MANDATE ISSUED MARCH 14, 2022

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

AMERICAN PUBLIC GAS ASSOCIATION, *et al.*, Petitioners, v. U.S. DEPARTMENT OF ENERGY, Respondent.	No. 20-1068 (consolidated with Nos. 20-1072, 20-1100)
AMERICAN GAS ASSOCIATION, *et al.* Intervenors.	

RESPONDENT-INTERVENORS' JOINT OPPOSITION
TO PETITIONERS' MOTION TO VACATE

The Court remanded this case to the Department of Energy to provide a more detailed justification for the challenged final rule. The Court then issued the mandate. More than a month after the mandate issued, Petitioners—dissatisfied with the Department's supplemental response on remand—filed a motion to vacate the underlying rule. But the Court did not retain jurisdiction when it remanded the case to the agency, and if Petitioners wish to seek judicial review of the proceedings conducted on remand, the Court's rules make clear that they must file a new petition for review. *See* Circuit Rule 41(b). The Court should deny the motion for this reason alone.

Even if the substance of the motion were considered, it should still be denied because Petitioners' complaints about the remanded proceedings are meritless. First, the agency did not need to provide further notice and an opportunity to comment on the supplementary information that it cited on remand because that information simply expanded on and confirmed the agency's prior explanations and actions. Second, on its substance, the agency's supplemental explanation more than reasonably satisfies the Court's deferential review.

ARGUMENT

I. Petitioners' post-mandate motion contravenes this Court's rules

When this Court remanded the final rule setting energy conservation standards for commercial packaged boilers to the Department, the Court did not retain jurisdiction over the case. Instead, the Court remanded the rule to the Department and allowed the mandate to issue in its normal course—which it did, more than two months ago. *See* ECF No. 1938953. Issuance of the mandate "formally marks the end of [the Court's] jurisdiction." *Johnson v. Bechtel Assocs. Pro. Corp.*, 801 F.2d 412, 415-16 (D.C. Cir. 1986) (denying petition for rehearing because it was filed after issuance of the mandate).

The Court's rules make clear that when the Court remands without retaining jurisdiction, as it did here, "a new . . . petition for review will be necessary if a party seeks review of the proceedings conducted on remand." Circuit Rule 41(b).

The rules distinguish between a mere remand of *the record*, where the Court retains jurisdiction to consider the parties' further arguments about the remanded proceedings, and a remand of *the case*, where the Court does not—and thus a new petition for review is required if any party wishes to seek further review. *Id.* The situation here is plainly the latter. *Compare, e.g.*, *Am. Gas Ass'n v. FERC*, 888 F.2d 136, 153 (D.C. Cir. 1989) (D.H. Ginsburg, J.) (asserting that "the court retains jurisdiction of this matter and remands the record only"), *with Am. Pub. Gas Ass'n v. U.S. Dep't of Energy* (*"APGA"*), 22 F.4th 1018, 1031 (D.C. Cir. 2022) (D.H. Ginsburg, J.) (asserting that the Court "shall remand the Final Rule to the DOE," and saying nothing about retaining jurisdiction). The Court's issuance of the mandate is further evidence that the case, and not merely the record, was remanded to the agency.

Petitioners do not acknowledge Circuit Rule 41(b), much less explain why they have not followed its "necessary" course of filing a new petition for review here. At best, Petitioners appear to suggest that they believe their post-mandate motion is somehow consistent with "the Court's prior order" in this case. Mot. 2. But the Court's prior order—in addition to omitting any reference to retaining jurisdiction or remanding the record—provided only that the final rule would "automatically" be vacated if the Department failed to take timely action on remand. *APGA*, 22 F.4th at 1031; *see also infra* n.2. The Court's order did not

leave the door open for further briefing on the substance of the agency's remanded proceedings. To the contrary, the Court issued the mandate in the normal course, rather than withholding it to allow for further briefing. *See, e.g.*, *Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (vacating agency action but withholding issuance of the mandate for 90 days and calling for a status report in the interim). Because the Court's order did not invite Petitioners to seek substantive review of the remanded proceedings in this case, the Court's rules specify the proper mechanism for seeking any such further judicial review: it is "necessary" for Petitioners to file a new petition. Circuit Rule 41(b).

Other options were available to Petitioners if they wished to obtain review of the remanded proceedings without filing a new petition for review. They could have asked the Court to retain jurisdiction (as Respondent-Intervenors suggested the Court might consider doing, *see* Final Br. of Resp't-Intervenors 53), after the remedy of remand without vacatur had been discussed at length during oral argument. *See, e.g.*, Oral Arg. Recording 1:19:50 (on rebuttal, discussing Petitioners' position on remand proceedings and not asking Court to retain jurisdiction). Or, after the Court issued its opinion, Petitioners could have sought panel rehearing on the remedy to request retention of jurisdiction, *see* Circuit Rules 35, 41(a)(1), or even moved to stay the mandate for an additional 90 days to allow

for further briefing on the substance of the remanded proceedings, *see* Circuit Rule 41(a)(2). Petitioners did none of these things.

Now, Petitioners' only remaining option is to ask the Court to recall its mandate. But that would require Petitioners to identify "extraordinary circumstances," such as "grave, unforeseen contingencies," *Calderon v. Thompson*, 523 U.S. 538, 550 (1998), which they have not attempted to do. In any event, it is "unnecessary to determine whether suitable reasons exist" to recall the mandate here, *Johnson*, 801 F.2d at 416, because Petitioners can file a new petition for review should they wish to pursue judicial review of the remanded proceedings. Indeed, in a footnote to their motion, Petitioners "reserve their rights" to file a new case. Mot. 4 n.2. "Surely with the normal process of [a new petition] available, resort to the extraordinary step of recalling the mandate is unjustifiable." *Johnson*, 801 F.2d at 416. The Court should accordingly deny the motion and decline to give Petitioners the multiple bites at the apple that they seek.

II. Even if the motion were proper, it fails on its merits

If the Court were to consider the substance of Petitioners' motion, however, it should still be denied. Petitioners raise both procedural and substantive complaints about the Department's actions on remand. None hold any merit.

A. Further notice-and-comment procedures were not required, and would not justify vacatur even if they were

An agency may rely on new evidence to support its further explanation on remand, without providing additional notice and an opportunity to comment, when the new evidence is supplementary and the petitioner has not shown prejudice. *Chamber of Com.*, 443 F.3d at 900, 904. For new information to be "supplementary," it must "clarify, expand, or amend other data that has been offered for comment." *Id*. at 903. An agency can cite new information to corroborate existing data in the record or to "confirm[] prior assessments without changing methodology." *Id*. at 900. Even an agency's "heavy reliance" on a new, previously undisclosed study does not require further public comment if the new study provides additional support for a hypothesis the agency already advanced. *Bldg. Indus. Ass'n v. Norton,* 247 F.3d 1241, 1244, 1246 (D.C. Cir. 2001).

1. The new information in the Department's supplemental explanation is purely supplementary and did not require additional notice and comment. In challenging the rule previously at issue in this litigation, Petitioners objected to the Department's economic modeling, and in particular to the random assignment of boilers to buildings in the no-new-standards case. *See APGA*, 22 F.4th at 1027. Although the Department had identified "several possible market failures" in the rulemaking as one justification for its modeling approach, the Court remanded to the Department for a "more complete response." *Id*. On remand, the Department

published a supplemental explanation that cited additional research to support the same premise and conclusions regarding possible market failures. 87 Fed. Reg. 23,421, 23,422-27 (Apr. 20, 2022).

The Department did not need to provide an additional opportunity for comment because the new information simply "expanded on and confirmed" existing information in the record. *Cmty. Nutrition Inst. v. Block,* 749 F.2d 50, 58 (D.C. Cir. 1984) ("Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments."); *cf. Solite Corp. v. EPA*, 952 F.2d 473, 485 (D.C. Cir. 1991) (agency can rely on supplementary data not disclosed during notice and comment period to check or confirm information in the proposed rule). Petitioners complain that the Department's new citations are not in the administrative record that the agency previously lodged in this case. Mot. 6. But that is irrelevant because those materials *would* be in the administrative record if Petitioners file a new petition for review—as the Court's rules require, *see supra* at 2-4.

Petitioners cite inapt authority in demanding a new comment opportunity. Mot. 5, 6. In *Center for Auto Safety v. Federal Highway Administration*, 956 F.2d 309, 314 (D.C. Cir. 1992), for example, the Federal Highway Administration deliberately excluded three draft studies from the administrative record during the rulemaking process, but then tried to rely on the same draft studies during judicial

review. By contrast, the Department here is not citing evidence in court that it previously disavowed. In *Owner-Operator Independent Drivers Ass'n v. FMCSA*, 494 F.3d 188, 201-02 (D.C. Cir. 2007), the Federal Motor Carrier Safety Administration relied on an "entirely new" methodology that was "integral" to its decision on remand. An additional comment opportunity was required because the agency's "methodology did *not* remain constant." *Id*. at 201. The same was true in *Chamber of Commerce*, 443 F.3d at 902-03, where "essential" extra-record sources supplied "the basic assumptions used by the Commission." Here, the Department's approach, methodology, and assumptions all stayed the same, and it relied on additional citations as further support to show an imperfect market and the likelihood of market failure. *See Solite*, 952 F.2d at 485 (agency did not violate notice-and-comment requirements where its "methodology remained constant" and "the added data was used to check or confirm prior assessments").

2. Petitioners also fail to show any prejudice from the purported notice-and-comment violation. *See* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."). To show prejudice, a petitioner must "indicate with 'reasonable specificity'" what new information it objects to "and how it might have responded if given the opportunity." *Chamber of Com.*, 443 F.3d at 904 (citation omitted). Petitioners must create enough uncertainty about whether their

comments "would have had some effect if they had been considered." *Id*. (citation omitted).

Petitioners never specify what objectionable new information the Department relied on. Instead, Petitioners refer vaguely to "critical new arguments and evidence" in the Department's supplemental explanation, Mot. 6, and assert generically that the explanation "consists largely of completely new information and lengthy argument," Mot. 7. Petitioners' failure to cite with specificity the offending new information forecloses any showing of prejudice.

At most, Petitioners refer to just a few of the many sources and examples of market failure identified in the Department's supplemental explanation. *See* Mot. 16 (required payback periods relative to cost of capital), 17 (misaligned incentives), 18-19 (lack of correlation between boiler efficiency and conditioned floor area or energy use). But the Department's explanation does not hinge on any of these points. Petitioners ignore all the other justifications and examples in the Department's supplemental explanation, including:

(1) The influence of choice architecture, 87 Fed. Reg. at 23,423;
(2) Behavioral phenomena that are likely to be especially acute for commercial packaged boiler purchases, *id*.;
(3) Information asymmetry in financial markets that affects energy efficiency choices, *id*. at 23,424;
(4) Limited feedback on purchasing decisions, *id*. at 23,423;

(5) The principal-agent problem, particularly in the sizable percentage of commercial buildings with a boiler occupied by a tenant or tenants, *id*. at 23,423-24;

(6) Shareholder focus on short-term returns, *id*. at 23,424;

(7) Conflicting goals among various actors in the same organization, including in the energy efficiency context in commercial building construction, *id.*;

(8) Organizational weaknesses, including lack of priority-setting and lack of a long-term energy strategy, *id*.;

(9) Tax rules that incentivize lower capital expenditures, *id*.;

(10) Biases against new technology, *id*.;

(11) The first-mover disadvantage, *id*.;

(12) Case studies demonstrating market failures that prevent adoption of energy-efficiency technologies in a variety of commercial sectors, *id*. at 23,425;

(13) "Like-for-like" substitutes in emergency boiler replacements, *id*. at 23,426;

(14) Comparable assumptions regarding market failures in another prominent energy conservation model, *id*. at 23,425; and

(15) The fact that external benefits of more efficient products are not captured by users of the equipment, *id*. at 23,423.

Petitioners' quibbles with stray elements of the Department's comprehensive explanation fail to show any prejudice. *See Air Canada v. Dep't of Transp.*, 148 F.3d 1142, 1157 (D.C. Cir. 1998) (no prejudice based on lack of opportunity to present evidence on issues that were not essential).[1]

[1] The Department also had good cause not to seek notice-and-comment on the supplemental response. *See* Resp't Opp. 12-14; 5 U.S.C. § 553(b)(B).

3. Even assuming the Department were required to solicit additional comment on its supplemental explanation, Petitioners make no attempt to justify their demand for vacatur based on this alleged procedural error. Mot. 2, 20-21.[2] If the Court believes additional comment is warranted, it should remand without vacatur again to provide a brief opportunity for public comment on the supplemental explanation. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (remanding for the agency to "afford a reasonable opportunity for public comment on the unredacted studies on which it relied in promulgating the rule"); *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (remanding without vacatur to correct notice-and-comment violation, and citing other cases). The equities the Court previously balanced continue to weigh heavily against vacatur, *see APGA*, 22 F.4th at 1030-31; Final Br. of Resp't-Intervenors 51-54, especially now that the Department has cured the explanatory failures previously identified by the Court.

[2] To the extent Petitioners contend that vacatur is *mandated* by the Court's order, that is plainly incorrect. As explained above, nothing in the order suggests the Court intended to review the remanded proceedings—much less to prejudge the remedy for any violation other than untimeliness. *See APGA*, 22 F.4th at 1031 (providing that, if the Department failed to take action within 90 days, the rule would "automatically be vacated *unless* the agency demonstrates within ten days of the issuance of this decision *the need for additional time*" (emphasis added)).

B. The Department's supplemental explanation was more than reasonable

If the Court considers the substance of the Department's supplemental explanation, it should uphold the agency's reasonable determination that the updated standards are supported by clear and convincing evidence.

1. Petitioners' arguments about the substance of the Department's supplemental explanation overlook the Court's deferential standard of review. As the Court previously held, even when the agency acts under a clear-and-convincing evidentiary standard, the Court's review of the agency's determination "remains deferential." *APGA*, 22 F.4th at 1026. "The court asks itself only whether it was *reasonable* for the agency to determine it met the standard." *Id.* (emphasis added); *see also* Final Br. of Resp't-Intervenors 22-25. Furthermore, that evidentiary standard does not require certainty, nor the elimination of all doubt. Instead, the Department need only have an "'abiding conviction' that [its] findings (in this case that a more stringent standard . . . is economically justified) are 'highly probable' to be true." *APGA*, 22 F.4th at 1025 (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)). Here, as the supplemental explanation confirms, the Department's determination—that it had an "abiding conviction" that it was "highly probable" that "the benefits of the standard exceed its burdens, *i.e.*, the standard is economically justified," 87 Fed. Reg. at 23,427—was more than reasonable.

2. Petitioners repeat their prior challenge to the Department's method of randomly assigning boiler efficiencies in its base case, but the Department's supplemental explanation provided a "cogent and reasoned response" to Petitioners' objections. *APGA*, 22 F.4th at 1028. The Department selected a random assignment approach based on the existence of market failures, reasoning that this "simulates behavior . . . where market failures result in purchasing decisions not being perfectly aligned with economic interests." 87 Fed. Reg. at 23,427. In its supplemental explanation, the Department more than adequately supported the premise that market failures exist in this specific market.

The Department described how market failures affect commercial and industrial consumers—even "large, sophisticated businesses," *APGA*, 22 F.4th at 1027—leading to "underinvestment in energy efficiency." 87 Fed. Reg. at 23,423; *see also id.* at 23,423-25 (citing barriers such as the principal-agent problem, misaligned incentives and conflicting goals within an organization, and asymmetric information in financial markets); *supra* at 9-10 (listing 15 examples of market barriers that the Department explained affect boiler purchasing decisions). The Department also confirmed that the "specific market" for commercial packaged boilers, *APGA*, 22 F.4th at 1027, was "most likely subject to several market failures" and that purchasing decisions were "complex and . . . not always made based on total building energy use, life-cycle cost, or payback period

estimates." 87 Fed. Reg. at 23,427; *see also id.* at 23,425-27; *id.* at 23,423 (noting "several case studies and sources of data specific to the commercial packaged boiler market" that supported the existence of market failures). These types of "[p]redictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies." *Mozilla Corp. v. FCC*, 940 F.3d 1, 50 (D.C. Cir. 2019) (per curiam) (citation omitted); *see also id.* at 56 (deferring to agency expertise in "evaluating complex market conditions" (citation omitted)); *Great Lakes Commc'n Corp. v. FCC*, 3 F.4th 470, 476 (D.C. Cir. 2021) (agency could "reasonably rely on common sense and predictive judgments within its expertise 'even if not explicitly backed by information in the record'" (citation omitted)).

Based on these market failures, the Department reasonably concluded that randomly assigning efficiencies—cabined by a probabilistic efficiency distribution, consistent with the data submitted by Petitioner Air-Conditioning, Heating, and Refrigeration Institute—was a "more appropriate representation of the market than if that assignment was based on energy use or payback period only." 87 Fed. Reg. at 23,427. As the Department emphasized, contrary to Petitioners' narrative, Mot. 3 (citing Petrs.' Opening Br. 52-53 and Petrs.' Reply Br. 22), probability-informed random assignment "does *not* assume that all purchasers of [commercial packaged

boilers] make economically irrational decisions (*i.e.*, the lack of a correlation is not the same as a negative correlation).” 87 Fed. Reg. at 23,427 (emphasis added).

Petitioners insist that the Department should have “correct[ed]” its assignment method by eliminating outcomes where “efficiency investments would pay off within twelve months.” Mot. 15. But the Department reiterated—as it previously explained in the final rule—that an approach relying on “apparent cost-effectiveness” would “lead to a more unrepresentative estimate.” 87 Fed. Reg. at 23,427; *see also* JA621 (rejecting an alternative model that would have “presumed” consumers already purchase high efficiency boilers when the analysis shows the “shortest paybacks” because it “reflects an overly optimistic and unrealistic working market” and “may unreasonably bias the results”).

In short, Petitioners offer “no real basis for second-guessing” the Department’s conclusion that random assignment based on a probability distribution was a better approximation of the market than assigning efficiencies based on cost-effectiveness. *AT&T Servs., Inc. v. FCC*, 21 F.4th 841, 849 (D.C. Cir. 2021); *see also id.* at 849-50 (upholding agency decision to discount a study that used “worst-case scenarios” and an “unrealistic” assumption, because it did not “rebut the persuasive showing” from the principal study “based on a reliable probabilistic assessment”). Even though Petitioners might prefer a different modeling approach, *see* Mot. 9, this Court “generally defer[s] to an agency’s

decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.'" *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) (citation omitted); *see also Great Lakes*, 3 F.4th at 476 (agency was "well within its broad discretion to 'decide when enough data is enough'" (citation omitted)); *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (similar).

Here, the Department reasonably concluded that there were "insufficient data to analyze site-specific economics that take into account a multitude of technical and other non-economic decision-making criteria . . . , as well as model the effects of various market failures, on a building-by-building level," and that a random assignment approach would better "acknowledge[] the uncertainty inherent in the data and minimize[] any bias in the analysis . . . , as opposed to assuming certain market conditions that are unsupported given the available evidence." 87 Fed. Reg. at 23,427.

3. In claiming that the Department's life-cycle cost results were skewed by modeled outcomes in which the "higher efficiency product" was the "low-cost option in terms of initial investment," Petitioners attempt to rely on an industry-sponsored critique of a now-withdrawn proposal to amend standards for a different product (residential furnaces). *See* Mot. 3, 9-14; JA328 (footnote in public comment linking to a study by the Gas Technology Institute submitted in response

to proposed standards for residential furnaces); *see also* 86 Fed. Reg. 3873 (Jan. 15, 2021) (withdrawing the proposed furnace standards). Petitioners place new emphasis on this argument: based on the furnaces study, they now insist at length that the Department's base-case modeling *actually* generated such outcomes, *see* Mot. 3, 11-14—a contrast with their prior cursory suggestions that such outcomes *could* be possible under the Department's method, *see* Petrs.' Opening Br. 54-55 & n.9; Petrs.' Reply Br. 21.

The residential furnaces study says nothing about the market for commercial packaged boilers, especially at the efficiency levels adopted in the final rule. There is no evidence that commercial boilers meeting the adopted efficiency levels would have lower total installed costs than models that were minimally compliant (i.e., lower efficiency) at the time of the Department's analysis. As the Department explained in the final rule, the total installed cost of a commercial packaged boiler is the sum of two components: the equipment price (the cost of the boiler itself) plus the installation cost. JA638. On the first component, as might be expected, the Department found that the equipment price of commercial boilers rises with the model's efficiency. *See* JA432 (showing average consumer equipment prices for commercial boilers meeting each analyzed efficiency level). On the second component, the Department concluded—in response to manufacturer comments stating as much—that the installation costs "do not vary with efficiency" at the

non-condensing efficiency levels the Department adopted for commercial boilers. JA611. In other words, higher efficiency boilers meeting the Department's amended standards cost more upfront than lower efficiency boilers. Given Petitioners' failure to dispute these conclusions that shaped the parameters of the Department's model, there is simply no way that Petitioners can now claim that the model generated any significant number of outcomes in which a commercial boiler meeting the adopted efficiency levels was also the "low-cost option in terms of initial investment," Mot. 11 (emphasis omitted), much less that these outcomes are driving the calculation of benefits, Mot. 12.[3]

4. Finally, although Petitioners object to the Department's random assignment of efficiencies, that is just one element of the Department's complex, multivariable analysis of consumer savings. The Department also analyzed variables such as equipment price and markups, installation cost, annual energy

[3] As in the residential furnace standards rulemaking that Petitioners discuss, the Department found that at efficiency levels more stringent than those adopted here, installation costs could be significantly more varied. *See* JA611 (noting conclusion that installation costs do not vary with efficiency does not apply to "condensing boilers where additional costs are incurred specific to such installations"). But given the much higher equipment price of commercial boilers, it is far from clear that, even at those much higher efficiency levels, higher efficiency boilers would ever cost less upfront than lower efficiency boilers. *Compare* JA432 (showing the average equipment price of a condensing (93% efficiency) small gas hot water boiler to be over $15,000 more than the price of a baseline small gas hot water boiler), *with* 81 Fed. Reg. 65,720, 65,775 (Sept. 23, 2016) (finding that the incremental equipment price increase from a baseline residential gas furnace to a high efficiency condensing furnace was $208 to $522).

use, maintenance costs, and repair costs, with most inputs also characterized by probability distributions. *See* JA424-25; Final Br. of Resp't-Intervenors 41-49 (describing complexity and advantages of the Department's Monte Carlo statistical approach); *AT&T Servs.*, 21 F.4th at 847 (explaining that when "'interactions between the possible outcomes become [exceptionally] complex,' Monte Carlo analysis can provide a 'more complete view of potential outcomes and their associated likelihoods'" (citation omitted)). And although Petitioners object to "high benefit outcomes," Mot. 15, a standard can be economically justified even if many consumers remain unaffected and a small number of consumers have larger savings. *See* Final Br. of Resp't-Intervenors 48-49; *see also* 42 U.S.C. § 6313(a)(6)(B)(ii) (requiring the Department to consider consumer savings but not mandating any specific distribution of savings).

Moreover, the Department's analysis of consumer savings was, in turn, just one component of its "economically justified" determination. That determination required the Department to also consider other statutory factors, such as the "need for national energy conservation" and the "projected quantity of energy savings." 42 U.S.C. § 6313(a)(6)(B)(ii). As the Department explained, its conclusions regarding those other factors informed its "abiding conviction" that it was "highly probable" that the "benefits of the standard exceed its burdens, *i.e.*, the standard is economically justified." 87 Fed. Reg. at 23,427 (citing emission reductions and

other environmental and public health benefits); *see also* JA658 (the updated standards are economically justified based on energy savings, consumer benefits, and emission reductions); JA381-83 (15 different technical analyses performed). As the supplemental explanation confirms, the Department reasonably concluded, based on all the factors, that the standards were economically justified.

CONCLUSION

The motion to vacate should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 4,354 words according to the count of Microsoft Word.

/s/ Michelle Wu
Michelle Wu

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 on May 16, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michelle Wu
Michelle Wu