No. 18-5353

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

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, et al.,
Appellants,

v.

WILBUR J. ROSS, JR., in his official capacity as Secretary of Department of Commerce, et al.,
Appellees.

On Appeal from the United States District Court for the District of the District of Columbia, Honorable James E. Boasberg, District Judge

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BRIEF OF *AMICI CURIAE* SENATOR RICHARD BLUMENTHAL AND SENATOR BRIAN SCHATZ IN SUPPORT OF APPELLEES AND FOR AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT

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Certificate as to Parties, Rulings, and Related Cases

A. Parties and Amici

Except for the Senator Blumenthal and Senator Schatz, who appear in this Court as *amici curiae*, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

This case has not previously been filed in this Court and counsel is unaware of any related cases.

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Glossary

The EEZ: the exclusive economic zone.

The NMSA: the National Marine Sanctuaries Act

Statutes and Regulations

All applicable statutes, etc., are contained in the addenda to the Brief for Appellants and the Brief for Appellees.

INTEREST OF *AMICI CURIAE*

Amici curiae Richard Blumenthal and Brian Schatz are United States Senators committed to the thoughtful management and protection of the Nation's natural resources and ecosystems.

Appellants ask the Court to hold that the Antiquities Act did not authorize President Obama to designate the Northeast Canyons and Seamounts Marine National Monument ("Monument"), which protects three underwater canyons, four undersea mountains, and the highly diverse ecological communities in and around them, approximately 130 miles from the New England coast. As members of Congress, Senators Blumenthal and Schatz have a strong interest in the proper interpretation of the Antiquities Act, and in its interplay with the separate statutory scheme Appellants try to use as their stalking horse, the National Marine Sanctuaries Act. Senators Blumenthal and Schatz both serve on the Senate Committee on Commerce, Science, and Transportation, which has jurisdiction over legislation involving coastal zone management, marine fisheries, and oceans policy, among other things.

Senators Blumenthal and Schatz both have advocated for presidential designation of marine monuments under the Antiquities Act. For example,

Senator Blumenthal led the Connecticut Congressional delegation in urging the creation of the Monument. In September 2015, the Senator wrote the President asking him to safeguard five submarine canyons and four undersea mountains and their diverse and fragile habitats. That same month, the National Oceanic and Atmospheric Administration invited public comment and held a town hall in Providence to discuss possible protection of the deep-sea canyons and seamounts. Nearly a year later, after additional meetings between Administration officials, state and local officials, fishermen, and other stakeholders, Senator Blumenthal again urged the President to use his authority under the Antiquities Act.[1] Because it is "a pristine hotspot of diverse and fragile wildlife and habitats" in a "world of canyons that rivals the Grand Canyon in size and scale and underwater mountains that are higher than any east of the Rockies," including the only such seamounts in the U.S. Atlantic Ocean, the Senator called upon the President to "preserve this undersea landscape and make this precious ecosystem the first marine national monument ever established in the

[1]https://www.blumenthal.senate.gov/newsroom/press/release/connecticut-delegation-urges-president-obama-to-designate-new-england-coral-canyons-and-seamounts-as-first-ever-atlantic-marine-national-monument.

Atlantic Ocean."[2] Noting the extensive public input and support for the new monument, Senator Blumenthal explained the clear reasons for the designation, including advancing science and research, preserving natural history, and promoting a healthy ecosystem.[3]

After public input and public meetings, including extensive engagement with local officials, commercial and recreational fishermen, businesses, and conservation organizations,[4] the President ultimately designated the Monument, albeit with boundaries smaller than those proposed by the Connecticut Congressional delegation and others. *See* Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016).

Senators Blumenthal and Schatz also have an interest in this appeal because the Court's decision could impact the viability of other monument designations that include marine areas, such as the Papahānaumokuākea Marine National Monument, the Marianas Trench Marine National Monument, the Rose Atoll Marine National Monument, and the Pacific

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[2] *Id.*
[3] *Id.*
[4] *See* https://obamawhitehouse.archives.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate.

Remote Islands Marine National Monument. The Papahānaumokuākea Marine National Monument, for example, was first established by President George W. Bush in 2006 to protect a 1,200 nautical mile stretch of seamounts, coral islands, banks, and shoals. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006), as amended by Proclamation No. 8112, 72 Fed. Reg. 10,031 (Feb. 28, 2007). President Bush designated nearly 140,000 square miles "of emergent and submerged lands and waters of the Northwestern Hawaiian Islands," after finding that the area "supports a dynamic reef ecosystem with more than 7,000 marine species," thousands of which are unique to the Hawaiian Islands and several of which are endangered or threatened, and noting the cultural significance of the area to Native Hawaiians. *Id.*

Ten years later, Senator Schatz urged President Obama to expand the Papahānaumokuākea Monument to the full limits of the Exclusive Economic Zone ("EEZ"), except for active fishing areas southeast of the pre-existing boundary.[5] After meetings between officials from the Council on Environmental Quality, the National Oceanic Atmospheric Administration, the Department of the Interior, and state and county leaders, Native

[5] https://www.schatz.senate.gov/imo/media/doc/PMNM%20Proposal.pdf.

Hawaiians, fishermen, scientists, and environmental groups, Senator Schatz explained that expanding the Papahānaumokuākea Monument in this way would strengthen the ecosystem, support more productive fisheries outside the Monument, preserve undiscovered biodiversity for future generations, and protect the cultural and historical resources of Native Hawaiians who used the area as an ancient pathway up and down the Hawaiian Archipelago.[6]

President Obama subsequently expanded the monument to include the submerged lands and waters surrounding the existing monument to the limit of the EEZ, excluding certain areas on the eastern side of the monument. *See* Proclamation No. 9478, 81 Fed. Reg. 60,227 (Aug. 26, 2016). The President identified as objects of historic and scientific interest the "geological and biological resources that are part of a highly pristine deep sea and open ocean ecosystem with unique biodiversity and that constitute a sacred cultural, physical, and spiritual place for the Native Hawaiian community." *Id.* Senator Schatz thus has an additional interest in the case, on behalf of himself and his constituents, because Appellants' arguments

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[6] *See id.*

appear to call into question this and every other Presidential monument declaration that includes ocean lands within the EEZ.

SUMMARY OF ARGUMENT

The President's designation of the Monument fits comfortably within the Antiquities Act. While the Monument is not dry land, the Supreme Court held decades ago that "[t]here can be no serious question" that the President has "power under the Antiquities Act to reserve . . . submerged lands and waters . . . as a national monument." *United States v. California*, 436 U.S. 32, 36 (1978) (addressing President Truman's 1949 enlargement of the Channel Islands National Monument to include submerged lands and waters within a one-mile belt surrounding Anacapa and Santa Barbara Islands).

Rather than focus on the Antiquities Act itself and the relevant precedent, Appellants instead focus on the National Marine Sanctuaries Act ("NMSA"), which permits the Secretary of Commerce to establish "marine sanctuaries." They assert the NMSA somehow means the President cannot use the Antiquities Act to designate as a monument submerged lands and waters within the EEZ. That assertion does not hold water.

The NMSA does not apply to the President's designation of national monuments, and does not purport to address, clarify, modify, or restrict the

President's authority under the Antiquities Act. Instead, it is a separate tool Congress gave to the Executive—as is Congress' prerogative—to preserve and protect certain areas. Even if the two statutes overlap to some extent in their objectives, they can and do co-exist. This Court should therefore reject Appellants' claim that the NMSA somehow curtails the authority Congress gave the President under the Antiquities Act.

ARGUMENT

I. Submerged Lands And Waters Within the EEZ Fall Within The Scope Of The Antiquities Act.

The Monument lies with the EEZ—the area between 12 and 200 nautical miles from the coast. *See* App. 78. Appellants argue that this does not constitute "land owned or controlled by the Federal Government" within the meaning of the Antiquities Act, 54 U.S.C. § 320301(a). The Court should reject that argument for the reasons set forth by the District Court.

Appellants suggest there is something "novel" about recent Presidential designations of submerged lands and waters within the EEZ as monuments under the Antiquities Act. *E.g.*, Appellants' Opening Brief ("Op. Br.") at 4, 14, 21, 25, 27, 28, 62. But the only thing "novel" is that the Federal Government did not proclaim its control over the EEZ until 1983. Before

1983, the Federal Government controlled the territorial sea; but in 1983 President Reagan exercised the United States' right to control the EEZ extending to 200 nautical miles. *See* Proclamation No. 5030, 48 Fed. Reg. 10,605 (March 10, 1983). Nothing in the Antiquities Act suggests it was intended to apply only to the lands owned or controlled by the Federal Government in 1906, when the Act was adopted, to the exclusion of lands over which the Federal Government later came to assert ownership or control.

As for Appellants' suggestion that the Federal Government does not "control" the EEZ (*see* Op. Br. at 39-50), the District Court's opinion persuasively refutes that contention (App. 78-82). Appellants assert that the Antiquities Act applies only if the Federal Government exercises "plenary authority" that is not in any way "constrained, even weakly." Op. Br. at 42-43. But the Federal Government's authority always is subject to some constraints, so no land could satisfy Appellants' absurd test. For example, the provisions of the Constitution—such as the First Amendment—impose constraints on the Federal Government that do not apply to private landowners. Indeed, Appellants also do not dispute that the Federal Government lacks unconstrained, plenary authority over Indian land (*see*

Op. Br. at 49), yet they assert (at 50) that "Congress' intention to include Indian lands [within the scope of the Antiquities Act] is indisputable."

Finally, while Appellants assert that submerged lands and waters cannot constitute "lands" under the Antiquities Act, Supreme Court precedent forecloses that line of attack. As the District Court observed (at App. 64-65), the Supreme Court has three times concluded that submerged lands and the waters over them fall within the scope of the Antiquities Act. *See Cappaert v. United States*, 426 U.S. 128, 131, 141-42 (1976); *California*, 436 U.S. at 36 & n.9; *Alaska v. United States*, 545 U.S. 75, 103 (2005).

Appellants' attempts to distinguish these cases miss the mark. It is true that none involved the EEZ, but if submerged land and waters in the territorial sea constitute "lands" (as in *California*), then so too do submerged land and waters in the EEZ. Appellants also assert (at 55) that these cases concerned waters adjacent to dry "land-based monuments," but that is a distinction without a difference. Adjacent or not, either these submerged lands and waters fell within the scope of the "lands" subject to the

Antiquities Act or they did not. The Supreme Court concluded that they did.[7]

II. The National Marine Sanctuaries Act Does Not Limit The Antiquities Act.

A. The District Court's Decision Does Not "Nullify" the NMSA.

Appellants suggest that affirming the President's authority to designate submerged ocean lands as monuments under the Antiquities Act would render the National Marine Sanctuaries Act ("NMSA") a redundant nullity. *E.g.*, Op. Br. at 25. Appellants are wrong.

The NMSA was originally enacted as the Marine Protection, Research, and Sanctuaries Act of 1972 in response to a specific problem, namely the "[u]nregulated dumping of material into ocean waters" that, Congress found, "endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities." Pub. L. No. 92-532, § 2(a), 86 Stat. 1052 (1972). To address this problem, Congress among other things, gave the Secretary of Commerce the authority, after specified

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[7] Appellants urge this Court to reject the Supreme Court's conclusions in favor of the Fifth Circuit's decision in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), which concerned a wreck in waters outside the territorial sea. *See* Op. Br. at 50-52. But *Treasure Salvors* was decided before the Federal Government asserted its rights to control the EEZ, and therefore has no bearing here. *See* App. 82-83.

consultations and public hearings, to designate as marine sanctuaries "those areas of the ocean waters," to the edge of the Continental Shelf, "which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values." *Id.* § 302(a), 86 Stat. 1061.

Congress also gave the Secretary the authority to adopt "regulations to control any activities permitted within the designated marine sanctuary" (*id.* § 302(f)), backed by an enforcement mechanism, with civil penalties of up to $50,000 per day for violations of the Secretary's regulations. *Id.* § 303, 86 Stat. 1062. Congress also made vessels used in violation of the Secretary's regulations liable in rem for the civil penalties. *Id.* § 303(c), 86 Stat. 1063.

Congress revised the NMSA in 1984, after noting that while the Nation "historically has recognized the importance of protecting special areas of its public domain," "these efforts have been directed almost exclusively to land areas above the high-water mark."[8] Public Law No. 98-498, § 102, 98 Stat. 2296 (codified at 16 U.S.C. § 1431(a)(1)). In contrast to the Antiquities Act's

[8] In quoting this finding, Appellants stop at the word "land," leaving out "areas above the high-water mark." Op. Br. at 25. They are attempting to avoid the obvious implication of Congress' actual words: that there also exist land areas *below* the high-water mark, *i.e.*, submerged lands.

focus on objects of "historical or scientific interest" (54 U.S.C. § 320301(a)), Congress more broadly gave the Secretary authority to designate national marine sanctuaries upon finding that "the area is of special national significance due to its resource or human-use values." Public Law No. 98-498, § 102, 98 Stat. 2296 (amending § 303(a)). Congress again gave the Secretary broad rulemaking authority to implement a designation, backed by a civil penalty scheme. *Id.* (amend. to §§ 303, 307). Since 1984, Congress has amended the NMSA a handful of additional times, including by clarifying that it extends to the EEZ (*see* Pub. L. No. 102-587, 106 Stat. 5039, § 2102 (Nov. 4, 1992)), and by expanding the Secretary's enforcement authority and creating a new, related criminal offense. *See* 16 U.S.C. § 1437.

That some marine areas might potentially be protected by invocation of the Antiquities Act or the NMSA—or both—thus does not nullify the NMSA. The latter gives the Secretary broad authority to designate marine sanctuaries to manage and conserve human uses and/or resource uses in areas as to which the President may not find have sufficient historic or scientific interest to warrant designation as a monument.[9] The NMSA also

[9] Here, Appellants challenge the geographic scope of the President's designation, but they do not contest his finding that "[t]hese canyons and

gives the Secretary broad authority, backed by a specific statutory scheme for civil and criminal penalties, to promulgate regulatory protections for areas designated as marine sanctuaries that may differ from for the protections applicable to monuments.

Further, actual practice shows how the two acts complement one another. In 2009, President George W. Bush designated the Rose Atoll Marine National Monument, which includes not just American Samoa's Rose Atoll and its lagoon, but also more than 13,000 surrounding square miles of submerged lands and waters. Proclamation No. 8337, 74 Fed. Reg. 1577 (Jan. 6, 2009). The President also directed the Secretary of Commerce to initiate the process to add these marine areas to the existing Fagatele Bay National Marine Sanctuary under the NMSA. *Id.* In 2012, the Secretary did just that and more, adding five geographical areas (just one of which was the monument) to the sanctuary and renaming it the National Marine Sanctuary of American Samoa. *See* Expansion of Fagatele Bay National Marine Sanctuary, Regulatory Changes, and Sanctuary Name Change, 77 Fed. Reg.

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seamounts, and the ecosystem they compose, have long been of intense scientific interest" and "[m]uch remains to be discovered about these unique, isolated environments and their geological, ecological, and biological resources." Proclamation No. 9496, 81 Fed. Reg. 65,161, 65,163.

43,942 (July 26, 2012) (codified at 15 C.F.R. Part 922). The Secretary also adopted regulations governing the different "units" of the new sanctuary, including fishing regulations that differ by geographic area. *See id.* at 43946.

The NMSA thus is a complementary tool for protecting and conserving the Nation's resources. The NMSA may overlap to some extent with the Antiquities Act in the sense that either might be used to protect some areas. But that presents no conflict between the two acts, because the NMSA does not govern the designation of monuments and the Antiquities Act does not govern the designation of marine sanctuaries.

"[F]ederal laws" can "provid[e] overlapping sources of protection." *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1138 (D.C. Cir. 2002). The Supreme Court has made clear that it "has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 144 (2001). That is plainly true of the NMSA and the Antiquities Act. The Antiquities Act, for example, extends to non-marine lands that are not covered by the NMSA. And the NMSA allows the Secretary to include in marine sanctuaries areas that the President has not deemed worthy of protection as a monument—precisely as occurred in the Fagatele Bay marine sanctuary expansion.

Designation of marine lands as sanctuaries under the NMSA also leads to application of the specific civil and criminal penalty enforcement provisions created by Congress in the NMSA.

The Court thus should reject Appellants' suggestion that Congress's enactment of the NMSA somehow means the Antiquities Act cannot be invoked to protect geographic areas as to which the NMSA might also be invoked. "[W]hen two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Appellants complain that Presidential declaration of a national monument under the Antiquities Act is procedurally easier than the Secretarial creation of a marine sanctuary under the NMSA, but as Judge Easterbrook explained, "[w]hether overlapping and not entirely congruent remedial systems can coexist is a question with a long history at the Supreme Court, and an established answer: yes." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004).

B. The NMSA Is Not Relevant To The Proper Interpretation Of The Antiquities Act.

In any event, the NMSA sheds no light on the underlying issue here—the scope of the Antiquities Act.

Appellants rely heavily upon *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), where the Court stated that the meaning of a statute may be affected by other acts, "particularly where Congress has spoken subsequently and more specifically to the topic at hand." *See* Op. Br. at 24. That decision is wholly inapposite.

The question in *Brown & Williamson* was whether the Food, Drug, and Cosmetic Act ("FDCA") authorized the Food and Drug Administration ("FDA") to regulate tobacco products. Over the course of thirty-five years, Congress enacted six separate pieces of legislation addressing tobacco products, each time "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco." 529 U.S. at 143-44. "Under these circumstances," the Court concluded, "it is evident that Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products." *Id.* at 144.

Here, in contrast, there is no indication that *any* President has *ever* taken the position that the Antiquities Act cannot be invoked to designate marine areas as monuments. For that reason, the NMSA cannot constitute Congressional ratification of any such "long-held position."

To the contrary, the President has long included submerged lands and waters in monument designations. And Congress has acknowledged the President's designation of submerged lands under the Antiquities Act, without calling that authority into question. For example, in 2007, Congress appropriated funds "to provide compensation to fishery participants who will be displaced by the 2011 fishery closure resulting from the creation by Presidential proclamation of the Papahãnaumokuãkea Marine National Monument." Consolidated Appropriations Act of 2008, Pub. L. 110-161, 121 Stat. 1844, § 111(a) (Dec. 26, 2007).

Just two months before *Brown & Williamson*, a unanimous Court reaffirmed the proposition that "later laws that 'do not seek to clarify an earlier enacted general term' and 'do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute,' are 'beside the point' in reading the first enactment." *Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)).

That is the case here. The NMSA does not purport to clarify the Antiquities Act's reference to "lands," nor does it depend for its effectiveness upon any clarification or change in the meaning of the Antiquities Act. The NMSA is therefore beside the point in construing the Antiquities Act.

Congress undoubtedly was clear in the NMSA that the Secretary may designate portions of the EEZ as marine sanctuaries, but that says nothing about the broad authority Congress had previously granted the President under the Antiquities Act to designate lands controlled by the U.S. Government as monuments.

III. The District Court Properly Rejected Appellants' "Smallest Area" Claim.

The District Court also correctly rejected Appellants' claim that the President violated the "smallest area" requirement of the Antiquities Act. As in their complaint, Appellants quibble with cherry-picked findings from the President's Proclamation establishing the Monument. But they misconstrue the Proclamation as a whole, and ignore the scope of the objects of scientific interest identified by the President.

The crux of Appellants' claim is that the Monument's boundaries purportedly "cannot be justified by the canyons and seamounts for which the monument was created." Op. Br. at 58. But the Monument was not created only for the canyons and seamounts. As the Proclamation plainly states, "[t]hese canyons and seamounts, *and the ecosystems they compose*, have long been of intense scientific interest." Proclamation No. 9496, 81 Fed. Reg.

65,163 (emphasis added). "[T]he waters and submerged lands in *and around* the deep-sea canyons . . . and the seamounts . . . contain objects of scientific and historic interest." *Id.* (emphasis added). "These objects are the canyons and seamounts themselves, and the natural resources and ecosystems in and around them." *Id.* at 65161.

The Antiquities Act requires monuments to be "confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). Here the President determined—in accordance with the broad discretion given to him by Congress—that the "objects to be protected" include the areas that the President identified surrounding the canyons and seamounts. Appellants' arguments, which incorrectly presume that only the canyons and seamounts themselves were designated as objects to be protected, provide no basis for second-guessing the President's determination. As this Court previously concluded, the proper "objects for protection" under the Antiquities Act include "such items as ecosystems." *Tulare County v. Bush*, 306 F.3d 1138, 1141–42 (D.C. Cir. 2002).

CONCLUSION

The judgment of the District Court should be affirmed.

This 5th day of June, 2019. Respectfully submitted,

/s/ Andrew J. Pincus

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June 5, 2019

Certificate Regarding Separate Briefing

Pursuant to Circuit Rule 29(d), I certify that this separate *amicus* brief is necessary. Senators Blumenthal and Schatz both have advocated for presidential designation of marine monuments under the Antiquities Act and serve on the Senate Committee on Commerce, Science, and Transportation, which has jurisdiction over legislation involving coastal zone management, marine fisheries, and oceans policy, among other things. The Senators therefore have a strong interest in the proper interpretation of the Antiquities Act, and in its interplay with the separate statutes enacted by Congress for the protection of the Nation's natural resources and ecosystems, such as the National Marine Sanctuaries Act.

The Senators' brief addresses the relevant Congressional intent and the appropriate judicial analysis when Congress creates overlapping sources of protection. The other proposed *amici* are differently situated with different perspectives and different areas of expertise. They include marine scientists, law school professors, and experts on international law of the sea and international conventions. None of the other *amici* present the perspective and expertise of members of Congress.

No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money to fund preparing or submitting this brief. No persons other than Senators Blumenthal and Schatz or their counsel contributed money to fund preparing or submitting this brief.

/s/ Andrew J. Pincus

Certificate of Service

I hereby certify that on June 5, 2019, 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.

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