ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

**FEDERAL ELECTION COMMISSION**,
Appellee.

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

# BRIEF FOR THE FEDERAL ELECTION COMMISSION

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the Federal Election Commission ("Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

**(A)** ***Parties and Amici***. Citizens for Responsibility and Ethics in Washington ("CREW") was the plaintiff in the district court and is the appellant in this Court. The Commission was the defendant in the district court and is the appellee in this Court. No parties participated as amici curiae in the district court. Public Citizen, Electronic Frontier Foundation, Electronic Privacy Information Center, OMB Watch, OpenTheGovernment.org, and The Project on Government Oversight are participating as amici curiae in support of Plaintiff-Appellant in this Court.

**(B)** ***Rulings Under Review***. CREW appeals the December 30, 2011, final order of the United States District Court for the District of Columbia (Kollar-Kotelly, J.) granting the Commission's motion for summary judgment in this suit brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain certain records from the Commission. The district court's opinion is available at 2011 WL 6880679 (D.D.C. Dec. 30, 2011).

**(C)** ***Related Cases***. The Commission knows of no other "related cases" as that phrase is defined in D.C. Cir. R. 28(a)(1)(C).

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# GLOSSARY

| | | |
|---|---|---|
| CREW | = | Citizens for Responsibility and Ethics in Washington |
| EFOIA | = | Electronic Freedom of Information Act Amendments of 1996 |
| FEC | = | Federal Election Commission |
| FOIA | = | Freedom of Information Act |
| J.A. | = | Joint Appendix |

## COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction over this action under section 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331, and entered a final judgment granting the Federal Election Commission's ("FEC" or "Commission") Motion for Summary Judgment on December 30, 2011. A notice of appeal was filed on January 9, 2012. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

## COUNTERSTATEMENT OF ISSUE PRESENTED

Whether CREW failed to exhaust administrative remedies as required by the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, because by the time CREW brought suit, the Commission had determined that it would comply with CREW's request, had agreed to produce responsive documents on a rolling basis, had performed relevant searches, and had begun to review potentially responsive documents.

## COUNTERSTATEMENT OF THE CASE

This case involves CREW's March 7, 2011, FOIA request to the Federal Election Commission which sought several categories of records relating to communications between three of the FEC's Commissioners and outside entities and persons. Within two weeks of receiving the request, Commission staff had several communications with CREW and indicated that the Commission would produce responsive records on a rolling basis. By the end of March 2011, the

parties had negotiated an agreement to clarify and limit the scope of the Commission's initial search for responsive records. In early May 2011, within two months of the request, the Commission informed CREW that it had located thousands of potentially responsive documents that it was in the process of reviewing. CREW filed suit in the district court on May 23, 2011, alleging that the Commission had violated FOIA by not providing CREW any records. By June 23, 2011, the Commission had produced 835 pages of responsive documents.

On June 23, 2011, the Commission moved to dismiss, or in the alternative, for summary judgment, claiming, *inter alia*, that since CREW had not yet filed an administrative appeal with the Commission, it had failed to exhaust administrative remedies, a prerequisite to filing suit under FOIA. Under section 552(a)(6)(A), an agency that has received a request for records must "determine within twenty days . . . whether to comply with such request and shall immediately notify the person making such request of such determination . . . ." If an agency fails to meet that deadline, the FOIA requester will be deemed to have constructively exhausted its administrative remedies, and can then file suit in the district court. This Court has clarified that even if an agency fails to meet that twenty-day deadline, a FOIA requester is precluded from claiming that it has constructively exhausted administrative remedies so long as the agency renders a determination within the meaning of section 552(a)(6)(A) before the requester files suit.

On December 30, 2011, the district court granted the Commission's motion for summary judgment on the ground that CREW had failed to exhaust its administrative remedies. The court held that the multiple steps the Commission had taken to comply with CREW's request within twenty days, as well as prior to CREW's judicial complaint, was a sufficient "determination" under FOIA and this Court's precedents to trigger the administrative exhaustion requirement. (J.A. 57-73.)

## COUNTERSTATEMENT OF THE FACTS

### I. BACKGROUND

#### A. The Parties

The Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("Act" or "FECA"), and other campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the Act, *id*. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," *id*. §§ 437d(a)(8), 438(a)(8),(d); and to issue written advisory opinions, *id*. §§ 437d(a)(7), 437f.

Appellant CREW is a nonprofit corporation, organized under section 501(c)(3) of the Internal Revenue Code. It describes itself as being "committed to

protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials." (J.A. 5 ¶ 4.)

**B. Statutory Background**

The Freedom of Information Act provides that upon request, government agencies shall make records "promptly available" to any person. 5 U.S.C. § 552(a)(3)(A). Section 552(a)(6)(A) specifies that upon receiving a request, an agency shall "determine within twenty days . . . whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination." *Id*. § 552(a)(6)(A)(i). If an appeal is taken, section 552 gives agencies twenty days to render a decision on the appeal. *Id*. § 552(a)(6)(A)(ii). If the agency decides to entirely or even partly uphold an adverse determination, the agency must notify the requester of FOIA's provision for judicial review, *id*., which vests the district courts with jurisdiction to order the production of records improperly withheld, *id*. § 552(a)(4)(B). This Circuit has interpreted FOIA, however, to require exhaustion of administrative remedies before a requester can seek judicial review. *See Hidalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003).

### C. CREW's FOIA Request

On March 7, 2011, CREW submitted a FOIA request to the Commission seeking various categories of records related to communications between three Commissioners and individuals and entities outside the Commission. (J.A. 6-7 ¶ 13.) In its request, CREW sought:

- Correspondence related to any business between Commissioners Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn and any individual or entity outside the Commission from the date each Commissioner took office;
- All calendars, agendas, or other records of the schedules of the three Commissioners;
- All written ex parte communications delivered to any agency ethics official by any of these Commissioners, or by anyone acting on their behalf pursuant to Commission regulations 11 C.F.R. §§ 7.15(c), 201.3(c), and 201.4(a); and
- All statements setting forth the substance and circumstances of any oral ex parte communication prepared by any of these Commissioners or someone acting on their behalf and delivered to an agency ethics official pursuant to Commission regulations, 11 C.F.R. §§ 7.15(d), 201.3(c), and 201.4(a).

(J.A. 6-7, ¶ 13.)

The day after receiving CREW's request, the Commission emailed CREW to acknowledge receipt of the request and to inform CREW that its application for a fee waiver had been granted. (J.A. 8 ¶ 17.) As CREW notes in its complaint, in "subsequent conversations and communications" with FEC Assistant General Counsel Nicole St. Louis Matthis, CREW agreed to exclude certain categories of documents from the Commission's initial search for responsive records. (J.A. 8-9

¶¶ 18-19.) This agreement was reached after four conversations between Ms. St. Louis Matthis and CREW, the first of which took place on March 9, two days after CREW submitted its FOIA request. (J.A. 17-19 ¶¶ 2-6.) In that March 9 conversation, Ms. Matthis informed CREW that the Commission would provide responsive materials on a rolling basis. (J.A. 17-18 ¶ 2.) In two additional conversations on March 14 and March 18, 2011, within eleven days of CREW's request, Ms. Matthis continued to discuss which categories of documents CREW would allow the Commission to exclude from its initial search. (J.A. 14-15 ¶ 8; J.A. 18 ¶ 3.) In these two additional conversations, she reiterated that the Commission would provide documents on a rolling basis. *Id*.

In a conversation on March 28, 2011, Commission staff and CREW reached agreement on limiting the scope of the Commission's initial search for documents. (J.A. 18 ¶ 5.) In a March 29, 2011, letter, CREW memorialized the parties' agreement that the Commission could exclude certain categories of documents from its initial search. (J.A. 25-26.) Those categories of documents included: (1) correspondence sent by one of the named Commissioners in a federal campaign-related matter or rulemaking proceeding solely in his or her authorized capacity as Commission Chair or Vice Chair, (2) correspondence docketed in a federal campaign-related matter or rulemaking proceeding and received by one of the named Commissioners solely as a carbon copy, and (3) correspondence

forwarding official reports to other government agencies or Congress and signed by one of the named commissioners solely in his or her authorized capacity as Chair or Vice Chair, such as agency privacy reports or budget justifications.[1] *Id*. On May 4, 2011, Commission attorney Katie Higginbothom became the point of contact for CREW's request because Ms. St. Louis Matthis was preparing to leave her position with the Commission in early June. (J.A. 27 ¶ 2.) Ms. Higginbothom called CREW that day and informed them that the Commission had located thousands of potentially responsive documents that the Commission was reviewing. (J.A. 27-28 ¶ 3; J.A. 59.) She also told CREW that the Commission was still in the process of searching for responsive documents. (*Id*.) She further indicated her hope that the review would allow for provision of the first batch of documents within a couple of weeks. (J.A. 27-28 ¶ 3.)

Between that May 4 conversation and May 23, 2011, when CREW filed suit, CREW contacted Ms. Higginbothom twice seeking updates on the status of its request. (J.A. 28 ¶ 4-5.) She informed them that the Commission was still processing the request and hoped to provide documents as soon as possible. (J.A. 28 ¶ 5.)

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[1] In a telephone conversation on April 1, 2011 — memorialized in a April 4, 2011 email (J.A. 21) — CREW further agreed to exclude from the request "correspondence docketed in a federal campaign-related matter or rulemaking proceeding and received by all the Commissioners."

On May 23, 2011, CREW filed its complaint in this matter. On June 15, 2011, the Commission provided CREW with 386 pages of responsive documents. (J.A. 28 ¶ 6.) This first batch of documents was accompanied by a letter which explained that the Commission was continuing to process the request, that additional responsive documents would be provided on a rolling basis, and that upon the delivery of the agency's last batch of responsive documents, CREW would be informed of its appeal rights. (J.A. 37-38.) The letter noted that it did not constitute final appealable agency action. (J.A. 38.)

On June 21, 2011, the Commission provided CREW with a second batch of 354 pages of responsive documents. (J.A. 28 ¶ 7.) As with the first batch of responsive documents, this batch was accompanied by a letter explaining that the Commission expected to produce additional documents and that this production was not a final appealable agency decision. (J.A. 40-42.) And on June 23, 2011, the Commission provided CREW with a final batch of 95 pages of responsive documents. (J.A. 28-29 ¶ 8.) These documents constituted the remaining agency records responsive to CREW's request. (*Id.*) This final batch of responsive documents was accompanied by a letter that outlined redactions and documents withheld under various FOIA exemptions. (J.A. 31-33.) The letter also informed CREW that it could appeal any adverse determination and that the guidelines for doing so could be found at 11 C.F.R. § 4.8. (J.A. 33.) All told, between June 15

and June 23, 2011, the Commission produced a total of 835 pages of responsive documents. (J.A. 28-29 ¶¶ 6-8.)

Since that final production, CREW has not asked the Commission for any additional documents. Nor has CREW lodged any administrative appeal with the Commission regarding any aspect of its request.

## II. DISTRICT COURT OPINION

On December 30, 2011, the district court denied the Commission's motion to dismiss for lack of subject matter jurisdiction, but granted the Commission's motion for summary judgment, concluding that CREW had failed to exhaust administrative remedies before bringing suit. (J.A. 57-74.)[2]

The district court rejected the Commission's argument that CREW's complaint had become moot. (J.A. 62-64.) The Commission had argued that since CREW filed its complaint before the Commission had delivered any responsive documents, CREW's complaint could not have included allegations about the adequacy of the Commission's response. (*See* J.A. 63.) Such a complaint about the timing of the agency's response to a FOIA request, the Commission argued, becomes moot when the agency provides the records sought. (*See id*.) The court rejected that argument, explaining that "courts do not routinely construe

[2] The district court's opinion is available as *CREW v. FEC*, 2011 WL 6880679 (D.D.C. Dec. 30, 2011); J.A. 57-73.

complaints to only challenge an agency's timeliness even if [the complaint is] filed before the agency produces any responsive records." (J.A. 64.)

In holding that that CREW failed to exhaust administrative remedies before bringing suit, the district court concluded that the "FEC provided an adequate determination in response to CREW's FOIA request prior to CREW filing suit, [and] thus CREW was required to exhaust its administrative appeals within the FEC before challenging the adequacy of the FEC's response in this Court." (J.A. 64.) The district court noted that CREW's opposition rested on the notion that a response from an agency is not a "determination" with the meaning of 5 U.S.C. § 552(a)(6)(A)(i) — and thus did not require CREW to exhaust its administrative remedies before bring suit — unless it was the agency's *final* substantive response including a notice of the requesting party's right to appeal. (J.A. 66.) The district court rejected this argument, explaining that it was supported by neither the plain text of the statute nor the case law in this Circuit. (J.A. 66-70.)

Regarding FOIA's plain text, the district court held that FOIA "[c]learly" does not require the agency to respond and produce responsive records within twenty days to trigger the administrative exhaustion requirement. (J.A. 67.) Rather, the court explained that if the agency intends to produce responsive documents, it need only fulfill two requirements: "(1) notify the requesting party

within twenty days that the agency intends to comply; and (2) produce the documents 'promptly.'" (*Id.*) Here, because CREW conceded that within two days of receiving its request, the Commission had agreed to produce responsive documents, and that within four weeks the Commission had performed searches and begun to review documents, the Commission's response to the request precluded CREW from claiming constructive exhaustion. (*Id.*) Overall, the court concluded, "[t]en weeks to search, review, and produce documents in response to relatively broad requests is not unreasonably long as to require a finding of constructive exhaustion." (*Id.*)

As to the applicable precedent, the district court found its own reading of FOIA consistent with this Court's opinion in *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 65 (D.C. Cir. 1990), and noted that in several cases within this Circuit, FOIA requesters were held to have failed to exhaust administrative remedies when the responding agencies provided *less* indication of their intent to comply than the FEC did here. (J.A. 67-69.)

The district court also held that requiring CREW to exhaust administrative remedies would further the rationale underlying the exhaustion requirement. (J.A. 71-73.) As the court noted, exhaustion serves to prevent a requester from proceeding immediately to court before an agency has had an opportunity to "correct or rethink initial misjudgments or errors." (J.A. 72.) "[A] finding of

constructive exhaustion is not appropriate," the district court stated, if it would allow a court to "decide an issue which [an agency] never had a fair opportunity to resolve prior to being ushered into litigation." (*Id.*) Because the FEC never had an opportunity to address any of CREW's objections, the district court explained that requiring CREW to exhaust administrative remedies would allow the agency time to correct potential errors, create a full record for later judicial review, and "further the ends of justice." (*Id.*)

Noting that the "FEC provided notice within two days that it intended to comply with CREW's request, and worked diligently with CREW to clarify and narrow the scope of the requests, then to perform searches, to review, and ultimately to produce responsive documents," the district court concluded that the Commission's response was sufficient under FOIA and that CREW could not claim to have constructively exhausted administrative remedies. (J.A. 73.)

## SUMMARY OF ARGUMENT

The district court correctly held that CREW was required to exhaust administrative remedies before it filed suit because the Commission had already determined that it would comply with CREW's FOIA request.

Section 552(a)(6)(A) of FOIA requires an agency that has received a request for records to "determine within twenty days . . . whether to comply" with the request and to immediately notify the requester of its determination. If an agency

fails to do so, the requester can file suit in district court claiming to have constructively exhausted administrative remedies. Before CREW brought suit here, however, the Commission had informed CREW that it would produce records on a rolling basis, reached an agreement with CREW to clarify the scope of the requests, and begun to search and review thousands of potentially responsive documents. Under FOIA's plain language and relevant precedent, that was enough to preclude CREW from claiming constructive exhaustion.

FOIA's plain language requires an agency to "determine . . . whether to comply" with a request within twenty days and to provide responsive records "promptly," not to complete the production of documents in twenty days. CREW's interpretation — requiring agencies to process requests completely within twenty days — would read several key terms out of the statute.

It is well established that the purpose of administrative exhaustion is to give agencies an opportunity to exercise their discretion, to reconsider possible mistakes, and to create a record amenable to judicial review. By prematurely filing suit, CREW denied the Commission that opportunity and has improperly sought judicial intervention in the administrative process. Indeed, the interpretation of FOIA that CREW urges this Court to adopt would create an incentive for requesters to file suit before an agency's response has been completed, even after learning that an agency is in the process of complying with the request.

Finally, the district court's decision does not conflict with, or render useless, either the "exceptional" or "unusual" circumstance provisions of FOIA. If an agency is completely unresponsive or merely indicates that it is "processing" a request, a requester could still gain access to the courts after twenty days.

## ARGUMENT

### I. STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." *Tate v. District of Columbia*, 627 F.3d 904, 908 (D.C. Cir. 2010). "This Court reviews the district court's grant of summary judgment *de novo*." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 774 (D.C. Cir. 2002). The district court's findings of fact "may not be set aside unless clearly erroneous." *Bailey v. Fed. Nat'l Mortg. Ass'n*, 209 F.3d 740, 743 (D.C. Cir. 2000).

### II. CREW WAS REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES ONCE THE COMMISSION DETERMINED THAT IT WOULD COMPLY WITH CREW'S FOIA REQUEST

FOIA requires a government agency that has received a FOIA request to determine within twenty days whether it will comply with the request, notify the requester of its determination, and inform the requester of its appeal rights if the determination is adverse. 5 U.S.C. § 552(a)(6)(A). Here, as the district court found, the Commission took multiple steps to respond to CREW's request before it

filed suit. The Commission informed CREW within two days that it would comply by producing records on a rolling basis, worked with CREW to clarify and narrow the scope of the requests, and began to search and review thousands of potentially responsive documents. That was enough, under FOIA's plain language and relevant precedent, to require CREW to actually exhaust administrative remedies before bringing suit. Since CREW had not (and still has not) filed any administrative appeal with the Commission, the district court correctly held that CREW had prematurely invoked the court's jurisdiction and summary judgment was appropriate.

### A. FOIA Requires Requesters to Exhaust Administrative Remedies Before Bringing Suit

"It goes without saying that exhaustion of [administrative] remedies is required in FOIA cases," so requesters may not bring suit until they have actually or constructively exhausted their administrative remedies. *Dettmann v. U.S. Dep't of Justice*, 802 F.2d 1472, 1477 (D.C. Cir. 1986); *see also Spannaus v. U.S. Dep't of Justice*, 842 F.2d 52, 58-59 (D.C. Cir. 1987). Regarding actual exhaustion, section 552(a)(6)(A) sets forth certain time limits and provides for an administrative appeal process when agencies deny requests; at the conclusion of that process, a requester can file suit. Specifically, section 552(a)(6)(A)(i) states that each agency that has received a FOIA request must "determine within 20 days . . . 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 and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination." If an appeal is taken, section 552 gives an agency twenty days to render a decision. *Id*. § 552(a)(6)(A)(ii). If the agency decides to entirely or even partly uphold its adverse determination, the agency must notify the requester of FOIA's provision for judicial review, *id*., which provides the district courts with jurisdiction to order the production of records improperly withheld, 5 U.S.C. § 552(a)(4)(B).[3]

FOIA also provides for constructive exhaustion of administrative remedies. Section 552(a)(6)(C) specifies that a requester "shall be deemed to have exhausted his administrative remedies" if the agency fails to comply with the time limits in section 552(a)(6)(A), including the requirement that an agency inform a requester within twenty days whether it will comply with the request. *Oglesby*, 920 F.2d at 62 ("If the agency has not responded within the statutory time limits, then, under 5 U.S.C. § 552(a)(6)(C), the requester may bring suit."). But, as this Court has explained, "once the agency responds to the FOIA request, the requester must exhaust his administrative remedies before seeking judicial review." *Id*. at 64. In particular, so long as the agency responds before the requester files suit — even if

[3] Commission regulations also set forth the procedures by which a requester can administratively appeal a denial of a FOIA request or the failure of the Commission to respond to a request within ten working days of receiving it. 11 C.F.R. § 4.8.

that response occurs *after* the statutory time limit has passed — a FOIA requester cannot constructively exhaust administrative remedies. *Id.* at 63-64 ("[A]n administrative appeal is mandatory if the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed.").

### B. The Commission Satisfied FOIA's Requirement to Determine Whether It Would Comply with CREW's Request, So CREW Was Required to Actually Exhaust Administrative Remedies

#### 1. The Commission Informed CREW That It Would Comply With the FOIA Request Before CREW Filed Suit

The Commission clearly responded to CREW's request as required by section 552(a)(6)(A)(i) by informing CREW that it intended to comply with the FOIA request well before the statutory twenty days had lapsed and well before CREW filed its judicial complaint. As the district court found, "within *two days* of transmitting the request to the FEC, the FEC agreed to produce responsive documents on a rolling basis." (J.A. 67.) Indeed, as noted by the district court (*id.*), CREW conceded (J.A 43-44) that it had "requested that the FEC produce documents on a rolling basis, which [the Commission] agreed to do." By doing so, the Commission informed CREW that it intended to comply with the request and nothing more in the way of response was required to obligate CREW to seek an administrative appeal before filing suit. Nonetheless, the Commission twice more informed CREW that it would provide documents on a rolling basis, thus reaffirming that it had determined to comply with the request. (J.A. 18 ¶ 3.) As

the district court noted, the "FEC indicated it would in fact produce records in response to CREW's request [and] [t]hus the FEC provided the response that the *Oglesby* court noted is a sufficient 'determination' under the FOIA to trigger the administrative exhaustion requirement . . . ." (J.A. 70.)

The Commission's response was, in fact, much more informative and cooperative than merely informing CREW that it would provide documents on a rolling basis. CREW filed its FOIA request with the Commission on March 7, 2011. The next day the Commission acknowledged receipt of the request and granted CREW's application for a fee waiver. (J.A. 14 ¶ 4; J.A. 58.) By April 4, 2011, within one month of the request — and over the course of at least four conversations with CREW — Commission staff negotiated an agreement with CREW to narrow the search for responsive documents by excluding certain categories of documents from the Commission's initial search. *See supra* pp. 5-7.[4] And the agreement between the parties was reduced to writing by a member of CREW's own staff. (J.A. 25-26.)

So by the time CREW filed its complaint on May 23, 2011, the Commission had acknowledged the request, granted a fee waiver, negotiated an agreement to

[4] CREW's original request was extremely broad and would have covered a wide range of routine documents transmitted to or from individual Commissioners such as carbon copies of rulemaking comments and official reports transmitted by the Chair or Vice Chair of the Commission to Congress or the Office of Management and Budget. (*See* J.A. 49-50.)

narrow the search for responsive documents, performed relevant searches, begun to review potentially responsive documents, spoken with CREW on the phone at least six times, and informed CREW on at least three occasions that responsive documents would be provided on a rolling basis. *See supra* pp. 5-7. Contrary to CREW's characterizations (Br. at 37-38), Commission staff were actively working to provide responsive documents in the weeks after CREW made its request, and the district court specifically found that the "FEC performed the relevant searches and began reviewing potentially responsive documents" and "was also reasonably prompt in producing documents to CREW." (J.A. 67.) And CREW's own witness concedes that by May 9, 2011 — two weeks before it filed its complaint — the Commission informed CREW that it had located thousands of potentially responsive documents that it was in the process of reviewing. (J.A. 45-46 ¶ 11; *see also* J.A. 15 ¶ 10; J.A. 27-28 ¶¶ 2-3; J.A. 59.) The district court's factual finding that the Commission performed searches and was actively reviewing potentially responsive materials by the time CREW brought suit is not clearly erroneous and therefore cannot be set aside. *See Bailey*, 209 F.3d at 743 (D.C. Cir. 2000).[5]

[5] CREW's insinuation (Br. at 38) of an improper relationship between the Commissioners targeted in its FOIA request and entities outside the Commission is not only wholly unsupported, but immaterial. CREW's suggestion (*id.*) that the Commission delayed producing responsive records to avoid embarrassment is not backed up by a scintilla of proof.

The district court's ruling that the Commission had determined whether to comply with CREW's request within the meaning of section 552(a)(6)(A) finds additional support in CREW's concession (Br. at 11) that the Commission had "explicit[ly] agree[d] with CREW on the procedure for complying with the request." This concession is also at odds with CREW's suggestion (Br. at 17, 19, 31), echoed by amici (Am. Br. at 7-8), that the Commission's determination here was not sufficiently clear, but merely indicated a "vague" intent to generally comply with FOIA. But the Commission had not merely indicated that it "intends generally to follow the law" as amici suggest (Am. Br. at 7); it had "explicit[ly] agree[d]" to comply with CREW's March 7, 2011 request for records. As the district court found, "the parties agreed that . . . the FEC would produce documents on a rolling basis."[6] (J.A. 58.)

CREW's criticism (Br. at 36) of the district court for purportedly failing to provide a "usable measure" of when an agency determination is made misapprehends the court's holding. The court was not purporting to fashion a general bright-line rule. Rather, the court examined the record before it and found

[6] Amici suggest (Am. Br. at 9-10) that the Commission could not have rendered a determination before CREW filed suit because the Commission later purportedly "denied" in part the request. Similarly, CREW claims (Br. at 24) that the Commission has yet to comply with the entirety of its request. Neither claim is based on the administrative record: CREW has yet to argue in an administrative appeal, or otherwise inform the Commission's FOIA Officer, that it believes the Commission has denied its request in whole or part.

that within twenty days, or at the latest before CREW filed suit, the multiple steps the Commission took to respond to the CREW's request clearly qualified as a "determination" under section 552(a)(6)(A). (J.A. 66-67.) It is immaterial that the court did not identify any single communication or particular subset of communications that was sufficient to trigger the exhaustion requirement as that is not what the law requires.

In sum, given the extent and substance of the multiple communications between the Commission and CREW, the Commission's response more than adequately constitutes "a reply from the agency indicating that it is responding to [the] request," *Oglesby*, 920 F.2d at 61. As a result, CREW was required to *actually* exhaust administrative remedies before invoking the jurisdiction of the district court.

### 2. The District Court's Holding That the Commission's Response Was a Determination Requiring CREW to Exhaust Administrative Remedies Comports With Other Decisions in This Circuit

As the district court explained, requiring CREW to exhaust administrative remedies here is entirely consistent with other decisions in which requesters were required to exhaust administrative remedies. (J.A. 67-69.) Indeed, the Commission's determination here was more clearly expressed than in other cases in which courts have denied relief to requesters who failed to exhaust administrative remedies.

In *Love v. FBI*, 660 F. Supp. 2d 56 (D.D.C. 2009), the Executive Office of United States Attorneys ("EOUSA") and the Drug Enforcement Agency ("DEA") responded to a FOIA requester before he filed suit with letters indicating that the agencies would comply with the requests. The court concluded that the responses were determinations whether to comply within the meaning of section 552(a)(6)(A) and precluded the requester from asserting constructive exhaustion. *Id*. at 59-62. CREW argues (Br. at 21-22) that *Love* was wrongly decided because the court ignored the requirement that agencies inform requesters of the reasons for their determinations and notify them of their appeal rights. But it would make no sense to require an agency to inform a requester of the reasons for its determination and of a requester's appeal rights if an agency has determined *to comply* with the request. And section 552(a)(6)(A) does not, as CREW argues (*see*, *e.g.*, Br. at 23, 25), require agencies to notify requesters of their appeal rights in every instance. It only requires agencies — as this Court explained in *Oglesby* — to provide "notice of the right of the requester to appeal to the head of the agency *if the initial agency decision is adverse*." 920 F.2d at 65 (emphasis added).[7]

[7] In *Oglesby*, this Court held that the requester was not required to exhaust administrative remedies concerning his request to the State Department, but that agency had informed him that no responsive records had been found; thus, the Court held that the response "constituted an adverse determination" and that the State Department was required to notify the requester of his appeal rights, which it failed to do. 920 F.2d at 67. Here the Commission did not, before CREW filed suit, inform CREW that it had found no responsive records or otherwise render an

In *Cabreja v. U.S. Citizenship & Immigration Servs.*, 2008 WL 4933649 (D.D.C. Nov. 19, 2008), the district court held that a FOIA requester had not constructively exhausted administrative remedies where the agency had acknowledged the request, assigned it a project number, and assigned it to the "complex" track. CREW's claim (Br. at 22) that dismissal in that case was appropriate for a separate reason — failure to "perfect the request" — is invented. The agency did not deny the FOIA request, and the court did not reach the merits of the agency's actions. Rather, the court held both that the plaintiff had "not exhausted *all* other avenues of relief, or even his mandatory administrative remedies under FOIA," and that FOIA "does not require an agency to produce within 20 days the results of a search based on a FOIA request." *Id.* at *1 & n.1.

Similarly, in *Bonner v. Social Security Administration*, 574 F. Supp. 2d 136 (D.D.C. 2008), the district court explained that there was "no genuine dispute" that a FOIA requester was precluded from claiming constructive exhaustion with respect to one agency, the Department of Veterans Affairs, which informed the requester by letter that a case number had been assigned to his request and that it was "in the queue for processing." *Id.* at 137-39. And in *Percy Squire Co., LLC v. FCC*, 2009 WL 2448011, at *4-5 (S.D. Ohio Aug. 7, 2009), the court concluded that an agreement between the FCC and the requester providing for the "phased

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adverse determination, so its determination did not need to include a notice of appeal rights.

response for the tens of thousands of pages" of responsive materials precluded the requester's constructive exhaustion claim. Though CREW mentions *Bonner* and *Percy Squire*, it makes no attempt to distinguish either case, even though they are directly on point.[8]

Indeed, the Commission's response here was more robust than those of the other agencies deemed to be sufficient in the cases discussed above. In *Love*, the agencies merely indicated by letter that they would comply; in *Cabreja*, the agency only acknowledged the request and assigned it a number and track; and the agency in *Bonner* did nothing more than inform the requester that his request had been assigned a number and that it was in line for processing. Here, by contrast, the Commission acknowledged the request, granted a fee waiver, spoke with CREW multiple times, informed CREW that it would provide documents on a rolling basis, performed relevant searches, began reviewing potentially responsive

[8] CREW relies (Br. at n.7) on *Petit-Frere v. U.S. Attorney's Office for the Southern District of Florida*, 664 F. Supp. 2d 69 (D.D.C. 2009), to suggest that the Commission's response was akin to the acknowledgement letter in that case. But the Commission's prompt and thorough response to CREW is hardly comparable to the acknowledgement in that case, which merely indicated that the request would be processed nine months later. CREW also relies (Br. at 23-24) on *In Defense of Animals v. NIH*, 543 F. Supp. 2d 83 (D.D.C. 2008), but the agency's response in that case also pales by comparison. In any event, an important basis for the holding in that case was the absence of a proper notice of administrative appeal rights, *id*. at 97, something that the Commission provided here when it completed its response (J.A. 33).

documents, and as CREW concedes, "explicit[ly] agree[d] with CREW on the procedure for complying with the request." (CREW Br. at 11.)

Neither *Ogelsby* nor *Spannaus*, the primary decisions from this Court upon which CREW relies (Br. at 18-21), are at odds with the decision below or otherwise support CREW's contention that the Commission's determination did not meet the requirements of section 552(a)(6)(A). Most important, in *Oglesby* the plaintiff — unlike CREW — did not jump the gun and file suit while the agencies were still in the process of searching for and providing responsive documents. The Court explained that once an agency "indicat[es] that *it is responding to [the] request*," the petitioner "may no longer exercise the option to go to court immediately." 920 F.2d at 61 (emphasis added). Although the plaintiff in *Oglesby* at least waited for the agencies to finish responding before filing suit, he nevertheless failed to exhaust his administrative remedies regarding several of his requests (*e.g.*, to the FBI and CIA) because he failed to administratively appeal his challenges; judicial review was therefore precluded. *Id.* at 69. Thus, while *Oglesby* dealt with very different facts, it clearly stands for the proposition that, once an agency signals that it is working to comply with a request, actual administrative exhaustion is required.

For almost the exact same reason, *Spannaus* lends no support to CREW's position. In *Spannaus*, this Court found that the FBI's New York office had failed

to make the requisite determination under section 552(a)(6)(A)(i) because it had responded to the FOIA request merely by acknowledging its receipt and informing the requester that the request would be forwarded to FBI headquarters. 824 F.2d at 59 & n.9. Again, the Commission here did much more than merely acknowledge the request. *See supra* pp. 5-7. In any event, the Court's discussion in *Spannaus*, particularly its analysis of its earlier decision in *Dettmann*, made clear that all an agency is required to do in the initial time window under section 552(a)(6)(A)(i) is make a determination about *whether to comply* with the request — not actually provide documents — to trigger the *actual* exhaustion requirement. 824 F.2d at 59 & n.7; *accord Oglesby*, 920 F.2d at 63 n.6 (noting that although the precise timing of the determination in *Dettmann* was unknown, it necessarily occurred before the first batch of documents was provided).

### 3. Section 552(a)(6)(A)'s Plain Language Only Requires Agencies to Determine "Whether to Comply" With a Request Within Twenty Days, Not to Process It Completely

As the district court correctly held (J.A. 66-67), the sufficiency of an agency's "determination" turns on whether it indicates within twenty days that it will comply with the request, not whether the agency completes the "final substantive response" within that limited time, as CREW contends.

The plain language of section 552(a)(6)(A) requires an agency that has received a FOIA request to "determine . . . whether to comply" with the request

within twenty days. It is a "cardinal principle of statutory construction," that courts "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). The interpretation of section 552(a)(6)(A) that CREW urges this Court to adopt would, however, render key terms of the FOIA, and of the provision itself, superfluous. Reading this provision as requiring agencies to completely process requests within twenty days (CREW Br. at 17, 23, 26-39) reads the language "determine . . . whether to comply" out of the statute.

Understanding the plain meaning of a statute begins with the "ordinary, contemporary, common meaning" of its words. *Williams*, 529 U.S. at 431 ("We give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import."). The ordinary, common meaning of "determine" is to decide; "whether" denotes contingency, an "if," as in "whether the court rules in our favor." Thus, section 552(a)(6)(A) plainly requires an agency only to decide — within the time allotted — if it will comply with the request and to notify the requester of that decision. By arguing that agencies must complete their search for and production of documents in twenty days, CREW's interpretation renders those terms superfluous.

Moreover, FOIA expressly provides that upon request, government agencies shall make the records available "promptly." 5 U.S.C. § 552(a)(3)(A). This term would also be rendered superfluous if section 552(a)(6)(A) were interpreted to

require agencies to make records available within twenty days, as opposed to "promptly." Amici appear to suggest (Am. Br. at 12, 15) that with the later-enacted deadlines in section 552(a)(6)(A), Congress meant to impose hard time limits in derogation of the "promptly" requirement. This cannot be, for it is a settled rule of statutory construction that "repeals by implication are not favored, and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (brackets and quotation marks omitted). Neither CREW nor amici have cited to anything demonstrating Congress's clear, manifest intent to do away with this extant statutory term.

CREW's interpretation — that section 552(a)(6)(A) requires agencies to completely process requests within twenty days — would also render superfluous another section of FOIA, section 552(a)(7). This provision requires agencies to assign tracking numbers for requests that will take longer than ten days to process and to inform requesters of their tracking numbers. Additionally, this provision requires agencies to establish a telephone line or internet service that provides information about the status of the request, including the "estimated date on which the agency will complete action on the request." 5 U.S.C. § 552(a)(7)(B)(ii). CREW's interpretation of FOIA would render this provision superfluous too, as there would be no need for an agency to provide an estimated date to "complete

action on the request" if it were already required to completely process the request within twenty days. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (quotation marks omitted).

Furthermore, CREW's interpretation conflicts with a provision enacted as part of the Electronic Freedom of Information Act Amendments of 1996 ("EFOIA"), Pub. L. No. 104-231, 110 Stat. 3048. EFOIA extended the period agencies have to make determinations under section 552(a)(6)(A) from ten to twenty days. It also established expedited processing. Codified at 5 U.S.C. § 552(a)(6)(E), the expedited processing provisions require agencies to provide for expedited processing for requesters who can demonstrate a compelling need for records. Agencies must determine whether to provide expedited processing within ten days of the request. *Id*. § 552(a)(6)(E)(ii). For any request for which the agency grants expedited processing, the "agency shall process *as soon as practicable* any [such] request." *Id*. § 552(a)(6)(E)(iii) (emphasis added). Yet under CREW's interpretation, an agency would be required to completely process typical requests within twenty days, but for those worthy of expedited processing, an agency would only have to complete them "as soon as practicable." Congress could not have meant to provide agencies with more time to process expedited requests than typical requests.

CREW and amici cite FOIA's legislative history to argue that Congress intended to require agencies to completely process FOIA requests within the time limits of section 552(a)(6)(A). In light of the plain meaning of the phrase "determine . . . whether to comply," however, this Court should not avail itself of FOIA's legislative history. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *United States v. Oregon*, 366 U.S. 643, 648 (1961) (explaining that if statutory provisions are "clear and unequivocal on their face, we find no need to resort to the legislative history of the [statute]."). In any event, much of the legislative history supports the plain meaning of section 552(a)(6)(A)'s language, and not CREW's strained interpretation. *See*, *e.g.*, S. Rep. No. 93-854, at 23 (1974) (Provision establishing deadlines for the administrative handling of requests "would require the agency to determine within 10 days . . . *whether to comply* . . . .") (emphasis added); *id*. at 26 ("[T]he time limits set in section 1(c) of S. 2543 will mark the exhaustion of administrative remedies, allowing the filing of lawsuits after a specified period of time, even if the agency had not yet *reached a determination whether to release* the information requested.") (emphasis added); H. Rep. No. 104-795, at 19 (1996) ("The deadline for responding to FOIA is extended to 20 workdays from the current 10 workday requirement for *initial determinations*.") (emphasis added).

### C. CREW's Interpretation of Section 552(a)(6)(A) Would Undermine the Purposes of Exhaustion and Create an Incentive to File Suit Prematurely

As explained *supra* pp. 17-19, by the time CREW brought suit on May 23, 2011, the Commission had agreed to provide documents on a rolling basis and had devoted significant resources to complying with the request. And to this day, CREW has still not informed the Commission's FOIA Officer or the Commission itself what, if anything, it finds inadequate about the Commission's response. As the district court correctly explained, "[r]equiring exhaustion in this case will only further the ends of justice." (J.A. 72.) In particular, the court noted (*id.*):

> Here, the FEC has not had the opportunity to address any of the objections CREW lodges to scope of the production, adequacy of the searches, or claimed exemptions and withheld documents. Providing the FEC the opportunity to review CREW's objections through the administrative appeals process would among other things allow the agency time to correct any errors alleged by CREW, and create a full record for the Court to review should CREW seek additional review of the FEC's decision.

As this Court has explained, potential litigants must generally exhaust administrative remedies before filing suit in federal court in order to give an agency "an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Hidalgo*, 344 F.3d at 1258 (quoting *Oglesby*, 920 F.2d at 61). "[I]t would be both contrary to 'orderly procedure and good administration' and unfair 'to those who are engaged in the tasks of administration' to decide an issue which the [agency] never had a fair opportunity

to resolve prior to being ushered into litigation." *Dettmann*, 802 F.2d at 1476 n.8 (quoting *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952)). Indeed, in *Hidalgo*, this Court held that the requester had failed to exhaust administrative remedies even though he had brought an administrative appeal; the appeal had been premature because it was filed *before* the FBI had completed action on the request. 344 F.3d at 1259-60. To allow the administrative appeals process to be meaningful, Hidalgo first needed to allow the FBI a chance to finish acting on his request. In short, the exhaustion requirement "prevents[s] premature interference with agency processes." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

Neither CREW nor amici explain how the purposes of exhaustion would not be undermined by adopting their interpretation. Indeed, although CREW asserts before this Court that the Commission's 835-page production of responsive materials was incomplete, CREW has yet to appeal anything to the Commission. But as this Court has noted, exhaustion gives *agencies* an opportunity to "correct mistakes made at lower levels and thereby obviate[] unnecessary judicial review." *Oglesby*, 920 F.2d at 61. Under any reasonable interpretation of FOIA's exhaustion requirement, the Commission — having taken significant steps to process CREW's request — should be afforded an opportunity to correct any possible mistakes, exercise its discretion, and develop a factual record amenable to judicial review.

Contrary to CREW's argument (Br. at 30), requiring CREW to exhaust its administrative remedies would not allow agencies to "unilaterally grant themselves an indefinite extension of time simply by indicating a willingness to comply in some fashion with FOIA." First, CREW's argument is entirely hypothetical here, given the Commission's prompt response to CREW's request. Second, it is CREW's interpretation, not the Commission's, that would severely disrupt proper implementation of FOIA. If a requester could run into court after learning that an agency is complying with the request, but before the response has been completed, requesters would have a perverse incentive to burden the courts with premature litigation. Rather than wait to see what documents the agency provides or what the agency's appeal process determines, requesters could simply wait twenty days, file suit, and then force the courts to analyze the propriety of the agency response without the benefit of the administrative appeals process — and without having to exhaust any administrative remedies. Indeed, as in this case, the courts could be asked to render judgments without even knowing what the agency's FOIA staff considered to be a complete response; here, CREW filed suit without even informing the Commission's FOIA Officer about alleged inadequacies in the document production, let alone appealing any adverse determination to the Commission.[9]

[9] If CREW's worst case scenario ever came to pass and an agency acted in

Finally, CREW criticizes the Commission (Br. at 11) for completing its production on the same day as the deadline for filing a responsive pleading in this case. CREW suggests that the Commission thereby denied it an opportunity to ask for additional searches. But CREW itself foreclosed an appropriate opportunity to review the document production for completeness by filing suit prematurely, knowing that the Commission was in the process of responding to its request. CREW has thus "frustrate[d] the policies underlying the exhaustion requirement." *Hidalgo*, 344 F.3d at 1260.

FOIA requests come in all shapes and sizes, from a simple request for a single record to a voluminous request for thousands of pages of documents. It is a practical impossibility for agencies to process all such requests completely within twenty days. The flawed interpretation of section 552(a)(6)(A) that the appellant and amici urge this Court to adopt would deprive agencies of the opportunity to correct mistakes and would threaten to inundate the federal court system with a surge of premature FOIA litigation.

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bad faith and attempted to delay judicial review by insincerely indicating an intention to comply with a request, a requester would likely be able to bring suit claiming unreasonable delay. *Cf. Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) (delineating "contours of a standard" to govern court review of claims regarding "unreasonably delayed" agency action). But as *Hidalgo* makes clear, under FOIA a requester is expected not only to exhaust administrative remedies before filing suit, but also to wait until an agency completes action on the request before seeking an administrative appeal. 344 F.3d at 1259-60.

### D. The District Court's Interpretation of Section 552(a)(6)(A) Does Not Conflict With Either the "Unusual" or "Exceptional" Circumstances Provisions of FOIA

FOIA's "exceptional circumstances" provision allows a federal court to stay proceedings in cases brought by requesters who have constructively exhausted administrative remedies if the government can show "exceptional circumstances" and that it is exercising "due diligence" in responding to the request. 5 U.S.C. § 552(a)(6)(C)(i). Contrary to CREW's argument (Br. at 32), the district court's interpretation does not render the exceptional circumstances provision useless. This type of stay — also known as an "*Open America* stay"[10] — allows the "court [to] retain jurisdiction and allow[s] the agency additional time to complete its review of the records." 5 U.S.C. § 552(a)(6)(C)(i). As the district court correctly explained (J.A. 71), that provision would still serve a purpose by giving requesters immediate access to the courts if the agency "fails to (1) respond at all; or (2) merely indicates it is 'processing' the request, but does not indicate whether the agency will comply." CREW disregards this reasoning and does not dispute that in those circumstances the requester would be able to bring suit after twenty days had elapsed.

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[10] In *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 615 (D.C. Cir. 1976), this Court interpreted the phrase "exceptional circumstances" to include instances where the agency "is deluged with a volume of requests . . . vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume . . . within the time limits of [section 552(a)(6)(A)]."

Similarly, FOIA's "unusual circumstances" provision allows an agency to extend by ten days the twenty-day limit for agencies to make a determination whether to comply with the request — as long as the agency tells the requester in writing of "the unusual circumstances for such extension and the date on which a *determination* is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B)(i) (emphasis added). Such unusual circumstances include (1) the need to search for and collect the requested records from separate offices; (2) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records; or (3) the need for consultation with other agencies having an interest in the "determination of the request." *Id.* § 552(a)(6)(B)(iii).

The suggestions of CREW (Br. at 27-32) and amici (Am. Br. at 17) that these enumerated situations demonstrate that the "unusual circumstances" provision was designed to give agencies additional time to *completely process* a request are unavailing. Rather, these situations are fully consistent with the plain reading of the unusual circumstances provision as granting agencies additional time to render a threshold determination, not to complete the substantive response. Deciding whether to comply with, or deny, a request will often entail considerable time to search for, collect, and examine possibly responsive records — or perhaps even a consultation with other agencies. For example, requests that involve

national security matters likely involve significant review and consultation before a determination is made whether to comply with the request at all.[11]

## CONCLUSION

The Commission clearly met its obligation to make a determination about whether it would comply with CREW's FOIA request before CREW filed suit. CREW thus failed to exhaust its administrative remedies, and allowing its claims to proceed to the merits prematurely would thwart the administrative appeals process that is central to the development of agencies' uniform handling of FOIA requests and orderly judicial review. The Court should affirm the decision below.

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[11] The twenty-day limit to make a determination whether to comply with a request may be tolled by the agency once to seek additional information from the requester or to clarify issues regarding fee assessments. *See* 5 U.S.C. § 552(a)(6)(A)(ii)(I)-(II). Although amici suggest otherwise (Am. Br. at 26), the need to seek additional information from a requester is likely to arise *before* an agency has indicated whether it will comply with the request — *e.g.*, with requests that are particularly vague or broad.

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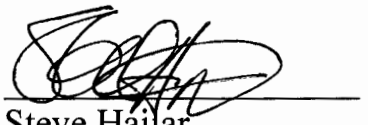
July 10, 2012

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 8,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.



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## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July 2012, I caused the Federal Election Commission's brief in *Citizens for Responsibility and Ethics in Washington v. FEC,* No. 12-5004, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

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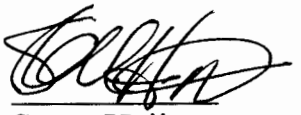
I further certify that I also caused the requisite number of paper copies of the brief to be filed with the Clerk.

July 10, 2012



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