12-15388 and 12-15409

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAREN GOLINSKI,

Plaintiff - Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,

Defendant-Intervenor - Appellant.

On Appeal from the United States District Court
for the Northern District of California

No. 10-CV-00257-JSW
The Honorable Jeffrey S. White, Judge

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE KAREN GOLINSKI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

INTEREST OF AMICUS CURIAE

The State of California has a significant interest in the outcome of this case. Antedating the founding of the Nation, one of the fundamental features of state sovereignty has been the States' power to determine the marital status of its residents. Until Congress enacted Defense of Marriage Act, Pub. L. No. 104-99, 110 Stat. 2149 (1996) ("DOMA") in 1996, marital status in the United States was determined by the law of the state of domicile. Even when federal law has turned on marital status, until 1996, the federal government relied upon state law to determine whether a person residing in a particular state is married. In this way, federal law and state law worked interdependently to support marriage.

Section 3 of DOMA defined marriage for all federal purposes to exclude same-sex marriages. DOMA rewrote, in its entirety, the United States Code, the Code of Federal Regulations, and various other rules to exclude married same-sex couples. In this way, DOMA is a marked deviation from centuries of common understanding about the structure of the constitutional balance between state and federal sovereigns, the historical roles of state and federal governments, and Supreme Court jurisprudence establishing the power of the States to regulate the relationships that are both

the most important to its citizens' daily lives and the building blocks of the social fabric.

The law of marriage in California remains in flux. In *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), the California Supreme Court invalidated state statutory restrictions on same-sex marriage, holding that the equal protection guarantee of the California Constitution includes the right of same-sex couples to marry. In response, opponents of same-sex marriage put Proposition 8 on the ballot to eliminate the right of same-sex couples to marry. Proposition 8 passed, adding article I, section 7.5 to the California Constitution ("Only marriage between a man and a woman is valid or recognized in California"). Before Proposition 8 passed, however, approximately 18,000 same-sex couples were wed in California. The California Supreme Court upheld the validity of Proposition 8 under the state constitution in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), but confirmed the validity of the same-sex marriages that had occurred prior to the passage of Proposition 8. Then, upon a federal constitutional challenge that no state officer would defend, the district court and then this Court struck down Proposition 8 as a violation of the Equal Protection Clause of the United States Constitution. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *aff'g on other grounds* 704 F. Supp. 2d 921 (N.D. Cal. 2010)), *pet.*

for reh. en banc denied, 681 F.3d 1065 (9th Cir. 2012). This Court's decision, however, is stayed pending final resolution; a petition for certiorari is expected.

The marriages of the more than 18,000 same-sex couples who were married during the interregnum between *In re Marriage Cases* and the passage of Proposition 8 remain valid. California has an interest in protecting the status of the same-sex couples wed in 2008, and those that may yet be wed under California law. California Attorney General Kamala D. Harris files this brief on behalf of the State of California as its chief law officer pursuant to Federal Rules of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

There are many reasons to view DOMA with skepticism. It singles out for discrepant treatment one category of civil marriages comprised of unions of gay men and lesbians, a historically unpopular class of persons. It was adopted in haste, without formal findings, with minimal hearings, and for reasons that are either illogical or legally infirm. And, it intrudes in an area — regulation of marital status — that traditionally has been the province of the States. For more than 200 years, state law determined the marital status of a state's residents for all purposes. DOMA is a sharp break from constitutional, historical, and jurisprudential norms; it intrudes on state

sovereignty; and it upsets the constitutional equilibrium between the States and the federal government.

The passage of DOMA produced a remarkably frank record of reflexive Congressional disapproval of homosexuality and marriage by same-sex couples. For the many sound reasons stated by the district court, as well as Appellee Karen Golinski and supporting amici, the State of California agrees that the classification of gay men and lesbians for adverse treatment is suspect, and therefore that heightened scrutiny applies, and that DOMA violates the Equal Protection Clause because it is not substantially related to an important governmental objective. *See* Plaintiff-Appellee Answering Brief, 14-28; Office of Personnel Management Brief, 12-38. The State of California also agrees that DOMA does not survive even the lowest level of constitutional scrutiny, as there is no plausible relationship between DOMA and any legitimate governmental interest. However, highly deferential rational basis review is inappropriate in this case.

At a minimum, and following the analysis recently employed by the First Circuit, because DOMA intrudes on the State's authority to determine marital status, this Court's analysis under the Equal Protection Clause should be less deferential and more rigorous than ordinary rational basis review. *See Massachusetts v. U.S. Dept. of Health & Human Servs.*, 10-2214, 682

F.3d 1, Nos. 10-2204, 10-2207, 2012 WL 1948017 (1st Cir. May 31, 2012), *aff'g* 698 F. Supp. 2d 234 (D. Mass. 2010) *and Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (hereafter, *Massachusetts v. HHS*). Specifically, the Court should increase its scrutiny of the justifications for section 3 of DOMA, and invalidate it because those justifications are infirm. As set forth below, the First Circuit's analysis is sound in this regard and adoption of its approach here would avoid a split between the Circuits. This Court should thus perform an "intensified" review of Congressional justifications for enacting DOMA and reach the same conclusion here as that reached by the First Circuit, that DOMA violates the Equal Protection Clause.

ARGUMENT

I. THE REMARKABLE CIRCUMSTANCES OF DOMA'S ADOPTION COMPEL A LESS DEFERENTIAL, MORE RIGOROUS RATIONAL BASIS REVIEW UNDER THE EQUAL PROTECTION CLAUSE

DOMA is an unprecedented congressional incursion into an area of previously unquestioned state authority to determine the marital status of its residents. For hundreds of years, state determinations of marital status governed under federal law, and Congress regularly acknowledged that it had no authority to determine marital status, even for purposes of federal

law. The Supreme Court recently noted that although legislative novelty is not necessarily fatal,

> sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress's action. . . . At the very least, we should "pause to consider the implications of the Government's arguments" when confronted with such new conceptions of federal power.

Nat'l Federation of Independent Businesses v. Sebelius, — S.Ct. —, No. 11-393, 2012 WL 2427810 at *15 (June 28, 2012) (citations omitted).

The First Circuit's decision in *Massachusetts v. HHS* presaged Chief Justice Roberts' caution. That decision resolved two companion cases. In the first, *Gill*, same-sex couples and surviving spouses legally married under Massachusetts law successfully sued to enjoin enforcement of DOMA under the Equal Protection Clause. 2012 WL 1948017 at *6-*7. In the second, the State of Massachusetts challenged section 3 of DOMA as a violation of the Tenth Amendment and the Spending Clause, and the district court found such violation. *Id.* at *7. The First Circuit affirmed, but on different grounds. The court concluded that First Circuit precedent barred it from accepting the district court's determination that laws that classify according to sexual orientation are suspect and therefore that "heightened scrutiny" applied, and it also rejected the Spending Clause and Tenth Amendment

findings. *Id.* at *8, *11. The court also observed that the plaintiffs would be unable to prevail under traditional rational basis review.[1] *Id.* at *9. Under this standard, which the court characterized variously as "minimalist," (*id.* at 10), "deferential" (*id.* at *11), "light scrutiny" (*id.*), "extreme deference" (*id.*), and "almost automatic deference to Congress' will" (*id.* at *15), Congress need only assert a "plausible factual basis . . . without regard to [its] actual motives" and "[m]eans need not be narrowly drawn to meet — or even be entirely consistent with — the stated legislative ends. *Id.* at *9 (citations omitted).

The First Circuit concluded that such minimalist review was inappropriate. Instead, relying on several lines of cases, it noted that Supreme Court decisions have "intensified [rational basis] scrutiny of purported justifications where minorities are subject to discrepant treatment . . . [,] limited the permissible justifications," and "in areas where state regulation has traditionally governed, the Court may require that the federal

[1] The State of California does not agree with this portion of the First Circuit's analysis. For the reasons eloquently set forth by Plaintiff-Appellant, supporting amici, and the district court, heightened scrutiny does apply to DOMA. Moreover, DOMA fails under even under rational basis review.

government interest in intervention be shown with special clarity." *Massachusetts v. HHS*, 2012 WL 1948017 at *10.

Under the Equal Protection Clause, this less deferential version of rational basis review, which the court characterized variously as disregard of purported justifications in favor of "intensified" scrutiny of the legislation's actual fit, *id.* (citing *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534, 537-38 (1973), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), and *Romer v. Evans*, 517 U.S. 620, 632-33, 655 (1996)), rational basis "applied with greater rigor," *id.* at *11, and "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review," *id.*, "the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered." *Id.* at *10.

Similarly, in the context of federalism-based challenges to federal laws, the First Circuit found that the Supreme Court has "scrutinized with special care federal statutes intruding on matters customarily within state control. The lack of adequate and persuasive findings led the Court in both cases to invalidate the statutes under the Commerce Clause even though nothing more that rational basis review is normally afforded in such cases." *Massachusetts v. HHS*, 2012 WL 1948017 at *13 (citing *United States v.*

Morrison, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995)). The court also found that the "Supreme Court has made somewhat similar statements about the need for scrutiny when examining federal statutes intruding on regulation of state election processes." *Id.* (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009), and *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). The court acknowledged that the precise sources of constitutional authority in those cases (e.g., the Commerce Clause) were not at issue in reviewing DOMA. The court determined, however, that the review of DOMA presented both issues of equal protection and issues of federal intrusion "broadly into an area of traditional state regulation," and that in these circumstances peculiar to DOMA, the equal protection concerns that required a more rigorous rational basis review were "uniquely reinforced by federalism concerns." *Id.*

A. Domestic Relations and Determination of Marital Status Traditionally Have Been the Exclusive Province of the States

Domestic relations, including determinations of marital status, are an area that "has long been regarded as a virtually exclusive province of the States," subject only to the constitutional limitations of due process and equal protection. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Zablocki v. Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring in the

judgment) (recognizing that the right to marry "is under our federal system peculiarly one to be defined and limited by state law"); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and that] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."), *overruled in part on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (relying on common understanding that domestic relations matters belonged exclusively to the States).

In accordance with the long-held understanding that domestic relations "belong" to the State, *Boggs v. Boggs*, 520 U.S. 833, 848 (1997), state determinations of marital status have controlled for purposes of both federal and state law until the passage of DOMA. *See, e.g., United States v. Yazell*, 382 U.S. 341, 352-53 (1956) (state law determines a wife's liability for a Federal Small Business Administration loan drawn by her husband); *Kahn v. INS*, 36 F.3d 1412, 1417 (9th Cir. 1994) (Kozinski, J., dissenting) ("[m]arital status, as defined by state law, plays a particularly prominent role in the administration of federal law"); *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011) (discussing "the longstanding

disposition of the federal government to accept state definitions of civil marriage").

Prior to DOMA, wherever federal statutes used the terms "marriage" or "spouse," state law supplied the meaning of those terms.[2] *See, e.g.*, *Slessinger v. Sec'y of Health & Human Servs.*, 835 F.2d 937, 939 (1st Cir. 1987) (rejecting argument that determining whether a marriage was validly terminated for purposes of the Social Security Act should be based on federal common law: "[t]his conclusion is strongly reinforced by the settled principle that matters of divorce and marital status are uniquely of state, not federal, concern" (citations omitted)); *Lee v. Comm'r of Internal Revenue*, 550 F.2d 1201, 1202 (9th Cir. 1977) ("[t]his circuit has held that state law should be used to determine marital status for federal tax purposes . . . . [m]arriage is peculiarly a creature of state law"); *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977) (state law regarding marital status determines who may claim marital privileges under the Federal Rules of Evidence).

[2] The federal government has historically adopted state determinations of marital status, even where those state determinations diverged and reflected deep-seated cultural disagreement. *See, e.g., Dragovich v. U.S. Dep't of the Treasury*, No. 10-01564, 2012 WL 1909603, at *12 (N.D. Cal. May 24, 2012); *see also Massachusetts*, 698 F. Supp. 2d at 237-38.

In contrast to the long tradition of federal respect for State marital status determinations, for the first time in United States history, DOMA has purported to declare that as a general matter (and not just for a particular purpose), the federal government will not recognize one category of marriages that are fully and legally valid under applicable state law. DOMA, which affects approximately 1,100 federal rights, protections, and benefits that are linked to marriage, expropriates to the federal government a substantial portion of the power previously exercised by the States to regulate marital status. By codifying for all purposes a federal definition of marriage based on one criterion, DOMA ensures that regardless of how the States may evolve on the issue of marriage equality, same-sex couples will not be married under federal law. Indeed, as BLAG admits, this was the animating purpose of DOMA. *See* BLAG Br. 9; *see also Dragovich*, 2012 WL 1909603 at * 4. For the first time in our nation's history, Congress has made it possible for an individual to be both married (for state purposes) and unmarried (for federal purposes).

B. DOMA's Unprecedented Intrusion Into This Area Traditionally Reserved to the States Implicates Federalism Concerns That Compel a More "Intensified" Examination of Its Rationale

As stated above, the State of California agrees that the district court correctly decided that classifications based on sexual orientation warrant heightened judicial scrutiny. But, as the First Circuit determined, it is not necessary to reach this issue. *See Massachusetts v. HHS*, 2012 WL 1948017 at *10.

In addition to the reasons set forth by Plaintiff-Appellee, the district court, and supporting amici, the fact that Congress is operating in an area traditionally reserved to States justifies a more searching inquiry into Congress's reasons for enacting DOMA.[3] *Massachusetts*, 2012 WL 1948017 at *8 (subjecting DOMA to an "intensified" inquiry under the Equal Protection Clause because it regulated marriage, an area typically

[3] Amici Indiana and some other states ("BLAG Amici") suggest that invalidating DOMA "on constitutional grounds would "ignor[e] the virtues of federalism." BLAG Amici Br. 1. BLAG Amici are correct that it is the States' prerogative to define, subject to the boundaries set by the Constitution, marriage as they see best. But BLAG Amici fail to appreciate that the exercise of congressional power underlying DOMA is a much greater threat to their sovereignty than a court decision conforming state law to the Constitution. DOMA is precisely a repudiation of the States' traditional control over marital status determinations.

reserved to states); *United States v. Morrison* 529 U.S. 598 (2000) (conducting detailed inquiry into Congress's economic justification under the Commerce Clause for Violence Against Women Act because it intruded on the States' traditional exercise of police power). This more searching rational basis review is justified both by equal protection concerns (because the law burdens a class of individuals who have historically experienced pervasive discrimination) and also by federalism concerns (because the law seeks to regulate in an area historically left to the States). *Id.* at *8-*14.

Although decided under the Commerce Clause and other enumerated powers of Congress, the Supreme Court's decisions in *Morrison* and *Lopez* illustrate that, when legislation implicates core areas of state sovereignty such as the regulation of family law, courts will not defer to Congress under the most deferential rational basis standard. In these cases, the Supreme Court rejected the argument that federal regulation in an area traditionally reserved to states was rationally related to Congress's Commerce Clause power because, in the aggregate, it would affect interstate commerce. In so doing, the Supreme Court noted that Congress's justification, if accepted, would allow it to legislate in areas normally reserved to the states, such as family law, and would offend the Constitution. *Lopez*, 514 U.S. at 565; *see also Morrison*, 529 U.S. at 615 (noting that accepting Congress's theory that

the economic effects of violent crime justified its regulation under the Commerce Clause would "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant").

In all these cases, the federal government's intrusion into areas traditionally controlled by the States led the Court to question the federal government's justifications—and in *Morrison*, Congress's findings—that the activities the government was regulating had a sufficient tie to interstate commerce. Similarly, the Supreme Court has refused to defer to Congress when it enacts laws to enforce the Fourteenth Amendment pursuant to section 5. *City of Boerne v. Flores*, 521 U.S. 507 (1997). In invalidating the Religious Freedom Restoration Act, the Supreme Court noted the "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens" and concluded that the costs on the States "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause. . . ." *Id*. at 534-35. And, in the context of preemption under article VI, section 2, courts narrowly construe preemption provisions to preserve core areas of state sovereignty. Where Congress has "'legislated . . . in a field which the States

have traditionally occupied,'" courts "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)).

This presumption is grounded in the same federalism concerns that underlie *Nat'l Federation*, *Morrison*, *Lopez*, and federalism jurisprudence generally. (*See, e.g.*, *Harris By and Through Harris v. Ford Motor Co*., 110 F.3d 1410, 1417-18 (9th Cir. 1997) ("The presumption against preemption supports a narrow interpretation of even an express preemption clause and is 'consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety'") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Whatever the purported justification for congressional authority, when it intrudes on traditional state prerogatives courts will closely examine the rationale and invalidate the law where that rationale is infirm.

The First Circuit relied on this reasoning, and critically examined the purported justifications for DOMA, in its decision striking down DOMA on equal protection grounds. *Massachusetts*, 2012 WL 194817 at *8. It noted that despite its application throughout the U.S. Code, Congress held only

one day of hearings on DOMA, "and none of that testimony concerned DOMA's effects on the numerous federal programs at issue." *Id.* at *13. The court opined that DOMA arguably undermines federal ethics laws as well as abuse reporting requirements in the military, and probably had many unintended consequences for anti-nepotism rules, judicial recusals, restrictions on receipt of gifts, travel reimbursements, and the crimes of bribery of federal officials and threats to their family members. *Id.* at *13 n.8. The court further noted that the statute lacks the kind of findings that Congress typically includes with federal laws. *Id.*

Accordingly, the First Circuit turned to the House Committee report's discussion of the governmental interests advanced by DOMA, examined each with rigor, and found each of them infirm. *Massachusetts v. HHS*, 2012 WL 1948017 at *14-*15. The court found inadequate the rationale that DOMA would save money because even if true, where this kind of distinction is drawn against a historically disadvantaged group and is the only rationale for the law, economy is an inadequate justification. *Id.* at *14. The court also found inadequate the rationale that DOMA would support child-rearing in the context of stable marriage because "DOMA cannot preclude same-sex couples from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners." *Id.* The

court dismissed as being without any demonstrated connection the idea that denying benefits to married same-sex couples would do anything to reinforce heterosexual marriage. *Id.* at *14-*15. Congress's moral disapproval of homosexuality the court noted, cannot alone justify discrimination as a matter of law. *Id.* at *15 (citing *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003)). The court rejected the argument that DOMA was intended as a "time-out" because it was not framed that way, and the evidence showed it was not intended to be a temporary measure. *Id.* Finding that none of Congress's purported justifications for DOMA survived scrutiny, the First Circuit concluded,

> without resort to suspect classifications . . . , that the rationales offered do not provide adequate support for section 3 of DOMA. . . . If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test.

Id.

The common feature underlying both the more rigorous rational basis review triggered by federalism, and that triggered by a classification that adversely affects an unpopular group, is the presence of a reason for a court to be skeptical and therefore to look more closely at Congress's rationale for

its actions. In both cases, a "red flag" raises the possibility that Congress is acting with an impermissible objective.

When Congress makes a classification that adversely impacts a disfavored group, the fact that the group has historically experienced discrimination justifies a more searching rational basis review. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. at 579-80 (O'Connor, J., concurring) (noting that where challenges to economic or tax legislation are typically rejected on a rational basis review based on confidence the democratic process will usually rectify any imprudent decisions, in contrast "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause"); *see also Romer v. Evans*, 517 U.S. 620, 633 (1996) ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law"). Similarly, when Congress is legislating in an area typically reserved to the States, particularly in the area of family law, courts must determine whether this incursion into state territory is the product of an improper legislative motive.

In the case of DOMA, both equal protection and federalism concerns are raised, and so there are two separate and independent reasons to conduct a more intensive rational basis review in this matter. Such a review demonstrates that the purported justifications for DOMA are invalid and, consequently, that DOMA violates the Equal Protection Clause.[4]

CONCLUSION

For the reasons stated in the briefs of the Appellee, the Office of Personnel Management, and their amici, this Court should affirm the decision of the district court and invalidate DOMA.

[4] BLAG Amici assert that if this Court finds DOMA unconstitutional, it will limit the ability of the States to restrict marital status to marriage between one man and woman. To the contrary, a ruling that DOMA violates the Equal Protection Clause would simply mean that the federal government cannot distinguish between two classes of couples, validly married, under their State's laws, based upon sexual orientation. Such a ruling does nothing to curtail state power as the exclusive power of the States over marriage, which has always been subject to general constitutional constraints. *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987) (holding unconstitutional state marriage law limiting ability of prisoners to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding unconstitutional state marriage law limiting access to marriage based on financial status).

Dated: July 10, 2012

Respectfully submitted,

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Defendant-Intervenor-Appellant.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: July 10, 2012

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Dated: July 10, 2012

By: */s/ Alexandra Robert Gordon*
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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Alexandra Robert Gordon
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