Case No. 09-71571

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCIO BRENDA HENRIQUEZ-RIVAS, A 098-660-718,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

On Rehearing En Banc of a Petition for Review
of a Final Removal Order of the Board of Immigration Appeals

BRIEF OF AMICI CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE CENTRAL AMERICAN RESOURCE CENTER IN SUPPORT OF PETITIONER

BENJAMIN RICHARD CASPER
COUNSEL OF RECORD
BENJAMIN CASPER, ATTORNEY AT LAW, P.A.
33 EAST WENTWORTH AVENUE, SUITE 360
ST. PAUL, MN 55118
(651) 271-6661
BCASPER1@CHARTER.NET

ADDITIONAL COUNSEL LISTED ON NEXT PAGE

STEPHEN W. MANNING
IMMIGRANT LAW GROUP, PLLC
P.O. BOX 40103
PORTLAND, OR 97240
(503) 241-0035
SMANNING@ILGRP.COM

DANIEL SHARP
CARECEN (CENTRAL AMERICAN RESOURCE CENTER)
2845 WEST 7TH STREET
LOS ANGELES, CA 90005
(213) 385-7800, X 153
DSHARP@CARECEN-LA.ORG

DEBORAH S. SMITH
LAW OFFICE OF DEBORAH S. SMITH
7 W. SIXTH AVE., SUITE 4M
HELENA, MT 59601
(406) 457-5345
DEB@DEBSMITHLAW.COM

ATTORNEYS FOR AMICI CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE CENTRAL AMERICAN RESOURCE CENTER

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INTRODUCTION

Over a short course of years, the MS-13 gang seized control of large areas of Honduras and then succeeded in murdering nearly every male member of J-G-Z-'s family. They tortured his father by cutting off his fingers with a machete before murdering him with a series of gunshots. Gang members sliced off the soles of a brother's feet, made him walk a gauntlet, then killed him too. They murdered other family members and later undertook a countrywide hunt for J-G-Z- to do the same to him. The MS-13 did this because J-G-Z- had provided testimony to the police against the gang for a brutal rape they committed in his village. The gang did this because they wanted to punish J-G-Z- for defying them by following his conscience and the rule of law.[1]

J-G-Z- believed that by escaping to the United States he would find protection. Honduras was doing nothing to protect him. His hopes seemed justified too—under 8 U.S.C. § 1101(a)(42)(A) a person who can prove membership in a "particular social group" may be a candidate for asylum, and for decades the Board of Immigration Appeals had asked only whether members of a proposed social group share "a common, immutable characteristic … that the members … either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I.

[1] Letter from Jennifer Rotman, Immigrant Law Group, PLLC, to Stephen Manning (February 21, 2012), on file with AILA.

& N. Dec. 211, 233 (1985), overruled on other grounds, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). J-G-Z- seemed to fit the bill since the BIA agrees a valid social group can be united by "shared past experience", *Acosta*, 19 I. & N. Dec. 233, and the decision to speak publicly against the gang was unquestionably a courageous exercise of J-G-Z-'s most fundamental human rights.

Tragically, BIA social group jurisprudence has come untethered from the "purpose and concerns of the immigration laws", *Judulang v. Holder*, 132 S.Ct. 476, 490 (2011), and no longer makes any sense. In a recent series of cases culminating in *Matter of S-E-G-*, the Board injected ill-reasoned "social visibility" and "particularity" tests into its analysis, promising these new criteria would add "greater specificity" to the *Acosta* standard. 24 I. & N. Dec. 579, 582 (B.I.A. 2008). All they have added is confusion. BIA social group precedents now defy congressional purpose by categorically excluding from the enumerated grounds of protection (race, religion, nationality, membership in a particular social group or political opinion) many persons just like J-G-Z- who are disqualified from becoming *mere candidates* for asylum relief even though they may face certain persecution on account of immutable characteristics fundamental to their human rights.

This illogical departure from *Acosta's* common sense interpretation of the enumerated grounds of protection is due no deference. Amici, the American

Immigration Lawyers Association and the Central American Resource Center, respectfully urge this Court to overrule its cases including *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009), *Donchev v. Mukasey*, 553 F.3d 1206, 1217 (9th Cir. 2009), and *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009), to the extent they hold that the "social visibility" and "particularity" tests for measuring a "particular social group" are worthy of *Chevron*[2] deference. The Court should also disapprove of the BIA's decisions in *Matter of C-A,* 23 I. & N. Dec. 951 (B.I.A. 2006), *Matter of A-M-E- & J-G-U-,* 24 I. & N. Dec. 69 (B.I.A. 2007) *, Matter of S-E-G-,* 24 I. & N. Dec. 579 (B.I.A. 2008), and *Matter of E-A-G-*, 24 I. & N. Dec. 591 (2008).

STATEMENT OF INTEREST

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's

[2] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984).

members practice regularly before the Department of Homeland Security ("DHS") and before the Executive Office for Immigration Review, which encompasses immigration courts and the BIA, as well as before the United States District Courts.

The Central American Resource Center (CARECEN), Los Angeles, was founded in 1983 by a group of Salvadoran refugees. Since its inception, CARECEN has advocated for the human rights of Central American migrants, building transnational alliances that address the root causes of migration. CARECEN has represented asylum seekers for over twenty-five years and currently serves thousands of clients each year, providing free legal representation in asylum cases. CARECEN has a strong ongoing interest in the proper application and development of U.S. asylum law, including the legal standard defining membership in a particular social group.

ARGUMENT

The route from *Matter of Acosta*'s immutable characteristics test, 19 I. & N. Dec. at 233, to *Matter of S-E-G-*'s "social visibility" and "particularity" concepts, 24 I. & N. Dec. at 584 - 88, is littered with faulty reasoning and marked by wrong turns that have left the agency miles from any common sense understanding of congressional purpose. At issue here is the "refugee definition" of 8 U.S.C. § 1101(a)(42)(A) and the enumerated grounds of protection at its core: "race,

religion, nationality, membership in a particular social group or political opinion." Congress adopted this statute with the express purpose of conforming U.S. asylum law to the United Nations Convention and Protocol Relating to the Status of Refugees ("Convention").[3] The enumerated grounds come directly from the Convention's refugee definition at Article 1.2, and they also anchor Article 33.1. Article 33.1 is the most important provision of the Convention because it articulates the protective principle of *non-refoulement* ("non-return"). *Non-refoulement* is "the cornerstone of asylum and international refugee law … that reflects the commitment of the international community to ensure to all persons the enjoyment of human rights[.]" *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: http://www.unhcr.org/refworld/docid/438c6d972.html [accessed 17 February 2012]. Congress left no question it intended the U.S. refugee definition to honor this central principle and give "statutory meaning to our national commitment to human rights and humanitarian concerns." See S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144; *Cardoza-Fonseca*, 480 U.S. at 428 – 29; *Matter of S-P-,* 21 I. & N. Dec. 486, 492 (B.I.A. 1996).

[3] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 1968 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268; United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 – 29 (1987).

Matter of Acosta honors Congress's clear purpose. 19 I. & N. Dec. at 232 ("'membership in a particular social group' comes directly from the Protocol and the U.N. Convention"). The Board applied the doctrine of *ejusdem generis* ("of the same kind"), comparing the term "particular social group" with the other grounds of race, religion, nationality, and political opinion. *Id.* at 233. In this way *Acosta* identified "immutable characteristics" as the defining feature of the statute—not of the term "particular social group" taken alone, but of all five enumerated grounds taken together. *Id.* The BIA understood "particular social group" to operate as one among five symmetrical statutory grounds that together anchor our nation's commitment to protect persons from persecution that would be inflicted on account of characteristics "fundamental to human identity or conscience." *Id.* It is this concern for human rights related to identity and conscience that defines all five enumerated grounds, unites them in common meaning, and carries out Congress's intent to align the U.S. refugee definition with the protective mandate of Article 33.1 of the Convention.

Against this background, the Board's decision to now apply asymmetric requirements of visibility and particularity to the particular social groups ground of protection is incoherent and simply makes no sense. The new tests cannot be squared with *Acosta's* uniform treatment of all five enumerated grounds and they defy any common sense understanding of the human rights policy that Congress so

obviously intended to promote when it adopted the refugee definition. The claim that these tests add "greater specificity" to *Acosta's* standard, *Matter of S-E-G-*, 24 I. & N. Dec. at 582, is illogical. It makes no sense to think Congress would thwart the very principle that *defines* the enumerated grounds of protection by categorically excluding from their scope individuals known to face persecution on account of immutable characteristics fundamental to their human rights. Yet this is exactly what the social visibility and particularity criteria now require in many cases, too often with tragic results.

I. The "social visibility" and "particularity" tests make no sense because they would exclude important social groups the BIA has long recognized under *Acosta*

The BIA must construe the term "particular social group" as part of a "symmetrical and coherent regulatory scheme" guided by a "common sense" understanding of congressional purpose. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Matter of X-M-C-,* 25 I. & N. Dec. 322, 325 (B.I.A. 2010). The Seventh and Third Circuits agree that the BIA's new social group tests are incoherent and senseless because the agency disingenuously reaffirms social groups it previously recognized under *Acosta*[4] but without

[4] *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996)(young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose

providing any rational explanation as to how many of them, such as "homosexual Cubans", could ever satisfy the social visibility criterion. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3rd Cir. 2011).[5]

The incoherence is even deeper than the Seventh and Third Circuits suppose. Consider a man like Nasser Mustapha Karouni[6], a citizen of Lebanon. Karouni always knew that he was gay, but because the Lebanese government condemns homosexuality, he never openly disclosed his sexual orientation in Lebanon. With the exception of one sister, he did not reveal that he was gay even to his immediate family. Karouni's first contact with an underground gay community was through a cousin with whom he secretly met other gay men. The Islamic terrorist

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the practice); *Matter of Toboso-Alfonso,* 20 I. & N. Dec. 819 (B.I.A. 1990)(homosexual Cubans); *Matter of Fuentes*, 19 I.& N. Dec. 658 (B.I.A. 1988)(former members of the national police of El Salvador); *Matter of H-*, 21 I. & N. Dec. 337 (B.I.A. 1996)(members of the Marehan subclan of Somalia); Matter of V-T-S-, 21 I. & N. Dec. 792 (B.I.A. 1997) (Filipinos of mixed Filipino-Chinese ancestry).

[5] The Third Circuit has correctly stated that particularity is "little more than a reworked definition of 'social visibility'", concluding "the former [test] suffers from the same infirmity as the latter." *Valdiviezo-Galdamez*, 663 F.3d at 608

[6] The facts here are taken from *Karouni v. Gonzales*, 399 F.3d 1163, 1173-1177 (9th Cir. 2005). The case was decided on other grounds but the facts are useful to illustrate the problems a visibility test creates for similarly situated asylum applicants.

organization, Hezbollah, shot and wounded the cousin because he was gay, and later murdered him. Karouni himself was detained and interrogated by members of a Lebanese militia group who demanded he confess to being a homosexual and identify other secretly gay men. He attended a series of secret dinner parties with other gay men, some of whom he later learned were arrested, detained, beaten or killed because they were gay. Karouni later learned he had been "outed" to the militia. He applied for asylum in the United States.

This case demonstrates the potentially inconsistent and unfair results that flow from a social visibility requirement. Presumably a person in Karouni's position, even if he proved a certainty of future persecution on account of his sexual identity, would not satisfy the social visibility test. Factors that perpetuate the persecution of gays and lesbians – oppressive domestic laws, societal hostility, discrimination, and prejudice – also force them to remain socially invisible. Requiring social visibility also might even have the discriminatory effect of rendering only effeminate men or "butch" women eligible for asylum because they are the only ones perceived as homosexual by their societies.[7]

[7] Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol'y Rev. 47, 79-81 (2008)("Marouf").

A social visibility test also neglects the fact that socially and culturally imposed invisibility may be important aspects of oppression and persecution. In a 2007 speech at Colombia University, Iranian President Mahmoud Ahmedinejad publicly maintained that Iranian homosexuals do not exist, despite reports of over 4000 executions of gay men and lesbians in Iran since 1979. Ahmedinejad's point of view demonstrates how a society can publicly deny the existence of sexual minorities, thereby rendering them socially "invisible" while at the same time persecuting them. Moreover, it illustrates how a society can persecute individuals based on a certain trait or characteristic without ever recognizing individuals with that trait as having a special social identity, even though individuals who possess the trait and the outside world may perceive the group to exist. *Marouf.* The BIA's social visibility test wholly fails to take this into account and so would actually enable persecution on account of immutable characteristics.

II. The "social visibility" and "particularity" tests make no sense because they confuse the first-order question of whether a particular social group *exists* with separate, second-order elements of asylum analysis.

To say that social visibility and particularity have no connection to the purpose of the enumerated grounds of protection is not to say that the visibility of a particular social group is *irrelevant* to eligibility for asylum or withholding relief. Indeed, the agency often *must* consider this question to determine whether an applicant's fear of persecution is objectively "well founded", *Matter of*

Mogharrabi, 19 I&N Dec. at 446 ("well founded fear" is established with proof that persecutor "is aware or could become aware of an applicant's protected characteristic."). Visibility may also bear on whether persecution is inflicted "on account of" of membership in a social group. *See Valdiviezo-Galdamez*, 663 F.3d at 615, n. 4 (Hardiman concurring). The point is that visibility only plausibly relates to these second order elements of refugee analysis, not the first order question of whether a person possesses an immutable characteristic fundamental to their human rights. The Board's departure from *Acosta* needlessly conflates the first order question of whether a social group *exists* with second order steps of asylum analysis.

The Third Circuit considered the whether Mauricio Valdiviezo established he was a member of a particular social group *and* whether he had been persecuted on account of that ground.[8] Gang members robbed and assaulted Valdiviezo and demanded he join the gang. Valdiviezo reported this attack to the police and went into hiding at his mother's home in another city. After three months of hiding, he returned to his home town but moved to another neighborhood. Gang members soon spotted him, shot at him, and threw rocks and spears at him several times a week. They renewed their threats shouting, "Don't run. Don't be afraid. Sooner or

[8] *Valdiviezo-Galdamez*, 663 F.3d at 587-588.

later you will join us."[9] He was able to identify some of the men, and filed five separate police reports about these incidents, but received no response from the police. In September, 2004, while traveling by car to visit family members in Guatemala, he and his fellow passengers were kidnapped by members of MS-13 after crossing the border into Guatemala. Valdiviezo's abductors thought he was trying to escape gang recruitment, and while threatening to kill him, beat him for five hours.

The agency requirement that Valdiviezo demonstrate the visibility of his social group effectively merged separate elements of the claim -- social group and nexus. *After* determining whether Valdiviezo was a member of a particular social group, analysis of visibility might have been relevant to determine whether he feared persecution "on account of" such membership. But the BIA erred by conflating the issue of nexus with the first-order question of whether Valdiviezo was in fact a member of a particular social group. To recognize that a person is a member of a particular social group should be analytically on par with recognizing that a person is a member of a religion or a racial group. That recognition alone comes no where close to a grant of asylum, as the applicant still must run a gauntlet of separate statutory tests and win a favorable exercise of discretion.

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[9] 663 F.3d at 587 (3rd Cir. 2011).

III. The "social visibility" and "particularity" tests make no sense because they address a concern utterly irrelevant to Congress: the *size* of particular social groups.

The Board now uses the incoherent concepts of social visibility and particularity to deny recognition of many social groups it deems "too broad", *see Matter of S-E-G-*, 24 I. & N. Dec. at 586 (citing *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005)), even though the members do possess unifying immutable characteristics fundamental to their identities and consciences. Gang-based claims are only the most prominent example.

Take the case of Benito Zaldivar-Payes, a citizen of El Salvador. Zaldivar was targeted for gang recruitment by the MS-18 gang as a young teenager. The gang warned him not to seek protection from the police and threatened to harm his family. His parents had departed for the United States, leaving Zaldivar in the care of an infirm grandfather. His older sister escaped from El Salvador and lived in Guatemala after having been kidnapped and raped by a local leader of the MS-18 gang. Zaldivar fled and sought asylum in the United States. He claimed that the MS-18 was motivated to kill him because they were targeting young males living in La Libertad, El Salvador without parents.

The BIA denied Zaldivar's asylum application finding that the designated social group was overly broad. Following the BIA's denial of his asylum application, Zaldivar was deported from the United States. Two months later, the

MS-18 killed him. *See* Julia Preston, *Losing Asylum, Then His Life*, N.Y. Times, June 30, 2010, at A16.

It is difficult to articulate social groups more deserving of protection under *Acosta* than those proffered by victims of gangs like Zaldivar, Mauricio Valdiviezo, J-G-Z, or the young siblings denied asylum in *Matter of S-E-G*, 24 I. & N. Dec. at 579 - 80, all of whom openly rejected membership in the gangs and followed their consciences and the rule of law instead. All are united by the unchangeable past experience of actually refusing the gang, an act that unquestionably sets them apart in their societies. However, under *S-E-G-*, they are missing some elusive hook that would "particularize" and make them "socially visible". But this type of analysis misses the point of what it means to possess a characteristic worthy of protection. If the evidence showed Zaldivar's persecutors were animated by a motive to harm parentless young males in La Libertad, or to harm those who oppose the gang and refuse to join as a matter of conscience and loyalty to the rule of law, these are immutable characteristics fundamental to identity and human rights. It ought to have been enough to save Zaldivar's life.

The sad but transparent reality is that the BIA is driven by an utterly misplaced concern for the *size* of particular social groups like the one it rejected in *S-E-G-* even though the other enumerated grounds of protection (race, religion, nationality, political opinion) are typically *very* large. Moreover, as noted, the

asylum statute is already designed with a series of second-order filters that cull from the large number of persons who possess a protected characteristic the much smaller number who can ultimately win relief. Deborah Anker, *The Law of Asylum in the United States*, §5.43, 340 - 41 (West 2011).

CONCLUSION

Most circuit courts have joined this Court in extending *Chevron* deference to the agency's new approach,[10] but Amici respectfully submit these judicial decisions have deferred too reflexively, considering the agency position on its own confusing terms while overlooking crucial evidence of contrary congressional purpose. It is worth noting again that just two months ago a unanimous Supreme Court resolved years of litigation over the "comparable grounds" test for 212(c) immigration relief. *Judulang v. Holder*, 132 S.Ct 476 (2011). There too most circuits had deferred to the BIA and affirmed the agency's convoluted test, but the Supreme Court reversed for a reason that, perhaps because it was so basic, had gone largely unnoticed to that point. BIA precedent, the Court explained, had become

[10] *Mendez-Barrera v. Holder*, 602 F.3d 21, 25 (1st Cir. 2010); *Kante v. Holder*, 634 F.3d 321, 326 (6th Cir. 2011); *Rivera-Barrientos v. Holder*, 658 F.3d 1222, 1228 - 35 (10th Cir. 2011). Some circuits have cited the Board's new tests with approval or upheld them under *Chevron* as relevant factors, if not strict requirements for all particular social groups. See *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628 - 29 (8th Cir. 2008); *Castillo-Arias v. United States AG*, 446 F.3d 1190 (11th Cir. 2006).

"unmoored from the purposes and concerns of the immigration laws" and no longer made any sense. 132 S.Ct at 490. The same is true here.

When actually scrutinized, "social visibility" and its indistinguishable twin "particularity" make no sense because the concepts have no logical connection to whether a characteristic is fundamental to identity or conscience. Congress would not categorically exclude from the enumerated grounds of protection a person whose secretive religion lacked visibility--perhaps because state persecution drove it underground, perhaps because the dominant culture denied even the possibility of the faith--and by this perverse method bar the individual from becoming a *mere candidate* for asylum.[11] The Court should change course and reject the Board's current social group precedents because they are just as senseless, and because they are causing the removal and persecution of persons whose basic human rights Congress surely intended to protect.

[11] This Court has held that a person cannot be required to practice his beliefs in secret in order to avoid persecution, given that such requirement would be "contrary to our basic principles of religious freedom and the protection of religious refugees." *Zhang v. Ashcroft*, 388 F.3d 713, 719 (9th Cir. 2004).

Respectfully submitted,

BENJAMIN RICHARD CASPER
COUNSEL OF RECORD
BENJAMIN CASPER, ATTORNEY AT LAW, P.A.
33 EAST WENTWORTH AVENUE, SUITE 360
ST. PAUL, MN 55118
(651) 271-6661
BCASPER1@CHARTER.NET

STEPHEN W. MANNING
IMMIGRANT LAW GROUP, PLLC
P.O. BOX 40103
PORTLAND, OR 97240
(503) 241-0035
SMANNING@ILGRP.COM

DANIEL SHARP
CARECEN (CENTRAL AMERICAN
RESOURCE CENTER)
2845 WEST 7TH STREET
LOS ANGELES, CA 90005
(213) 385-7800, X 153
DSHARP@CARECEN-LA.ORG

DEBORAH S. SMITH
LAW OFFICE OF DEBORAH S. SMITH
7 W. SIXTH AVE., SUITE 4M
HELENA, MT 59601
(406) 457-5345

s/ Deborah S. Smith

ATTORNEYS FOR AMICI CURIAE
AMERICAN IMMIGRATION LAWYERS
ASSOCIATION AND CENTRAL AMERICAN
RESOURCE CENTER

DATED: February 21, 2012

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed.R.App.Proc. 32(a)(7)(B), because it contains 3,910 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I certify further that this brief complies with the typeface requirements in Fed.R.App.Proc. 32(a)(5), and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, Version 11.5.5, in Times New Roman14-point font.

February 21, 2012

s/ Deborah S. Smith
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Deborah S. Smith, certify that on February 21, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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