

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 14, 2008
(BEFORE CHIEF JUDGE SENTELLE AND CIRCUIT JUDGES RANDOLPH AND GRIFFITH)

In The
United States Court of Appeals
For The District of Columbia Circuit

**CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,**

Plaintiff – Appellant,

v.

OFFICE OF ADMINISTRATION,

Defendant – Appellee.

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

REPLY BRIEF OF APPELLANT

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*Authorities we chiefly rely upon are marked with an asterisk

GLOSSARY

BR	Brief for Appellee
E.O.	Executive Order
EOP	Executive Office of the President
FOIA	Freedom of Information Act
JA	Joint Appendix
NSC	National Security Council
OA	Office of Administration

INTRODUCTION AND SUMMARY OF ARGUMENT

As explained in our opening brief, the judicially created tests for determining “agency” status under the Freedom of Information Act (“FOIA”) serve the practical purpose of ferreting out those components of the Executive Office of the President (“EOP”) that are, as a matter of fact and law, really just extensions of the president’s personal staff such that subjecting them to the FOIA would raise a number of constitutional concerns. In response, the Office of Administration (“OA”) focuses exclusively on those judicial tests but, like the district court below, completely divorces those tests from their underlying purpose. The result is a hodgepodge of arguments that employ all the right buzzwords, but never articulate what it is that makes OA factually and practically an extension of the president’s staff and therefore not subject to the FOIA. In reality, OA does not function as an adjunct to the president’s staff and that alone is basis for decreeing it an agency under the FOIA.

There is no dispute here that within and on behalf of the EOP, OA performs a variety of functions with no direction or oversight by the president, and lacks an “intimate organizational and operating relationship” with the president. Nor does defendant dispute that OA does not advise and assist the president directly and, at most, provides indirect assistance by allowing the rest of EOP beyond the Office of the President to function smoothly. The core of the dispute turns instead on two issues: (1) whether OA’s lack of operational proximity to the president and non-advisory role within EOP are fatal to OA’s claim to be a non-agency, and (2) the significance of the differences between OA’s functions and those of other EOP entities this Circuit has found to be agencies under the FOIA.

Leaving unaddressed the critical importance that operational proximity plays in ascertaining an EOP entity's agency status, OA suggests instead that the evidence on this issue is in equipoise. But the district court found to the contrary that, weighing all the evidence, OA lacks substantive operational proximity and defendant never cross-appealed on this issue. Having failed to join issue on this critical component of agency status, defendant has no basis to contest a lack of operational proximity between OA and the president.

Defendant's argument that OA is not an agency rests almost exclusively on the factual differences between the nature of authority OA yields, and the authority exercised by other EOP components found to be agencies under the FOIA. But defendant fails to explain how and why these differences equate to a legally significant distinction and, more specifically, why the authority OA wields does not constitute "substantial independent authority."

1. The FOIA excepts from its coverage only those EOP entities that advise and assist the president and, as a result, are the functional equivalent of the president's staff. An entity like OA, that functions with no operational proximity to the president, receives no direction or oversight directly from the president, and performs no functions to directly assist the president and his immediate staff, does not function as the president's staff. As a necessary corollary, OA falls within the FOIA's definition of agency.

In arguing to the contrary, defendant places undue emphasis on the 1977 Message of the President transmitting to Congress the Reorganization Plan that established OA and the initial language of OA's chartering documents, ignoring the subsequent changes to those documents that reflect a transfer of power and authority from the president to OA directly and dictate that OA is not to provide services "primarily in direct support of the President." E.O. 12028, § 3(c),

42 Fed. Reg. 62891 (Dec. 12, 1977). Similarly, defendant ignores the analysis of the White House that created OA in the first place and its conclusion that because no part of OA functions solely to serve the president, OA is an agency subject to the FOIA.

2. As confirmed by the executive order setting forth OA's functions, OA operates independently of the president with authority to do all that the president, as head of OA, might do in providing administrative assistance and services to all EOP components *except* the president. By these terms, OA does not advise and assist the president in the manner contemplated by Congress when it incorporated the Soucie v. David¹ analysis into the amended FOIA definition of agency. That OA exercises administrative rather than programmatic authority does not alter the fact that it wields "substantial authority *independently of the President.*" Sweetland v. Walters, 60 F.3d 852, 854 (D.C. Cir. 1995) (*citing Meyers v. Bush*, 981 F.2d 1288, 1292 (D.C. Cir. 1993) (emphasis added).

Defendant argues that the relevant focus is not OA's relationship with the president, taking into account whether or not OA provides services to the president, but rather OA's relationship with outside entities such as Congress and other executive branch agencies. Leapfrogging past two factors this Circuit has identified as probative of agency status, defendant insists that OA is not an agency solely because its functions differ from those EOP entities found to be agencies.

These differences, however, do not transform OA into a non-agency; at most they highlight why OA cannot properly be deemed the functional equivalent of the president's personal staff, operating "a hair's breadth from the President." Meyers, 981 F.2d at 1294. Just

¹ 448 F.2d 1067 (D.C. Cir. 1971)

as importantly, OA is completely unlike those EOP components found to not be agencies under the FOIA. Application of both Meyers' three-part test and the more truncated analysis adopted in Sweetland confirms OA's essential status as an agency, operating independently of the president pursuant to authority delegated from the president. Nothing about OA's administrative functions changes these essential agency characteristics of OA.

3. OA's consistent past practice of functioning as an agency under the FOIA also confirms its agency status, notwithstanding its recent proclamation to the contrary. In asking this Court to ignore this evidence of OA's agency status, defendant cites to this Circuit's decision in Armstrong v. Executive Office of the President, 90 F.3d 553, 566 (D.C. Cir. 1996), rejecting as probative the National Security Council's ("NSC") prior references to itself as an agency. Unlike the NSC, however, OA has a 30-year past practice of consistently functioning as an agency under the FOIA.

4. As to the district court's error in dismissing plaintiff's complaint for lack of jurisdiction and limiting plaintiff's discovery to only jurisdictional proof, defendant offers no substantive defense and argues instead that plaintiff waived these arguments and in any event suffered no harm from the district court's errors. This is wrong as a matter of fact and law. First, plaintiff never attempted to persuade the district court that agency status under the FOIA is an issue of subject-matter jurisdiction. At most, plaintiff acknowledged that the district court judge had already treated the issue as jurisdictional in a previous, similar case and would likely do so again.

More fundamentally, concepts of waiver have no place when subject-matter jurisdiction is at issue. The court, not the parties, bears "the ultimate responsibility to ensure subject matter

jurisdiction,” Haase v. Sessions, 835 F.2d 902, 904 (D.C. Cir. 1987), and “subject-matter jurisdiction, because it involves the court’s power to hear a case, can never be forfeited or waived.” Arbaugh v. Y&H Corp., 546 U.S. 500, 501 (2006) (internal quotation omitted).

Defendant’s alternative argument that plaintiff was not harmed by this error because it received discovery ignores the underlying basis for that discovery. Beyond the limited jurisdictional discovery the district court authorized, plaintiff was entitled to discovery on a crucial, disputed issue of fact with the full procedural protections of Rule 56 of the Federal Rules of Civil Procedure.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFF’S COMPLAINT BASED ON A FINDING THAT OA IS NOT AN AGENCY.

A. OA Does Not Function As The President’s Immediate Staff.

1. As the legislative history to the 1974 amendments to the FOIA confirms, included with the statute’s amended definition of “agency” are all components of the EOP except those “whose sole function is to advise and assist the President.” H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974); Rushforth v. Council of Economic Advisers, 762 F.2d 1038, 1040 (D.C. Cir. 1985). Had Congress also included within the FOIA’s reach those who advise and assist the President and function as the president’s staff, such legislation would have raised “serious, practical, political, and constitutional questions that warrant careful congressional and presidential consideration.” Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991).

To function as the equivalent of the president's immediate staff, "a hair's breadth from the President,"² of necessity requires close operational proximity to the president. An EOP entity that is not operationally close to the president does not "advise and assist" the president within the meaning of Soucie, since it operates outside the presidential orbit. Stated differently, the fact that an EOP component is operationally proximate to the president may not end the inquiry of whether that component is nevertheless an agency, but the lack of operational proximity almost by definition dictates that an EOP entity is an agency.

Here, the district court properly concluded that OA does not have an "intimate organizational and operating relationship" with the president, JA 354. Defendant attempts to recast this conclusion, suggesting the evidence on this question is really in equipoise, with "weight on both sides of the scale." Br. 26. This misstates the district court's conclusion and relies on the fact that OA is "headed by the President," id., even though the president subsequently delegated his authority directly to the head of OA through E.O. 12028.

Defendant also fails to take into account section 3(c) of E.O. 12028, which dictates that OA is not to provide services "primarily in direct support of the President." Similarly, defendant ignores the analysis of the White House that created OA in the first place and its conclusion that because no part of OA functions solely to serve the president, OA is an agency subject to the FOIA. JA 98. As this evidence confirms, OA functions with no operational proximity to the president, receives no direction or oversight directly from the president, and performs no functions to directly assist the president and his immediate staff.

² Meyers, 981 F.2d at 1294.

In arguing that OA is nevertheless not an agency, defendant places undue emphasis on President Carter's message transmitting to Congress the Reorganization Plan that established OA and the initial language of OA's chartering documents. President Carter explained that he was changing EOP's structure "based on the premise that the EOP exists to serve the President and should be structured to meet his needs." JA 81 (Message of the President). But contrary to defendant's suggestion, Br. at 14, this language did not relate specifically to OA and does not evidence that OA directly serves the president in a manner that makes it the equivalent of the president's personal staff. Rather, President Carter was referencing the entire EOP as serving and meeting his needs, including EOP components that unquestionably are agencies subject to the FOIA.

Similarly misplaced is defendant's reliance on the provision of the Reorganization Plan denominating the president as head of OA. Br. at 14, citing JA 79 (Reorg. Plan No. 1 of 1977, § 2). Executive Order 12028, issued in the same year as the Reorganization Plan, transferred power and authority from the president directly to the head of OA and dictated that OA is not to provide services "primarily in direct support of the President." E.O. 12028, § 3(c), 42 Fed. Reg. 62891 (Dec. 12, 1977). These changes, unaccounted for by defendant, negate any suggestion that OA functions as the president's immediate staff.

2. That OA performs only administrative functions in service only of other EOP components does not undermine its agency status. Given that the relevant question here is whether OA is not an agency because it functions like the president's staff, the relevant focus must be on OA's relationship with the president and not, as defendant urges, on OA's relationship with outside entities such as Congress and other executive branch agencies (Br.15).

Nor is the administrative nature of OA's authority dispositive of its agency status. That OA exercises administrative rather than programmatic authority does not alter the fact that it wields "substantial authority *independently of the President.*" Sweetland v. Walters, 60 F.3d 852, 854 (D.C. Cir. 1995) (*citing* Meyers v. Bush, 981 F.2d 1288, 1292 (D.C. Cir. 1993) (emphasis added). It is that independence in exercising all of its functions that distinguishes OA as an agency.

In arguing to the contrary, defendant equates "substantial independent authority" with substantive programmatic authority, contending that OA cannot be an agency because it performs only administrative services. Not surprisingly, defendant points to no case that so holds, and premises its argument on the substitution of "substantive" for "substantial." See, e.g., Br. 15 (noting OA's lack of "substantive authority" over other EOP components). Although defendant places heavy reliance on Sweetland, arguing that OA performs a similar "non-substantive, supporting role," Br. 18, Sweetland is of no assistance. Dispositive in Sweetland was the complete absence of any presidentially delegated independent authority to any Executive Residence staff. 60 F.3d at 854 ("[N]either Congress nor the President has delegated independent authority to these employees."). Similarly, in Armstrong, the NSC was not an agency in large part because it exercised no authority of its own and instead performed "quintessentially advisory" functions. 90 F.3d at 561.

Here, by contrast, through E.O. 12028 the president has delegated to OA's head all the authority the president would have as head of OA. OA's independence and autonomy from the president, exercising all the authority the president would have in OA's stead, demonstrate the requisite "substantial independent authority" for agency status, regardless of the fact that OA

performs “purely administrative functions.” Br. 18. Stated differently, what matters is not the quality of the services that OA performs, but the independence with which OA performs them.

B. The Lack Of Factual Similarities Between The Functions Of OA And Other Agency Components Of EOP Does Not Undermine OA’s Agency Status.

For similar reasons, the differences in functions between OA and other agency components of the EOP do not undermine OA’s agency status, as they are distinctions without a meaningful difference in this context. Defendant’s arguments to the contrary rest on inverted logic that strays far from the underpinnings of Congress’ intent in exempting from the FOIA those EOP components whose sole function is to advise and assist the president.

First, while apparently conceding that OA does not directly assist the president, defendant argues that the *indirect* assistance OA provides -- making the EOP run more smoothly -- makes it a non-agency. Br. 19. But this indirect assistance only underscores how different OA is from a presidential advisor performing “quintessentially advisory” functions.³

Second, defendant argues that as a “presidential creation,” OA must be considered a non-agency. Br. 19. In this regard, OA stands in the same shoes as the Office of Science and Technology at issue in Soucie, also the product of an executive reorganization plan and still found to be an agency. 448 F.2d at 1073-75.

Third, defendant equates OA’s provision of administrative services to all *but* the president with solely advising and assisting the president “on administrative matters internal to EOP.” Br. 27. With no evidence that OA has any contact whatsoever with the president, with an executive order that explicitly carves out of OA’s responsibilities providing administrative

³ Armstrong, 90 F.3d at 561.

support to the president, and with OA's director enjoying the full complement of authority the president would have as head of OA, this tautological equation defies all logic and sense.

Most telling of all are the differences between OA and those entities found to not be agencies because they function like the president's staff. For example, in Armstrong, the NSC virtually whispered in the president's ear, "working in close contact with and under the direct supervision of the President," on key areas of national security. 90 F.3d at 560. Likewise, Sweetland dealt with the Executive Residence, which has dominion over the presidents's personal possessions and personal space, with access to "the intimate details of the management of his home . . . often [] closely connected to his duties as head of State as well as head of Government." 60 F.3d at 855. OA simply has no comparable duties and lacks completely a close, exclusive relationship with the president on any matter whatsoever.

C. OA's 30-Year History Of Functioning As An Agency Bears Directly On Its Current Agency Status.

For nearly 30 years OA functioned as an agency under the FOIA, processing hundreds of FOIA requests under a comprehensive FOIA regulatory scheme established three years after its inception. JA 69-75. Consistent with that functioning, OA accepted plaintiff's FOIA requests for processing, agreed to expedition, and committed to a court-ordered time table for processing specific prioritized categories of records. The district court erred in not crediting this consistent evidence of agency status.

Beyond its FOIA regulations OA has published an index and description of its major information and record locator systems⁴ and for ten years until its proclamation that it was no

⁴ See <http://www.whitehouse.gov/oa/functions>.

longer an agency OA consistently filed annual FOIA reports.⁵ And until early September 2007, after this litigation was initiated, the White House official website also included OA in its enumeration of EOP entities that are agencies subject to the FOIA. JA 76. This evidence stands in stark contrast to the on-again, off-again approach of the NSC, which the Court refused to credit as evidence of its agency status.

Defendant argues that this evidence is entitled to no weight, citing Armstrong, 90 F.3d at 566. Unlike the NSC at issue in Armstrong, however, OA's past behavior on the subject of its agency status under the FOIA has not been inconsistent. Unlike the NSC, OA has not treated some of its records as subject to the FOIA, while exempting others from the FOIA's reach. 90 F.3d at 566. Instead, OA has functioned consistently as an agency under the FOIA with no public assertion to the contrary,⁶ conduct that goes well mere sporadic references to itself as an agency. Compare Armstrong, 90 F.3d 566 (finding non-probative "NSC's prior references to itself as an agency . . .").

The differences between the NSC's erratic functioning under the FOIA and OA's consistent functioning under the FOIA likely stem from their fundamentally different roles within the EOP. The NSC could never open all of its records to scrutiny under the FOIA precisely because of its close proximity to the president and its essential function of providing the president confidential advice on highly sensitive matters. OA, by contrast, has regularly

⁵ These annual reports are available on OA's electronic reading room, <http://www.whitehouse.gov/oa/foia/readroom.html>.

⁶ Defendant makes much of the fact that behind the scenes, OA was consulting with the Office of Legal Counsel of the Department of Justice regarding OA's agency status under the FOIA. Br. 29. This is not, however, the kind of public evidence of non-agency status that the Armstrong court found persuasive.

processed FOIA requests with no need to carve out specific areas from public scrutiny because it does not advise and assist the president on any matters, sensitive or not.

II. THE DISTRICT COURT ERRED IN TREATING OA’S AGENCY STATUS AS AN ISSUE OF SUBJECT-MATTER JURISDICTION AND ACCORDING PLAINTIFF LIMITED JURISDICTIONAL DISCOVERY.

1. OA can offer no substantive defense of the district court’s error in treating “agency” status as an issue of subject-matter jurisdiction, and so it asserts merely that plaintiff waived the argument and was not harmed by the error in any event. To the contrary, plaintiff did not waive its right to object to the court’s treatment of the issue as one of jurisdiction -- indeed, the objection cannot be waived -- and the error is far from harmless.

Plaintiff never attempted to persuade the district court that “agency” status is an issue of subject-matter jurisdiction, but simply acknowledged that the district court judge had already treated the issue as jurisdictional in a previous, similar case and likely would do so again.

Electronic Privacy Information Ctr. v. Office of Homeland Security, Civil Action No. 02-620 (CKK), Mem. Op. (Dec. 26, 2002). As predicted, in its February 11, 2008 Order, which plaintiff could not appeal as a non-final order, the district court appeared to take the same position as it took in Electronic Privacy, noting that “agency” status “might be considered jurisdictional,” “at least arguably goes to the Court’s jurisdiction,” and “may be viewed as jurisdictional.” JA 104, 107.

The district court also ordered OA to “file an appropriate dispositive motion” at the conclusion of discovery, without specifying what that motion would be. JA 109. The district court did not definitely settle on a procedural mechanism until its June 16, 2008 final order, in which it stated that “agency” status should be raised by a 12(b)(1) motion, with the burden on the

plaintiff and the court empowered to look outside the pleadings and resolve factual disputes. Mem. Op. [54] at 16-17. Even then, the court hedged, maintaining that “agency” status is “arguably” jurisdictional, that rule 12(b)(1) “appears to be the proper authority,” and that the motion alternatively could be resolved as a matter of law under Rule 12(b)(6).⁷

Despite this muddled procedural posture, defendant now seeks to hold plaintiff to a strict waiver rule. But waiver has no application here, where defendant’s argument is based not on a failure by plaintiff to advance a specific allegation or argument in support of OA’s agency status but, at best, on an argument that plaintiff acceded to the court’s “jurisdictional” labeling. On the merits, plaintiff advances the same arguments as to OA’s “agency” status here as it did below, with no new wrinkles.

More fundamentally, even when a waiver is well-grounded in the record, concepts of waiver have no place when subject-matter jurisdiction is at issue. “[T]he ultimate responsibility to ensure subject matter jurisdiction always lies with the court, not the parties,” Haase v. Sessions, 835 F.2d at 904, and “subject-matter jurisdiction, because it involves the court’s power to hear a case, can never be forfeited or waived.” Arbaugh v. Y&H Corp., 546 U.S. 500, 501 (2006) (internal quotation omitted). “Because subject matter jurisdiction cannot be created by consent, waiver, or even estoppel,” this Court has held that it will consider a “belated argument” in support of jurisdiction if it is “of any consequence to federal jurisdiction.” Princz v. Federal

⁷ The district court never reconciled its assertion that it could look outside the pleadings and resolve disputed issues of fact -- both of which it endeavored to do in its opinion -- with its alternative holding that dismissal was warranted as a matter of law under Rule 12(b)(6), which permits neither procedure. This lies at the heart of the court’s error, as review under Rules 12(b)(1) and 12(b)(6) does not run on parallel tracks. Haase v. Sessions, 835 F.2d 902, 905-10 (D.C. Cir. 1987) (noting that consideration of matters outside the pleadings converts a 12(b)(6) motion to one for summary judgment, while a 12(b)(1) motion cannot be converted). The court was obligated to pick the proper mode of review and apply it properly, which it failed to do.

Republic of Germany, 26 F.3d 1166, 1176 (D.C. Cir. 1994); see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) (because “no action of the parties can confer subject-matter jurisdiction upon a federal court,” the consent of the parties, waiver, and estoppel do not apply); Settles v. U.S. Parole Comm’n, 429 F.3d 1098, 1104-05 (D.C. Cir. 2005) (noting that “[t]his court always must address issues of its jurisdiction”; holding that issue of whether a party is covered by statute goes to claim for relief, not jurisdiction); United States v. Baucum, 80 F.3d 539, 541 (D.C. Cir. 1996) (“a jurisdictional claim can never be waived (through forfeiture or even through purposeful waiver”).

Courts cannot decline subject-matter jurisdiction through a waiver theory because “federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.” Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 715 (1996); Cohens v. Virginia, 6 Wheat. 264, 404, 19 U.S. 264, 404 (1821) (federal courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not”). “[T]he virtually unflagging obligation of the federal courts to exercise the jurisdiction given them” can be declined only when one of the “extraordinary and narrow” grounds for abstention is present, and waiver has never been recognized as a basis for refusing “the duty of a District Court to adjudicate a controversy properly before it.” Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817, 813 (1976).

2. OA claims that this error should stand because plaintiff was not harmed in any event, as it received discovery and the district court did not abuse its discretion in limiting that discovery. But plaintiff’s entitlement to discovery did not arise by virtue of the court’s decision to treat “agency” status as a jurisdictional issue. Rather, discovery was warranted because of a

crucial, disputed issue of fact that required resolution. It was on this basis that plaintiff consistently called for discovery, with the full procedural protections of Rule 56 summary judgment. See CREW’s Opposition to Motion for Judgment on the Pleadings [23] (Sept. 4, 2007) at 14, 22-24; CREW’s Opposition to Motion to Dismiss [51] (May 9, 2008) at 15-16. Despite those requests, the district court severely restricted the scope of plaintiff’s discovery and denied it all of the procedure afforded under Rule 56, on the ground that the issue went to subject-matter jurisdiction.

The district court also relied on its characterization of the agency issue as one of subject-matter jurisdiction to justify the procedures and standards by which it reviewed the merits of plaintiff’s complaint. For example, as plaintiff pointed out in its opening brief to this Court, the district court resolved factual disputes based in part on matters outside the pleadings and without a hearing, but ruled that plaintiff bore the burden of proving that the requested records are “agency records,” despite contrary language in the FOIA. As this Court has explained at length, the significant procedural differences between motions under Rule 12(b)(1), Rule 12(b)(6), and Rule 56 are not mere niceties of form, but are substantive, and must be properly applied. See Haase v. Sessions, 835 F.2d at 905-10. Plaintiff is entitled to have the sufficiency of its complaint tested under the proper procedures, with the proper scope discovery, and under the proper standard.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the order of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Reply Brief of Appellant has been prepared using:

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12 Point type Space.

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I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the word or line printout.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 3, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand-delivery, the required copies of the foregoing Reply Brief of Appellant, and further certify that I served, via U.S. Mail, postage prepaid, the required copies of the same to the following:

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The necessary filing and service upon counsel were performed in accordance with the instructions given to me by counsel in this case.

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