[ORAL ARGUMENT NOT SCHEDULED]

No. 21-5105

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alicia KIRTON,

Plaintiff-Appellant,

v.

Alejandro MAYORKAS, Secretary, Department of Homeland Security, et al.

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
(No. 1:18-cv-1580-RCL)

APPELLANT'S OPPOSITION TO SUMMARY AFFIRMANCE AND MOTION TO HOLD IN ABEYANCE

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INTRODUCTION

The government is asking the Court to summarily affirm judgment against Ms. Kirton based on an atextual gloss on Title VII—the requirement of "objectively tangible harm"—applied by the district court in this case. But the Court has, *sua sponte*, granted rehearing en banc in *Chambers v. District of Columbia*, No. 19-7098 (D.C. Cir. May 5, 2021), to consider the validity of that very standard. There can be no stronger demonstration that the merits are not "so clear" as to warrant summary affirmance, *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam), than that the standard on which Ms. Kirton lost below is currently being reconsidered by this Court.

Further, the Court hardly needs Ms. Kirton to explain why the government's motion for summary affirmance is meritless, because the government itself has done so—four times in the past three years—arguing as recently as March 2021 that this Court's "objectively tangible harm" standard is "mistaken" and "limits the antidiscrimination statutes in a manner that is inconsistent with their text and purpose." Resp. to Pet. for Init. Hearing En Banc, *Townsend v. United States*, No. 19-5259, at 1-2 (D.C. Cir. filed Mar. 10, 2021) ("U.S. *Townsend* Br."). The government has urged both this Court and the Supreme Court to overrule this and similar standards in three other cases, too. *See* Br. for the U.S. as Amicus Curiae, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451, at *6 (Mar. 20,

2020), *pet. dismissed*, 140 S. Ct. 2841 (2020) ("U.S. *Peterson* Br."); Br. for Resp. U.S. in Opp'n to Certiorari, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239, at *13-14 (filed May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020) ("U.S. *Forgus* Br."); Br. for the U.S. as Amicus Curiae, *Chambers*, 2020 WL 1432198 (D.C. Cir. filed Mar. 12, 2020) ("U.S. *Chambers* Br."). In light of the government's own—repeated and persuasive—arguments to this Court and the U.S. Supreme Court about the proper meaning of Title VII, the government can hardly carry its "heavy burden" of showing that the merits of this case are "so clear" as to warrant summary affirmance. *Taxpayers Watchdog*, 819 F.2d at 297.

The government argues that Ms. Kirton waived the issue she now raises, but the briefing and decision below belie this claim. And even under the current standard, it is not "so clear" that Ms. Kirton failed to raise a dispute of fact as to whether she suffered "objectively tangible harm."

For these reasons, the motion for summary affirmance should be denied. Additionally, pursuant to D.C. Cir. Rule 27(c), Ms. Kirton moves the Court to hold this case in abeyance pending the decision in *Chambers*, which is likely to have a significant, perhaps even dispositive, effect on the outcome here.

BACKGROUND AND PROCEDURAL HISTORY

Appellant Alicia Kirton is an African American woman employed by the Federal Emergency Management Agency ("FEMA") as a GS-13 Budget Analyst.

Kirton v. Mayorkas, 2021 WL 981241, at *1 (D.D.C. Mar. 16, 2021). Her job involved coordinating the proper allocation of funding for programs within FEMA. *Id.* at *2. In December 2015, Ms. Kirton asked to telework on 95-100% of her workdays, a request her supervisor denied, *id.* at *2-3, even though her work could be done 100% remotely. ECF 32, *Kirton v. Mayorkas*, No. 1:18-cv-01580 (D.D.C. filed Oct. 23, 2020), at 2-3 (Pl.'s Opp'n to Mot. for Sum. J.). As a result of the denial, Ms. Kirton was required to commute to Washington from her home in Florida twice per month, at substantial cost. *See Kirton*, 2021 WL 981241, at *3. After exhausting administrative remedies, Ms. Kirton sued under Title VII.

The district court granted summary judgment to the government because Ms. Kirton could not show that the denial of telework "affected her salary, job responsibilities, or future employment opportunities," and thus it "simply does not involve the type of 'objectively tangible harm' to her employment status that is necessary to constitute an adverse employment action." *Id.* at *5 (citation and internal quotation marks omitted). The district court's ruling rested solely on this threshold ground; the court did not reach the question whether her request was denied on the basis of race, and that issue remains in dispute.

Ms. Kirton filed this appeal on May 12, 2021, and the government moved for summary affirmance on June 28, 2021.

ARGUMENT

The Court should deny the motion for summary affirmance and grant Ms. Kirton's motion to hold this appeal in abeyance pending the en banc resolution of *Chambers*.[1]

I. Summary Affirmance Should Be Denied Because The Merits Are Not "So Clear" As To Warrant Summary Action.

The government "bears the heavy burden of establishing that the merits of [t]his case are so clear that expedited action is justified." *Taxpayers Watchdog*, 819 F.2d at 297. Summary affirmance requires this Court to "conclude that no benefit will be gained from further briefing and argument of the issues presented." *Id.* at 298. Here, the government's primary argument is premised on the district court's application of this Court's "objectively tangible harm" requirement for Title VII discrimination claims—a rule currently being reconsidered en banc in *Chambers*. Summary affirmance should be denied on that ground alone: because the validity of the governing standard is not "so clear," the merits of the decision below applying it are not "so clear," either. And even the government thinks that standard is wrong.

The government's waiver argument ignores that Ms. Kirton raised, and the district court addressed, the exact issue Ms. Kirton presses on appeal (except the specific suggestion that the district court overrule this Court's precedent—a step that

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[1] On June 24, 2021, counsel for Ms. Kirton requested the government's consent to holding this appeal in abeyance; the government did not consent.

it would have been futile for Ms. Kirton to urge and impossible for the district court to take). Finally, even under the existing standard, whether Ms. Kirton failed to show "objectively tangible harm" is not "so clear" as to warrant summary affirmance.

A. The merits cannot be "so clear" because the district court's ruling relies on a standard currently under reconsideration by the en banc Court.

In May 2021, the en banc court *sua sponte* ordered rehearing en banc in *Chambers* to consider the "question of whether the court should retain the rule that the denial or forced acceptance of a job transfer is actionable under Title VII, 42 U.S.C. 2000e-2(a)(1), only if there is 'objectively tangible harm.'" 2021 WL 1784792, at *1 (internal citation omitted).

Ms. Kirton's appeal presents two questions:

- Whether an employer's denial, on the basis of race, of an employee's request for full-time telework status is actionable under Title VII, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-16.
- Whether this Circuit should retain the rule that an employee's claim is actionable under Title VII, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-16, only if there is "objectively tangible harm."

The answer to both questions depends on the Court's interpretation of Title VII to require "objectively tangible harm." That the specific question in *Chambers* is formally limited to the lateral transfer context is immaterial. The "objectively tangible harm" standard at issue in *Chambers* is the linchpin of this Circuit's rule—applied both in *Chambers* and in the district court here—that Title VII applies only

to "materially adverse" actions, defined as "'consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm.'" *Kirton*, 2021 WL 981241, at *4 (quoting *Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009)). Indeed, the district court recognized the connection between the *Chambers* context and this one in considering Ms. Kirton's argument below analogizing telework to lateral transfers. *See id.* at *7 (explaining that "the lateral transfer standard is no more favorable" because the same requirement applies to claims about lateral transfers as to claims about telework).

The resolution of *Chambers* is likely to govern the resolution of the issues in this appeal. If the validity of the legal standard the district court applied is not "clear," then necessarily the correctness of its conclusion applying that standard cannot be "clear." For this reason alone, summary affirmance is unjustified.

B. The merits cannot be "so clear" because the "objectively tangible harm" standard is wrong, as the government has admitted.

The standard applied below is inconsistent with the text of Title VII, conflicts with Supreme Court precedent, and produces untenable results. The government has repeatedly argued as much both to this Court and the Supreme Court.

1. The "objectively tangible harm" standard is wrong.

Start with the text. What Title VII prohibits is not "materially adverse" actions based on prohibited grounds, but "discriminat[ion] against any individual with

respect to his compensation, terms, conditions, or privileges of employment" based on prohibited grounds. 42 U.S.C. § 2000e-2(a)(1). A separate provision requires that "[a]ll personnel actions affecting employees ... in executive agencies ... [and] in those units of the Government of the District of Columbia having positions in the competitive service ... shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Although their language differs, this Circuit has held that both provisions "contain identical prohibitions." *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007). The latter provision is the one at issue in both this case and *Chambers*.[2]

As then-Judge Kavanaugh explained in arguing that Title VII applies to all discriminatory transfers, the private-sector provision bars discrimination with respect to "terms, conditions or privileges of employment." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring). The phrase "objectively tangible harm" does not appear in the text at all.

The text of the federal-sector provision, requiring that "[a]ll personnel actions affecting employees ... shall be made free from any discrimination," 42 U.S.C. § 2000e-16(a), also leaves no room for the requirement of "objectively tangible

[2] Although the en banc order in *Chambers* refers only to the private-sector provision of Title VII, 42 U.S.C. § 2000e-2(a)(1), the federal-sector provision at issue here, 42 U.S.C. § 2000e-16, is implicated there as well because that provision applies to the District of Columbia—the defendant in *Chambers*, *see* 988 F.3d at 500.

harm." The Supreme Court recently examined this same language in a provision of the Age Discrimination in Employment Act in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020). The Court found the meaning of "personnel actions," though undefined by the statute, "easy to understand," because it is used in another bedrock federal employment statute, the Civil Service Reform Act of 1978. *Id.* at 1172-73. The CSRA "defines a 'personnel action' to include most employment-related decisions, such as appointment, promotion, work assignment, compensation, and performance reviews," *id.* at 1173, and that expansive interpretation "is consistent with the term's meaning in general usage." *Id.* Given that Title VII uses the identical "personnel action" language, and considering that the Supreme Court and this Court interpret Title VII and the ADEA in parallel, *see Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 756 (1979); *Miller v. Clinton*, 687 F.3d 1332, 1338 (D.C. Cir. 2012), *Babb*'s broad reading applies with full force here.

Of note, the CSRA's list of "personnel actions" includes "a detail, transfer, or reassignment," as well as "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. 2302(a)(2)(A)(iv), (xii). Similar to the lateral transfer at issue in *Chambers*, teleworking is obviously is a "significant change in ... working conditions"—the work occurs at a location chosen, and in a space set up, by the employee rather than the employer. Teleworking is "significant" in other ways, too: it affects the need to commute (and accordingly affects the employee's finances),

the formality of required attire, and the employee's ability to respond to child-care or other family emergencies. And, again, nowhere in *Babb*, the CSRA, or the text of either the private- or federal-sector Title VII antidiscrimination provisions is the scope limited by a notion of "objectively tangible harm."

This Court's creation of the "objectively tangible harm" standard relied on *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761 (1998), which discussed the concept of a "tangible employment action"—such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"—in explaining when an employer is subject to vicarious liability under Title VII for a hostile work environment created by a supervisor it employs. *See Chambers*, 988 F.3d at 504–06 (Tatel, J., concurring). But the Supreme Court subsequently clarified that *Ellerth* "did not discuss the scope of the general antidiscrimination provision." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 65 (2006). Accordingly, this Court's reliance on *Ellerth*'s "tangible action" criterion—developed to determine the standard for vicarious liability for just one subset of Title VII claims—to answer the separate question of when Title VII's antidiscrimination provision applies generally, is "no longer tenable." *Chambers*, 988 F.3d at 504–06 (Tatel, J., concurring).

Moreover, applying the "objectively tangible harm" standard to Title VII produces "startling result[s]" that are "irreconcilable with [its] purpose." U.S.

Peterson Br. *6, 9. A restaurant manager could assign white servers to air-conditioned indoor tables and Asian American servers to outdoor tables. A building security company could assign all African American guards to the undesirable midnight shift. A construction foreman could assign Hispanic employees the most hazardous jobs at his site. As long as these actions do not reduce employees' pay, benefits, or responsibilities, Title VII offers no protection in this Circuit. Such a rule cannot possibly align with Congress's intent "to prohibit all practices *in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race [and] national origin[.]" *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). The merits of this appeal cannot be "so clear" when they rest on this Circuit's erroneous standard.

2. *The government agrees that the "objectively tangible harm" standard is wrong.*

The government itself—on at least four occasions in the past three years—has taken the position that the "objectively tangible harm" standard (and similar rules imposed in other circuits) is incorrect and should be overruled. *See* U.S. *Townsend* Br. 7 (urging this Court to overrule its standard as "inconsistent with the antidiscrimination statutes"); *accord* U.S. *Peterson* Br. *6-14 (arguing that the Fifth Circuit rule limiting Title VII to "ultimate employment decisions" is at odds with the statutory text, congressional intent, and Supreme Court caselaw, and that other circuits' "significant and material" discrimination limitation "suffers from the same

flaws”); U.S. *Forgus* Br. *12-13 (arguing that the Fourth Circuit’s “some significant detrimental effect” limitation on discrimination claims is “misguided”); U.S. *Chambers* Br. 4-5 (arguing that all discriminatory job transfers are actionable under Title VII).

The government’s arguments are directly applicable here and align with Ms. Kirton’s position on the merits. Even more to the point, the government has urged that the ordinary meaning of Title VII’s antidiscrimination provision “plainly includes” working conditions including “the *location* and nature of [a] job assignment.” U.S. *Peterson* Br. *8 (emphasis added); *see also id.* (“A typical employee asked to describe his ‘terms’ or ‘conditions ... of employment,’ would almost surely mention where he works ....” (cleaned up)). Denial of telework, especially the full-time telework request Ms. Kirton made, affects the location of an employee’s job. Because both parties believe that the district court’s conclusion rested on an incorrect interpretation of Title VII, it can hardly be “so clear” that the district court was right; if anything, it is clear that the decision below is *wrong*.

C. Ms. Kirton has not waived her argument that the “objectively tangible harm” standard is wrong.

Attempting to sidestep its own position on the appropriate standard, the government claims that Ms. Kirton waived the issue she raises. The government’s position fails at several levels. Most obviously, Ms. Kirton *did* argue that the denial of her telework arrangement affected the “terms and conditions” of her employment,

and the district court accordingly addressed that argument. The district court understood Ms. Kirton's argument that denial of telework is actionable because it "materially affected the 'terms' and 'conditions' of her employment," *Kirton*, 2021 WL 981241, at *5 (quoting Pl.'s Opp'n to Mot. for Sum. J. 10), and the court rejected that argument solely because it "simply [did] not involve the type of 'objectively tangible harm' to her employment status that is necessary to constitute an adverse employment action"—the very requirement she now challenges. *Id.* (quoting *Douglas*, 559 F.3d at 553). Her position on appeal that no "objectively tangible harm" is required to sustain a Title VII claim is not inconsistent with the view that she demonstrated such a harm, let alone "diametrically opposed" to that view.[3] To the extent any tension exists, it is merely because Ms. Kirton recited and attempted to meet—as she had to—the governing law in this Circuit. At the same time, Ms. Kirton highlighted a prior opinion by then-Judge Kavanaugh arguing that this Court's interpretation of Title VII was too narrow and calling for the Court to "go further" en banc. Pl.'s Opp'n to Mot. for Sum. J. 11 (quoting *Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring)). And, in addition to Ms. Kirton's own argument that a denial of telework status affects the "terms and conditions" of her employment,

[3] In any event, the government's cited authorities on this point are inapposite because they concern differences between an amicus and party, not the same party at trial and on appeal. *See Eldred v. Ashcroft*, 255 F.3d 849, 850-51 (D.C. Cir. 2001) (declining to consider an *amicus* argument that was opposed to appellants' position); *New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) (same).

there is "no doubt in the present case that [the lower court] decided the crucial issue," *United States v. Williams*, 504 U.S. 36, 43 (1992), so it is properly before the Court here. *See id.* at 41; *accord Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009).

All that's left of the government's waiver point is a formalistic objection that Ms. Kirton never asked the district court to overrule the controlling D.C. Circuit standard. But it is obvious why not: no district court could do so. Just as parties are not required to administratively exhaust issues that would have been futile, *see Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 635 (D.C. Cir. 1996), so too are parties not required to make futile arguments at the lower court, *see Sims v. Apfel*, 530 U.S. 103, 108-09 (2000) (explaining that "the issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts"); *see also* U.S. *Peterson* Br. *22 ("Given the [court of appeals'] entrenched precedent, moreover, it seems unlikely that petitioner's raising the issue would have affected ... resolution."). Indeed, this Court has already implicitly rejected the government's formalistic objection here by granting en banc review in *Chambers*—where the plaintiff, like Ms. Kirton, did not make the pointless request for the district court to overrule the "objectively tangible harm" standard set out by this Court.

Finally, even if Ms. Kirton had not raised the issue, she is entitled to the benefit of any change to the "objectively tangible harm" standard by the en banc

proceedings in *Chambers*, because courts must "consider any change, either in fact or in law, which has supervened since the [trial court's] judgment was entered." *United States v. Washington*, 12 F.3d 1128, 1138 (D.C. Cir. 1994) (internal citation omitted). This "supervening-decision doctrine" allows courts to "consider issues not raised at trial where a supervening decision has changed the law in appellant's favor and the law was so well-settled at the time of trial that any attempt to challenge it would have appeared pointless." *Id.* at 1139; *accord Raynor v. Merrell Pharm. Inc.*, 104 F.3d 1371, 1373 (D.C. Cir. 1997) (applying the doctrine in the civil context). Here, the en banc court's forthcoming decision in *Chambers* may be such a supervening decision, and Ms. Kirton should not be deprived of its potential benefit.

D. Even if the "objectively tangible harm" standard applied to Ms. Kirton's case, a reasonable jury could conclude that Ms. Kirton made such a showing.

Even under the "objectively tangible harm" standard, the merits of Ms. Kirton's case are not "so clear" as to warrant summary affirmance. The district court concluded that a denial of full-time telework status did "not involve a 'significant change in benefits' or any other comparable harm." *Kirton*, 2021 WL 981241, at *6. But this conclusion is not "so clear." As technological advances have made telework more feasible, more common, and more important to employees (never more than during the COVID-19 pandemic), being denied telework status frequently involves "objectively tangible harm" because it tangibly affects the work location,

environment, and commuting.[4] Indeed, because Ms. Kirton could not work fully remotely, she spent substantial funds commuting to Washington from her home in Florida twice per month. *Kirton*, 2021 WL 981241, at *3. By August 2019, these costs exceeded $50,000. Pl.'s Opp'n to Mot. for Sum. J. 3. Economic harm is the most traditional form of "tangible" harm. *See Ellerth*, 524 U.S. at 762 ("A tangible employment action in most cases inflicts direct economic harm."); *see generally TransUnion LLC v. Ramirez*, 2021 WL 2599472, at *7 (U.S. June 25, 2021).

That her employer had a policy providing that there was no "entitlement" to telework, Mot. for Sum. Affirmance 2, is of no moment; employers cannot, by fiat, exempt parts of the employment relationship from Title VII's antidiscrimination mandate. For instance, employees generally have no "entitlement" to a promotion, but that obviously doesn't mean employers are free to discriminate based on race

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[4] Contrary to the district court's reasoning, these background trends are relevant in understanding what a reasonable jury *today* would consider to be "objectively tangible harm" for a specific employee. Courts regularly find that applying settled tests in new contexts results in different outcomes in light of changes in technology. *See, e.g., Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-37 (2017) (holding that state law barring sex offenders from use of social media websites violated the First Amendment in light of the development of social media); *Riley v. California*, 573 U.S. 373, 385-86, 394-95, 403 (2014) (distinguishing modern cell phones from mere "physical objects" and imposing warrant requirement notwithstanding general rule governing searches incident to arrest); *Kyllo v. United States*, 533 U.S. 27, 32-34, 40 (2001) (holding that use of thermal imaging device on private home required warrant notwithstanding lack of physical intrusion). In the modern era, many government jobs can be performed entirely from a remote location through teleworking; it makes a significant financial difference to the employee if she is permitted to do her job from a city with a lower cost of living than Washington, D.C.

with respect to promotions. The merits of Ms. Kirton's claim under the existing standard are not "so clear" as to warrant summary affirmance.

II. The Court Should Hold This Case in Abeyance Pending Resolution of *Chambers v. District of Columbia*.

Pursuant to D.C. Cir. Rule 27(c), Ms. Kirton moves to hold this case in abeyance pending resolution of *Chambers*, which will be argued October 26, 2021. That decision is almost certain to have significant consequences for the outcome of this appeal. An abeyance would conserve judicial resources and avoid the duplicative litigation that can occur when an en banc decision changes the law in a manner that requires reconsideration of another pending case. *See, e.g., Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518, 519 (D.C. Cir. 2015) (noting that intervening en banc decision resulted in the need for rehearing). Additionally, if the Court grants summary affirmance, Ms. Kirton will have to file—and judges of this Court and/or the Supreme Court will have to spend time considering—a petition for rehearing or rehearing en banc and potentially a petition for certiorari as well. The government has, as noted, already agreed the issue she raises is certworthy.

That abeyance is appropriate is perhaps best demonstrated by this Court's decision to hold in abeyance—at the government's request—another case raising the same core issue as this one. *See* Order, *Townsend v. United States*, No. 19-5259 (D.C. Cir. May 28, 2021). The question in *Townsend* is whether a lateral transfer or reassignment is actionable under the ADEA only if there is "objectively tangible

harm." Because the ADEA and Title VII standards are analogous, the government argued, "the issues presented in these cases are clearly related, and the Court's decision in *Chambers* ... may affect the disposition [here]." 28(j) Letter of United States, *Townsend* (filed May 7, 2021), at 2. The same is true here. Like *Townsend*, this appeal challenges the "objectively tangible harm" standard; it also concerns the proper interpretation of the federal sector provision. The Court is holding *Townsend* in abeyance pending resolution of *Chambers*, and it should do likewise here.

CONCLUSION

The Court should deny Appellees' Motion for Summary Affirmance and grant Ms. Kirton's Motion to Hold in Abeyance, pending resolution of *Chambers v. District of Columbia*, No. 19-7098.

July 8, 2021

Respectfully submitted,

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[5] Counsel wish to acknowledge the assistance of Columbia Law School student Larisa Antonisse in the preparation of this brief.

CERTIFICATE OF WORD COUNT

I certify that this motion complies with the requirements of D.C. Circuit Rule 27(c) for a response that also seeks affirmative relief, because it contains 4,211 words. This motion also complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) and Fed. R. App. P. 32(a)(5)-(6) because it was prepared in a proportionally spaced typeface (Times New Roman 14-point type) using Microsoft Word.

/s/ Scott Michelman