UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro M. Bedoya

In the Matter of **Meta Platforms, Inc.,** **a corporation,** **Mark Zuckerberg,** **a natural person,** **and** **Within Unlimited, Inc.,** **a corporation.**	**DOCKET NO. 9411**

ORDER DENYING PETITION FOR RECUSAL

On July 25, 2022, Meta Platforms, Inc. ("Meta") filed a petition to recuse Chair Lina M. Khan from participating in any decision concerning the Commission's review of Meta's proposed merger with Within Unlimited, Inc ("Within"). Meta argues that Chair Khan's prior statements require recusal. In truth, those statements concern a different industry, a different realm of transactions than those presented here, and, effectively, a different acquiring company. They were made before she was appointed to the FTC and known to the President who nominated her and Senate who confirmed her, and predated the transaction at issue here. In fact, they predated the rebranding of the company as "Meta," signaling its strategic shift into a focus on artificial and virtual reality. Accordingly, as discussed in more detail below, the Commission, without participation of Chair Khan, denies the petition.

I. Procedural History

A. Meta's July 2021 Petition for Recusal of Chair Khan

Meta's predecessor company, Facebook, Inc. ("Facebook"), first filed a petition to recuse Chair Khan on July 14, 2021 ("July 2021 Petition"), about a month after her swearing in as Chair

of the Commission.[1] That petition concerned a federal case, brought before Chair Khan joined the agency, alleging that Facebook monopolized the market for personal social networking services, including through the acquisitions of WhatsApp and Instagram. Complaint, *FTC v. Facebook, Inc*., No. 20-cv-03590-JEB (D.D.C. Dec. 9, 2020), ECF No. 3. The petition argued that due process and federal ethics rules required Chair Khan to be recused from participating in any decision concerning whether and how to continue the federal action because, according to Facebook, Chair Khan throughout her career had "consistently and very publicly concluded that Facebook is guilty of violating the antitrust laws." July 2021 Petition at 1, 6. To support this claim, Facebook cited: Chair Khan's work for the Open Markets Institute ("OMI"), a political advocacy group for which she was the Legal Director; her academic writings; her role, as Majority Counsel for the U.S. House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, in leading the congressional investigation and publication of a report concerning digital markets; and her public appearances, speeches, and posts on Twitter. *Id.* at 3-4, 6.

Because no proceeding was pending before the Commission when the July 2021 Petition was filed, the Secretary rejected it for noncompliance with Commission Rule 4.17, 16 C.F.R. § 4.17.

B. *Facebook I*

On August 19, 2021, the Commission amended its federal court complaint against Facebook, with Chair Khan joining two other Commissioners in voting to authorize the amendment. On October 4, 2021, Facebook moved to dismiss the amended complaint arguing, among other things, that the Commission's vote to authorize the amended complaint was invalid because Chair Khan's participation in that decision violated due process and federal ethics rules. *See* Memorandum in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint at 38, *FTC v. Facebook, Inc*., No. 20-cv-03590-JEB (D.D.C. Oct. 4, 2021), ECF No. 83. In that motion, Facebook attached and cross-referenced its July 2021 Petition, arguing that Chair Khan's prior statements made clear that she had prejudged Facebook's liability and was biased against the company. *Id.* at 40. The district court judge presiding over the case, Judge Boasberg, rejected Facebook's argument. *FTC v. Facebook, Inc*. (*Facebook I*), 581 F. Supp. 3d 34 (D.D.C. 2022). He found that Chair Khan's role in voting out the amended complaint was analogous to that of a prosecutor. *Id.* at 63. He further observed that, although "the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial officers," their behavior is not "immunized from judicial scrutiny in cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Id.* at 63-64 (quoting *Young v. U.S. ex rel. Vuitton et Fils S.A*., 481 U.S. 787, 810-11 (1987) and *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980)) (brackets omitted). On the facts presented, however, Judge Boasberg found that recusal was not required. *Id.*

[1] *See* Press Release, Fed. Trade Comm'n, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc.

C. The Current Petition

On July 25, 2022, Facebook's successor, Meta, filed the present Petition for Recusal ("Petition"), which seeks to recuse Chair Khan from participating in any decision concerning the FTC's review of Meta's proposed acquisition of Within. Whereas Facebook's motion in *Facebook I* concerned Chair Khan's prosecutorial role in voting out the federal court complaint, the current Petition asserts that Chair Khan's participation in the agency's review of the Meta/Within transaction as an adjudicator would violate due process and her obligations of impartiality under the federal ethics rules. *Id.* at 2, 3. The Petition attaches and incorporates the arguments from the July 2021 Petition. *Id.* at 1. It also specifically highlights four pieces of evidence discussed in the July 2021 Petition which allegedly demonstrate Chair Khan's prejudgment of this case: (1) a press release issued by OMI concerning an op-ed that called for the FTC to, among other things, prohibit future acquisitions by Facebook for at least five years, where Chair Khan's name does not appear on either the press release or the related op-ed,[2] (2) a video of Ms. Khan's appearance as OMI's Legal Policy Director on The Bernie Sanders Show in which she stated that she hoped that if Facebook announced it was acquiring another company, the FTC would look at that very closely and block it,[3] (3) a transcript from an October 2020 interview for the New York Times in which Ms. Khan discussed Facebook and emails released by the House Judiciary Committee "from high-level Facebook executives talking about how Facebook's acquisition strategy was basically a land grab to buy up as many assets and kind of lock up the market,"[4] and (4) posts on Twitter in which she praised the FTC's federal monopolization complaint against Facebook (discussed above) and similar state enforcer complaints, and, commenting on an article discussing Facebook's alleged "copy-acquire-kill" efforts in the virtual reality space, stated that enforcers should prevent a repeat.[5] Petition at 1-2.

On August 11, 2022, the Commission issued an administrative complaint alleging that Meta's proposed acquisition of Within, a software company that develops apps for virtual reality ("V/R") devices, would substantially lessen competition or tend to create a monopoly in the market for V/R dedicated fitness apps. Complaint ¶¶ 1, 31.[6] Following issuance of the

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[2] Meta's assertion that Chair Khan herself "advocated" for this position mischaracterizes the evidence. Petition at 1; Press Release, Open Markets Inst., Fines for Facebook Aren't Enough: The Open Markets Institute Calls on FTC to Restructure Facebook to Protect Our Democracy (Mar. 22, 2018), https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-markets-institute-calls-on-ftc-to-restructure-facebook-to-protect-our-democracy [https://perma.cc/P4AU-C4CZ].

[3] Bernie Sanders, *The Bernie Sanders Show: The Greatest Threat to Our Democracy?*, YouTube, starting at 20:29 (May 15, 2018), https://www.youtube.com/watch?v=wuCAy10hlHI.

[4] Meta asserts that Chair Khan herself characterized Facebook's acquisition strategy as a land grab, but a review of the transcript reveals that she was merely describing emails by Facebook's own executives. Petition at 2; Sway, *She's Bursting Big Tech's Bubble*, N.Y. TIMES (Oct. 29, 2020) (transcript), https://www.nytimes.com/2020/10/29/opinion/sway-kara-swisher-linakhan.html?showTranscript=1.

[5] Lina M. Khan (@linamkhan), TWITTER (Dec. 9, 2020, 4:20PM), https://web.archive.org/web/20210614143417/https://twitter.com/linamkhan/status/1336828056695136259.

[6] The August 2022 complaint also alleged that the acquisition would substantially lessen competition in a broader V/R fitness app market. Complaint ¶ 31. On October 13, 2022, the Commission issued an amended complaint that addresses only the V/R dedicated fitness app market. Amended Complaint ¶ 30.

Complaint, Meta's Petition for Recusal was transferred to the Commission as a motion for disqualification ("Motion for Disqualification"), pursuant to Commission Rule 4.17, 16 C.F.R. § 4.17.

D. The Rule 4.17 Process

Rule 4.17 provides that a motion to disqualify a Commissioner from any adjudicative proceeding shall be addressed in the first instance by the Commissioner whose disqualification is sought. 16 C.F.R. § 4.17(b)(3)(i). In the event the Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission must determine the motion without the participation of such Commissioner. *Id.* § 4.17(b)(3)(ii). Pursuant to the procedure laid out in Rule 4.17, Chair Khan has declined to recuse herself from participation in the matter. The Commission, without the participation of Chair Khan, now finds that disqualification is not warranted in this proceeding, including as an adjudicator in this matter.

II. Due Process Requirements Do Not Bar Chair Khan's Participation in the Meta/Within Adjudication.

A. Legal and Evidentiary Standards

The disqualification of an administrative official acting in a judicial or quasi-judicial capacity is governed by the requirements of due process. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."). An administrative adjudicator must be disqualified if "a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)); *Texaco Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965). Both unfairness and the appearance of unfairness must be avoided. *See Cinderella,* 425 F.2d at 591.

Administrative adjudicators are presumed to be unbiased. *Schweiker*, 456 U.S. at 195. A party seeking the disqualification of an agency adjudicator based on a public statement has the burden of overcoming that presumption by showing that the adjudicator "is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quotation omitted); *see also Schweiker*, 456 U.S. at 196 ("[T]he burden of establishing a disqualifying interest rests on the party making the assertion."); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (the contention of bias in an administrative adjudication "must overcome a presumption of honesty and integrity in those serving as adjudicators"). The test may be stated in terms of whether the adjudicator's mind is "'irrevocably closed' on the issues as they arise in the context of the specific case." *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 991 (D.C. Cir. 1984) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)).

For federal judges, a "comment is disqualifying only if it connotes a fixed opinion—'a closed mind on the merits of the case.'" *United States v. Haldeman*, 559 F.2d 31, 136 (D.C. Cir.

1976) (en banc) (per curiam) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)). The due process standard applicable to disqualification of administrative adjudicators is more flexible and less stringent than the statutory standards governing the disqualification of federal judges, such that a comment that would not disqualify a federal judge would necessarily also not disqualify an administrative adjudicator. *See N.Y. State Inspection, Sec. & L. Enf't Emps., Dist. Council 82 v. N.Y. State Pub. Emp. Rels. Bd.*, 629 F. Supp. 33, 48 (N.D.N.Y. 1984) ("Instead of transplanting standards from the judicial to the administrative context, the court finds that it must evaluate the procedures allegedly employed by the defendants against a more flexible touchstone derived from *Withrow* and its progeny."); *S. Pac. Commc'ns*, 740 F.2d at 991 n.9 (explaining that because the statutory requirements for disqualification of federal judges "establish a more stringent standard for disqualification than is required by the right to a fair trial guaranteed by the due process clause," a determination that a judge is not disqualified for bias "necessarily includes a determination that the right to a fair trial is not violated by the judge's presiding over the case"). In assessing whether disqualification is appropriate, all of the circumstances should be considered. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872, 880, 885 (2009).

B. Discussion

For the reasons discussed below, we find that Meta has failed to meet its burden of showing that the challenged statements, made by Chair Khan in her academic writing, advocacy, public appearances, and work for the House Judiciary Committee, rebut the presumption of Chair Khan's impartiality in adjudicating the proposed Meta/Within transaction and thus require her disqualification.

1. Statements regarding law or policy do not require an adjudicator's disqualification.

"It is well established that the mere fact that [an adjudicator] holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case." *S. Pac. Commc'ns*, 740 F.2d at 990; *see also Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) ("[R]ecusal is not required where the [adjudicator] has definite views as to the law of a particular case.") (quotation omitted). Further, an adjudicator is not disqualified simply because he or she has expressed those views. *Cement Inst.*, 333 U.S. at 702-03; *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1171 n.51 (D.C. Cir. 1979) (adjudicators "are free to decide cases involving policy questions on which they previously have expressed a view").

"In each new case the [adjudicator] confronts a new factual context, new evidence, and new efforts at persuasion." *S. Pac. Commc'ns*, 740 F.2d at 991. As long as the adjudicator is capable of refining his views and "maintaining a completely open mind to decide the facts and apply the applicable law to the facts, personal views on law and policy do not disqualify him from hearing the case." *Id.*

2. Chair Khan's expressions of her views regarding law and policy do not require disqualification.

Chair Khan's statements voicing her views about whether Facebook's conduct violated the law in previous matters or indicating her support for government enforcement efforts do not warrant her disqualification. As Judge Boasberg observed in *Facebook I* when presented with the same statements cited here, contrary to Facebook's claim that Chair Khan had an "axe to grind" against the company, "there is no allegation that Khan has a personal animosity against Facebook beyond her own views about antitrust laws." *Facebook I*, 581 F. Supp. 3d at 64.[7] And, as discussed above, expressions of views about the law are not disqualifying. This includes statements concerning whether certain conduct runs afoul of the antitrust laws and expressions of support for government enforcement. *See Cement Inst.*, 333 U.S. at 702-03 (holding that it is not a violation of procedural due process for a Commissioner "to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law"); *Nuclear Info. & Res. Serv. v. NRC* (*NIRS*), 509 F.3d 562, 571 (D.C. Cir. 2007) (a party cannot overcome the presumption that administrative officers are objective and capable of judging a particular controversy fairly on the basis of its own circumstances with "a mere showing that an official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute") (quoting *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980)) (quotation marks omitted); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) ("[O]nly in the most extreme of cases would disqualification on [a bias or prejudice] basis be constitutionally required.").

Cases concerning the disqualification of federal judges are instructive.[8] Federal judges are not recused simply because they have previously ruled against the same party in prior matters. *N'Jai v. Pittsburgh Bd. of Pub. Educ.*, 487 F. App'x 735, 738 (3d Cir. 2012) (an unfavorable ruling in a previous case is not a basis for recusal); *United States v. Cooley,* 1 F.3d 985, 993-94 (10th Cir. 1993) (requirements for disqualification not satisfied based on prior rulings in the proceeding, or another proceeding, solely because they were adverse); *Barnes v. United States*, 241 F.2d 252, 254 (9th Cir. 1956) ("Because a judge has decided one case against a litigant is no reason why he cannot sit in another."); *Burnett v. Lyon*, No. 2:06-CV-295, 2007 WL 1284940, at *1 (W.D. Mich. Apr. 30, 2007) ("Adverse rulings against a party do not in themselves provide a basis for disqualification.").

Nor are judges recused because they have consistently ruled in favor of a particular legal position. *Phillip*, 945 F.2d at 1056 ("[A] motion for disqualification ordinarily may not be predicated . . . on a demonstrated tendency to rule any particular way[.]") (quotation omitted); *Andrada-Pastrano v. United States*, Nos. CV-14-02608-PHX-JAT(JFM), CR-12-0877-PHX-JAT, 2015 WL 13734999, at *9 (D. Ariz. Nov. 3, 2015), *report and recommendation adopted*

[7] *See also United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980) (absent an invidious motive such as racial bias or a dangerous link such as a financial interest, to disqualify a judge based on personal bias or prejudice concerning a party there must be "an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct").

[8] Because the due process standard applicable to disqualification of administrative adjudicators is less stringent than the statutory standards governing the disqualification of federal judges, as noted above, decisions finding a lack of basis to disqualify a federal judge are particularly illuminating here.

sub nom. Andrada-Pastrano v. USA, Nos. CV-14-02608-PHX-JAT, CR-12-00877-PHX-JAT, 2016 WL 1399361 (D. Ariz. Apr. 11, 2016) ("Almost by definition, a pattern of rulings in prior cases would not support such a showing [of bias or prejudice] . . . [S]uch rulings may just as likely result from a stringent view of the applicable law. A judge's views on legal issues may not serve as the basis for motions to disqualify.") (quotation omitted); *see also Cement Inst.*, 333 U.S. 683 at 703 ("[J]udges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.").

So, too, Chair Khan's purported assertions regarding what is or should be prohibited conduct and whether Facebook may have in the past violated the law do not require disqualification in this separate matter concerning Meta and Within. None of the cited statements regarding Facebook's prior conduct indicates that Chair Khan is biased against the company or incapable of deciding this case fairly on its own merits. *See Facebook I*, 581 F. Supp. at 64 ("Although Khan has expressed views on Facebook's monopoly status . . . she 'remained free, both in theory and in reality, to change h[er] mind upon consideration of' the suit given her new role and other factors.") (quoting *Consumers Union of U.S., Inc. v. FTC,* 801 F.2d 417, 427 (D.C. Cir. 1986)). As such, Chair Khan's expressed views on law and policy do not serve as a basis for disqualification. Moreover, just as the Commissioners who voted out the federal complaint against Facebook are not disqualified from presiding over the administrative action against Meta,[9] Chair Khan should not be disqualified based on her indication of support for that same federal complaint.

3. The Chair's challenged statements about Facebook are not in the same "particular case" as Meta/Within.

In *Cinderella*, the court articulated the test for disqualification as whether "a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." 425 F.2d at 591 (quotation omitted). Chair Khan's challenged prior comments about Facebook as a mature social networking platform in 2018-20 do not implicate the same "particular case" as Meta's acquisition of Within, a V/R firm in a nascent industry, in 2022. *Id.* The proposed acquisition at issue in this case did not exist when the comments were made, and the acquisition is set in an entirely different alleged relevant market (V/R dedicated fitness apps vs. social networking). The core issue also differs: Chair Khan's prior statements discussed an entrenched monopolist, while the Meta/Within transaction involves competition in a developing field (V/R dedicated fitness apps) of which Meta is allegedly "poised on the edge." *Compare, e.g.*, July 2021 Petition at 9-12 *with* Compl. ¶ 11.

[9] *See Blinder, Robinson & Co., Inc. v. SEC*, 837 F.2d 1099, 1104-08 (D.C. Cir. 1988) (rejecting argument that the SEC denied defendant due process when it pursued injunctive relief in federal court and then instituted an administrative proceeding for sanctions); *Kessel Food Mkts., Inc. v. NLRB*, 868 F.2d 881, 887 (6th Cir. 1989) (rejecting argument that statutory scheme violates due process by allowing the NLRB to first pursue an injunction against an employer to restrain further activity in violation of the National Labor Relations Act and then decide, through the hearing process, whether the employer has violated the Act).

Similarly, Chair Khan's prior academic writings suggesting that Facebook foreclosed competitors from its social networking platform or misused information gleaned from its social networking users are not part of the same "particular case" as the Meta/Within merger in the V/R industry.[10] Nor are statements by OMI suggesting remedies for Facebook's social networking monopoly; concerns raised in the House Report about Facebook's acquisitions of WhatsApp and Instagram; passing mentions of potential future activities in V/R generally in the House Report; or potential definitions in the House Report of a relevant antitrust market in social networking.[11] *See Bankhead v. Castle Parking Sols.,* No. 1:17-cv-04085, 2018 WL 3599258, at *3 (N.D. Ga. July 27, 2018) (no reasonable person would doubt the court's impartiality where pending matter involved "different parties, different law, and different facts" from conflicted matter).

Nor does Chair Khan's single post on Twitter from December 2020, broadly stating that "FB is now following this playbook in the virtual reality space," demonstrate an "irrevocably closed" mind on the adjudication of factual and legal issues as they arise in a "specific case." July 2021 Petition Ex. D at 3; *S. Pac. Commc'ns*, 740 F.2d at 991 (quoting *Cement Inst.*, 333 U.S. at 701). The Twitter post, authored from Khan's perspective as an academic, referenced a press article that claimed that Facebook may be using a "copy-acquire-kill" strategy in V/R; she advocated that enforcers "prevent a repeat." July 2021 Petition Ex. D at 3.[12] Neither the Twitter post nor the article addressed this particular matter or identified Within. Moreover, even the use of broad and arguably "strong language" in 2020 does not establish that Chair Khan is incapable of judging the specific facts and law applicable to the present Meta/Within transaction. *Planned Parenthood of S.E. Pennsylvania v. Casey,* 812 F. Supp. 541, 545 (E.D. Pa. 1993).

As the D.C. Circuit explained in *United Steelworkers of America*, 647 F.2d at 1209 (discussing the *Cinderella* standard as applied to hybrid rulemaking proceedings), an adjudicator's ultimate decision need not be disturbed unless she has "demonstrably made up her mind about important and specific factual questions and [is] impervious to contrary evidence." The statements cited by Meta in its petition for disqualification focus on social media and general antitrust policy. However, the "important and specific factual questions" in this proceeding will relate to an acquisition's effect on the alleged market for V/R dedicated fitness apps.

Indeed, by its own design, the company at issue in the challenged statements is not the same company that is today acquiring Within. By its own CEO's admission, the company's name change from "Facebook" to "Meta" is intended to signal to the world a new, different focus for the company: a "next chapter" in which it will build "the next platform," the

[10] July 2021 at 3, 9-10.

[11] *Id.* at 7-8, 11-12.

[12] *See* David McLaughlin, *Facebook Accused of Squeezing Rival Startups in Virtual Reality*, BLOOMBERG (Dec. 3, 2020), https://www.bloomberg.com/news/articles/2020-12-03/facebook-accused-of-squeezing-rival-startups-in-virtual-reality#xj4y7vzkg.

metaverse.[13] Chair Khan's past comments regarding Facebook's legacy social networking platform cannot represent prejudgment of Meta's new metaverse initiative, including its self-proclaimed primary focus on the V/R space, because they do not relate to it. *See NIRS*, 509 F.3d at 571 (denying disqualification based on comments made "in an unrelated proceeding").

4. Chair Khan's statements as Legal Director of OMI do not warrant disqualification.

Chair Khan's statements in her advocacy role as Legal Director of OMI do not indicate that she would be incapable of judging this matter fairly, based on its own circumstances, in her capacity as FTC Chair. For one thing, the positions taken by Chair Khan as an advocate on behalf of OMI should not necessarily be ascribed to her personally; "[a] lawyer often takes legal positions on behalf of his client that he may or may not personally agree with[.]" *Jackson v. Valdez*, 852 F. App'x 129, 133 (5th Cir. 2021) (upholding denial of motion to recuse in case alleging constitutional violations based on transgender plaintiff's gender identity, where the judge, prior to his appointment to the bench, advocated against equal rights for members of the LGBTQ community as Deputy Attorney General of the State of Texas); *see also Facebook I,* 581 F. Supp. 3d at 63 (even when Chair Khan expressed views on the specific case at issue prior to joining the FTC, she "remained free, both in theory and in reality, to change her mind upon consideration of the suit given her new role and other factors") (quoting *Ass'n of Nat'l Advertisers*, 627 F.2d at 1172) (quotation marks and brackets omitted); *infra* Section II.B.7.

Indeed, a number of statements cited in Meta's Petition are not actually attributed to Chair Khan, including the OMI press release regarding a March 22, 2018 op-ed published in The Guardian in which the Executive Director of OMI and a Fellow at the organization called on the FTC to "prohibit all future acquisitions by Facebook for at least five years."[14] Although Meta alleges that Chair Khan advocated for this prohibition, Chair Khan's name does not appear in this op-ed or the OMI press release.

None of the statements made by OMI or by Chair Khan as its Legal Director at that time indicates that her mind would be irrevocably closed with respect to new facts, markets, and arguments in her current position as Chair. Moreover, the suggestion that the Chair's or OMI's statements reveal an irrevocable commitment to ban all of Facebook's future acquisitions, regardless of the merits, is undermined by the fact that, since she joined the agency, Facebook/Meta has completed other acquisitions[15] that have been neither challenged nor even subject to compulsory process by the FTC with Chair Khan at the helm.

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[13] Mark Zuckerberg, *Founder's Letter, 2021*, META (Oct. 28, 2021), https://about.fb.com/news/2021/10/founders-letter/.

[14] Press Release, Open Markets Inst., Fines for Facebook Aren't Enough: The Open Markets Institute Calls on FTC to Restructure Facebook to Protect Our Democracy (Mar. 22, 2018), https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-markets-institute-calls-on-ftc-to-restructure-facebook-to-protect-our-democracy [https://perma.cc/P4AU-C4CZ].

[15] *See* Kyle Wiggers, *Facebook Quietly Acquires Synthetic Data Startup AI.Reverie*, VENTUREBEAT (Oct. 11, 2021), https://venturebeat.com/business/facebook-quietly-acquires-synthetic-data-startup-ai-reverie/; Complaint for a

5. Chair Khan's statements differ in substance and context from those made by Chair Dixon in *Cinderella* and *Texaco*.

The Chair's past statements are demonstrably different in substance and context from the statements by past FTC Chair Paul Rand Dixon in the *Cinderella Career and Finishing Schools* and *Texaco* cases cited by Meta.[16] In *Texaco*, Chair Dixon gave a speech *while an enforcement matter was pending before the ALJ* in which he identified by name several companies, including the respondent, as engaging in practices that "plague you [the audience]." 336 F.2d at 759. Chair Dixon then listed the practices that were the subject of the enforcement proceeding before the ALJ and gave assurances of continued FTC enforcement. *Id.* Meta does not allege anything remotely like Chair Dixon's comment in a pending enforcement matter. Further, Chair Dixon made his statement while he was sitting FTC Chair, not years before he joined the Commission. *Texaco* thus does not require recusal.

Cinderella also is distinguishable. That case involved a speech by then-Chair Dixon regarding a matter that at the time was pending, not before the ALJ, but before the Commission itself (including Dixon). 425 F.2d at 589-90. The court made clear that its concern was with Chair Dixon's speaking on "a case awaiting his official action." *Id.* at 591. Again, Meta's petition does not allege that Chair Khan spoke on a matter then pending before her at the FTC, or publicly expressed a view on Meta/Within at all. *Cinderella* thus does not require recusal.

6. The Chair's prior Congressional work differs sufficiently from Meta's proposed acquisition of Within that it does not imply partiality.

Relying on *American Cyanamid Co. v. FTC,* 363 F.2d 757 (6th Cir. 1966), Meta claims that Chair Khan's prior work for a House subcommittee investigation and on an associated report requires her recusal here. July 2021 Petition at 3-4, 10-13, 17-20, and n.4 (discussing work on U.S. House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law ("House Subcommittee") and Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. Law of the Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* (released Oct. 2020, published July 2022) ("Report")).

However, the House Subcommittee investigation did not involve the "same facts and issues" as this case nor fully the "same parties," which distinguishes it from *American Cyanamid.* 363 F.2d at 768. In *American Cyanamid*, the Commission's underlying enforcement proceeding dealt with alleged misconduct including price fixing in the sale of tetracycline, an antibiotic. *Id.* at 761-62. Before taking on the role of FTC Chair, Dixon had served as Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Committee on

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Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(B) of the Federal Trade Commission Act ¶ 34, *FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325-EJD (N.D. Cal. July 27, 2022), ECF No. 12-3 (discussing, among other acquisitions, Facebook's November 2021 acquisition of Twisted Pixel). *See also* Mike Verdu, *Welcoming BigBox VR to Facebook*, OCULUS BLOG (June 11, 2021), https://www.oculus.com/blog/welcoming-bigbox-vr-to-facebook/?MID=43993.

[16] July 2021 Petition at 17-19 and n.74.

the Judiciary of the U.S. Senate. *Id.* at 763. In that role, he had played an active part in investigating the very same conduct by the very same parties that the FTC later was adjudicating during his tenure. *Id.* at 765, 768.[17] The court held that Chair Dixon should have recused himself from the FTC proceeding. *Id.* at 768. The court reasoned that fundamental fairness requires that "one who participates in a case on behalf of any party . . . take no part in the decision of *that case* by any tribunal on which he may thereafter sit." *Id.* at 767 (emphasis added) (internal quotation omitted).

Unlike in *American Cyanamid,* Chair Khan did not "participate[] in [the] case" now before the Commission – she did not investigate a Meta/Within transaction during her time on the Hill because the transaction did not exist then. *Id.*[18] As reflected in the Report, the House Subcommittee investigated eleven technology markets, none of which concerned V/R.[19] There are only a few scattered references to virtual reality in the entire 450-page Report, which focuses on markets such as online search and online commerce.[20] The Report stated that Facebook's Oculus V/R system is one of the company's five primary product offerings,[21] and observed that the company had "acquired several virtual reality and hardware companies, such as Oculus [and]. . . Oculus game developers."[22] The report added that Facebook and other tech companies "have recently focused on acquiring startups in the artificial intelligence and virtual reality spaces," and that in these spaces, "the dominant firms of today could position themselves to control the technology of tomorrow."[23] The expression of such generalized policy views, even if they could be attributed specifically to Chair Khan (which, as discussed above, they cannot), do not amount to prejudging a specific transaction involving Meta and Within. *Hortonville Joint Sch. Dist. No. 1,* 426 U.S. at 493; *Facebook I,* 581 F. Supp. 3d at 63.

Moreover, Meta's concerns about the Report's statements about social networking, including an asserted finding that social networking is a relevant market, are even less a reason for disqualification here because they do not relate to the alleged V/R dedicated fitness app market definition or other salient issues in a merger case in that industry.[24] Similarly, Meta

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[17] As the court explained, "[t]hese hearings were concerned specifically, among other things, with issues which were decided against petitioners by the Commission in the instant case and which are involved on the present petitions to review." *Am. Cyanamid,* 363 F.2d at 765; *see also id.* at 767 ("As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.").

[18] Ms. Khan was also counsel, not chief counsel, to the subcommittee, unlike Dixon.

[19] Report 61-110.

[20] *Id.* at 61-71.

[21] *Id.* at 110.

[22] *Id.* at 124.

[23] *Id.* at 327.

[24] July 2021 Petition at 3, 4, 11-12 (citing originally-released October 2020 version of Report at 11-13, 60, 90, 133-34, 138, 144, 147, 149, 151, 154-55, 170, 172). The Committee adopted the Report in April 2021 and published it in July 2022. Report 1.

complains of statements in the Report regarding Facebook's past purchases of Instagram and WhatsApp,[25] but these acquisitions did not relate to Meta/Within; rather, the Report discussed Instagram as a possible threat to Facebook's social networking market share, and WhatsApp as an opportunity to grow Facebook's user base.[26] These discussions do not create partiality or the appearance thereof with respect to a transaction in a V/R market.

In sum, none of the challenged statements occurred in the context of a Meta/Within merger challenge, referred to a Meta/Within transaction, or related to a matter now pending before Chair Khan. They are thus unlike Chair Dixon's activities in *American Cyanamid*, which involved the "same facts and issues" and the "same parties" as the case he subsequently adjudicated while at the Commission – the setting to which the Sixth Circuit explicitly restricted its holding. 363 F.2d at 768. Chair Khan's work for the House Subcommittee is more analogous to the Commission's Congressional report in *Cement Institute*: it provides no evidence that her mind is "irrevocably closed" as to the matters she may ultimately be required to adjudicate in *Meta/Within.* 333 U.S. at 701. The fact that she gained familiarity with other related markets in the course of her prior work is not disqualifying. *Hortonville Joint Sch. Dist. No. 1,* 462 U.S. at 493.

7. Additional considerations logically weigh against disqualification.

Although Meta cites Chair Khan's prior work and publications taking positions on the applicability of the antitrust laws to digital markets as disqualifying, this experience was an important basis for her nomination to the position.[27] This further weighs against disqualification. As Judge Boasberg stated:

> The Court also notes the unique circumstances in which the FTC operates as an agency that may bring suit, conduct rulemaking, and act as an adjudicator. In selecting a chair for a Commission with these diverse responsibilities — as with choosing the head of any agency — it is natural that the President will select a candidate based on her past experiences and views, including on topics that are likely to come before the Commission during her tenure, and how that administrator will implement the Administration's priorities. *Ass'n of Nat. Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1174 (D.C. Cir. 1979) ("An administrator's presence within an agency reflects the political judgment of the President and Senate."). Courts must tread carefully when reviewing cases in this area lest we "eviscerate the proper evolution of policymaking were we to

[25] *Id.* at 3, 11.

[26] *See, e.g.*, Report at 127 (purchase of Instagram was "[i]nsurance" for Facebook's main product), 132 (purchase of WhatsApp was a way to "grow Facebook even further" by exposing new users to Facebook).

[27] *See* Press Release, President Biden Announces his Intent to Nominate Lina Khan for Commissioner of the Federal Trade Commission (Mar. 22, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/22/president-biden-announces-his-intent-to-nominate-lina-khan-for-commissioner-of-the-federal-trade-commission/ (highlighting Chair Khan's award-winning antitrust scholarship, lead role in the congressional investigation into digital markets, and legal director position at OMI).

> disqualify every administrator who has opinions on the correct course of his agency's future action." *Id.*

Facebook I, 581 F. Supp. 3d at 62. Moreover, "to disqualify administrators because of opinions they expressed or developed in earlier proceedings would mean that 'experience acquired from their work . . . would be a handicap instead of an advantage.'" *United Steelworkers of Am.*, 647 F.2d at 1209 (quoting *Cement Inst.*, 333 U.S. at 702).[28] So long as the administrator has not adjudged *the particular case* in advance of hearing it—and the case here centers on the question of whether Meta's acquisition of a V/R app developer is anticompetitive—due process does not require administrative adjudicators to be blank slates. Instead, depriving the Commission of Chair Khan's expertise on the intersection of antitrust law and technology would undermine both the interests of the agency as an expert body and the intent of the President who nominated her and the Senate that confirmed her.

Further, regardless of the opinions Chair Khan expressed before joining the FTC, "she remained free, both in theory and in reality, to change her mind upon consideration of the suit given her new role and other factors." *Facebook I*, 581 F. Supp. 3d at 63 (quoting *Ass'n of Nat'l Advertisers*, 627 F.2d at 1172) (quotation marks and brackets omitted). And notably, subsequent to making the statements cited in Meta's July 2021 Petition, the Chair pledged to fairly and impartially follow the facts and law in her role as FTC Chair.[29] Chair Khan's reaffirmation of her impartiality weighs against finding that she has an irrevocably closed mind and is unable to judge the current matter fairly on the basis of its own circumstances. *See Jackson*, 852 F. App'x at 134 (judge's assertion during confirmation process that he would "set aside his personal beliefs and apply binding precedent" supports the conclusion that he is committed to applying the law accordingly); *Walls v. City of Milford*, 938 F. Supp. 1218, 1228 (D. Del. 1996) (adjudicator's statement that he had an open mind must be assumed to be true and gives "further support to the judicially-created presumption of honesty and integrity in those serving as adjudicators").

Accordingly, for the reasons discussed above, we find that Meta has failed to meet its burden of showing that Chair Khan's participation in this matter would violate Meta's rights to due process and thus require her disqualification.

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[28] *See also S. Pac. Commc'ns*, 740 F.2d at 991 ("If a judge approached every case completely free of preconceived views concerning the relevant law and policy, we would be inclined not to applaud his impartiality, but to question his qualification to serve as a judge.").

[29] *See Nomination Hearing, Before the Sen. Comm. on Commerce, Sci. & Transp*., 117th Cong. at 2:44:19 (Apr. 21, 2021), https://www.commerce.senate.gov/2021/4/nomination-hearing (exchange with Sen. Lee); *see also* CNBC Transcript: *Federal Trade Commission Chair Lina Khan Speaks Exclusively with Andrew Ross Sorkin and Kara Swisher Live from Washington*, D.C. TODAY (Jan. 19, 2022), https://www.cnbc.com/2022/01/19/cnbc-transcript-federal-trade-commission-chair-lina-khan-speaks-exclusively-with-andrew-ross-sorkin-and-kara-swisher-live-from-washington-dc-today.html (stating that her job is to "enforce the law in an even handed way").

III. Federal Ethics Rules Do Not Bar Chair Khan's Participation in the Meta/Within Adjudication.

Nor do federal ethics rules require Chair Khan's recusal or disqualification. 5 C.F.R. § 2635.501(a) is intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in performance of the employee's official duties. The rule provides that:

> unless [she] receives prior authorization, an employee should not participate in a particular matter involving specific parties which [she] knows is likely to affect the financial interests of a member of [her] household, or in which [she] knows a person with whom [she] has a covered relationship is or represents a party, if [she] determines that a reasonable person with knowledge of the relevant facts would question [her] impartiality in the matter.

The rule defines a "covered relationship" to include, *inter alia,* members of the employee's household, persons with whom the employee seeks a business or financial relationship, persons for whom the employee has served as an attorney or in specified other roles, and an organization in which the employee is an active participant. 5 C.F.R. § 2635.502(b).

Here, Meta does not allege, and "there is no indication that this case would affect the financial interests of a member of [Chair Khan']s household or that an individual with whom she has a covered relationship is involved in the case." *Facebook I,* 581 F. Supp. 3d at 65 (quotation omitted).

Meta raises broader issues of appearance of impropriety under 5 C.F.R. § 2635.501(a), which suggests that "other circumstances" may raise a question concerning the employee's impartiality. July 2021 Petition at 25 n.104. Meta asserts only one argument in support of its claim that any participation by Chair Khan in decisions related to the Meta/Within matter would violate her obligations of impartiality under federal ethics rules: Chair Khan's work for the House Subcommittee is a "political . . . association [that] may raise an appearance question" for the purposes of the ethics rules. July 2021 Petition at 25. Meta rests on this bare assertion citing no cases. This political work alone, however, does not create an appearance question. *Higganbotham v. Oklahoma ex rel. Oklahoma Transp. Comm'n,* 328 F.3d 638, 645 (10th Cir. 2003) ("It is, of course, an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs. The fact of past political activity alone will rarely require recusal, and we conclude it does not do so here.") (quotation omitted). Judge Boasberg's opinion in *Facebook I* is instructive. He notes,

> Although [Chair] Khan has worked extensively on matters relating to antitrust and technology, including expressing views about Facebook's market dominance, nothing the company presents suggests that her views on these matters stemmed from impermissible factors. Indeed, she was presumably chosen to lead the FTC in no small part because of her published views.

Facebook I, 581 F. Supp. 3d at 65. Further, we concur with Judge Boasberg's finding in *Facebook I* that an appearance-of-impropriety argument is subsumed in, and disposed of, by the due process analysis here. *Id.*; *see also supra* Section II. As described above, Chair Khan's House Subcommittee work is distinct enough from the Meta/Within transaction, involving different facts, markets, and at least one different party.[30] Therefore, Meta has failed to show an appearance of partiality on Chair Khan's part that precludes her adjudicating this matter.

IV. Public Disclosure of Staff Material Protected by Deliberative Process Privilege Is Inconsistent with Legal Precedent and Long-Standing Commission Policy

The majority rejects the assertion that redactions in the dissent are inconsistent with precedent and policy. Rather, what is unprecedented is the dissent's attempt to make implications about the substance of—much less attempt to reveal publicly direct quotes and extensive details from—materials prepared for and used by the Commission in its deliberations.[31] Such material falls squarely within the scope of deliberative process privilege (DPP). We agree that the Commission has the authority to waive DPP. In fact, the Commission has waived DPP in portions of the dissent that do not involve pre-decisional analysis by staff in the spirit of government transparency. However, having the authority to waive DPP does not speak to the wisdom or propriety of doing so. Here, legal precedent and long-standing Commission policy counsel against waiver of DPP as it relates to materials prepared to facilitate Commission deliberations.

DPP is a form of executive privilege that protects from disclosure "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). It "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front-page news, and its object is to enhance the quality of agency decisions." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). Staff recommendations, including on questions of ethics, are core DPP materials. *See U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 788 (2021) ("[S]taff recommendations were thus part of a deliberative process that worked as it should have.").

The Supreme Court has recognized that the ultimate purpose of DPP is "to prevent injury to the quality of agency decisions." *NLRB*, 421 U.S. at 151. Release of agency deliberations would harm decision-making by discouraging candor among decisionmakers and staff. *Id.* at 150-51 ("Human experience teaches that those who expect public dissemination of their remarks

[30] Within was not part of the Report. Meta has been renamed to reflect its changing focus toward the metaverse. *See* Section II.B.3 above.

[31] The majority disagrees with many of the premises and implications of the dissent's discussion of staff input on the ethics question in this matter; however, a detailed public debate of these issues would require the type of privilege waiver that precedent and prudence prohibit. *See* Dissent at 31; *see also* Majority Op. 13-14.

may well temper candor with a concern for appearances . . . to the detriment of the decision-making process."); *Fed. Open Mkt. Comm. of Fed. Rsrv. Sys. v. Merrill*, 443 U.S. 340, 359-60 (1979) ("[I]f advice is revealed, associates may be reluctant to be candid and frank."). "Frank discussion of legal or policy matters" would be "inhibited if discussion were made public," resulting in poorer decisions and polices. *NLRB*, 421 U.S. at 150, *quoting* S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965) (discussing rationale for FOIA exemption covering privileged documents); *see also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. at 10 (1966) ("[Agency witnesses] contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced 'to operate in a fishbowl.'").

Public disclosure of materials prepared for the Commission, as sought by the dissent, would be in direct opposition to the Commission's own long-standing policy. In 1984, under FTC Chairman Jim Miller, the Commission adopted a policy that individual Commissioners cannot quote directly from or reveal pre-decisional advice from a staff member without the consent of a majority of participating Commissioners. *See* 140 Commission Minutes 674-675 (July 25, 1984). The reason the Commission took this action was "to protect the deliberative privilege regarding materials submitted by staff and *to reaffirm the need as a body for full and frank staff debate* for FTC decisions" *Id.* (emphasis added). The Commission's reasoning is consistent with the policy underpinnings for DPP. *See FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (noting that compelled disclosure of two BE memoranda would encourage "the Commission to have deliberative reports and recommendations prepared only by those economists who will draw the conclusions sought by the Commission").

The Commission precedent cited by the dissent is not factually analogous to the present case and does not provide justification for the Commission to abandon its long-standing policy of protecting materials prepared for and considered by the Commission from public disclosure. The dissent points to five instances where the Commission disclosed staff materials protected by DPP. However, three of the five instances simply predate the adoption of Commission's 1984 policy.[32] Of the remaining two instances cited by the dissent, one involved a situation where the Commission chose to release redacted staff memoranda for the purpose of facilitating public comment on a proposed consent agreement. *In the Matter of Gen. Motors Corp.*, 103 F.T.C. 58, 1984 WL 565314 (1984). The other instance cited by the dissent occurred when the Commission closed an investigation after the parties abandoned a merger. In its announcement, the Commission recognized the work staff had done during the investigation and noted that staff had recommended challenging the transaction.[33] These instances bear no similarity to the unprecedented disclosure sought by the dissent. Further, the dissent is unable to provide a single instance where the Commission released or quoted from pre-decisional advice. When it has released or quoted materials prepared by staff for the Commission, those have been *final* decisions—not pre-decisional and nonbinding material of the type at issue here.

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[32] *See Kellogg Co.*, 92 F.T.C. 938, 1978 WL 206543 (Dec. 8, 1978); *American Brands, Inc.*, 77 F.T.C. 1623, 1970 WL 117288 (May 1, 1970); *Shell Oil Co.*, 62 F.T.C. 1488, 1963 WL 66699 (Feb. 1, 1963).

[33] Press Release, Fed. Trade Comm'n, Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Two Health Care Systems in Central Georgia Abandon Proposed Merger (March 3, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/following-federal-trade-commission-staff-recommendation-challenge-transaction-two-health-care.

Finally, the dissent's reliance on other agencies' practices with respect to DAEO recommendations is misplaced. Nearly all of the examples involved situations where the DAEO was making final decisions about covered relationships, financial conflicts of interest, or a presidential Ethics Pledge. Only three instances involved the "other circumstances" provision. And even in those instances, it is unclear whether the ethics advice at issue would be covered by DPP. That is because those agencies do not have a procedure analogous to FTC Rule 4.17, which places responsibility for the final decision on the participating Commissioners. Other agencies that have expressly adopted recusal rules or procedures leave the recusal decision in the hands of the challenged Commissioner or Board Member.

Simply put, we are aware of no precedent for disclosing pre-decisional materials prepared for the Commission *during an ongoing adjudication before the Commission*. What Commissioner Wilson is proposing to do has not been done before. We are aware of no compelling reason to change Commission policy in this regard.

Accordingly,

IT IS HEREBY ORDERED THAT the Petition for Recusal and Motion for Disqualification are **DENIED**.

By the Commission, Chair Khan not participating, Commissioner Wilson dissenting.

April J. Tabor
Secretary

SEAL:
ISSUED: February 1, 2023