/ Sarang V. Damle
SARANG V. DAMLE

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause eight paper copies of this brief to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Sarang V. Damle
SARANG V. DAMLE