No. 08-16661

United States Court of Appeals
For The Ninth Circuit

SONYA RENEE ET AL.,

Plaintiffs-Appellants,

v.

ARNE DUNCAN, in his official capacity;

UNITED STATES DEPARTMENT OF EDUCATION,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of California
Case No. 3:07-cv-04299-PJH

PLAINTIFFS'-APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

The law of the land, as enacted by Congress in the No Child Left Behind Act of 2001 ("NCLB"), is that only "highly qualified" teachers—defined as those who have "obtained full State certification as a teacher"—may teach the core curricula to the nation's children. 20 U.S.C. § 7801(23)(A)(i). Defendant Secretary of Education's ("ED's") regulation directly countermanded Congress's enactment by permitting intern teachers who are merely *making "progress toward full [State] certification*," to be treated as "highly qualified" by states and districts. 34 C.F.R. § 200.56(a)(2)(ii) (emphasis added). All three members of the panel concluded that ED's regulation contradicts NCLB's clear language. Simply put, one cannot have "obtained" full certification if one is merely pursuing it.

ED argues, as it has before, that Congress could not have meant what it said because it also funded certain alternative teacher preparation programs, such as Teach For America ("TFA") and Troops-to-Teachers whose *participants* lack full certification. But this is a false dichotomy. When NCLB was enacted in 2001, Congress recognized that shortages of fully-certified teachers existed which would make it a challenge for all states to achieve 100% highly qualified teachers by 2006 as NCLB expected. Congress thus keenly understood the need to create an ample pipeline of future highly qualified teachers in alternative (as well as

traditional) certification programs to meet the stated goal by 2006 and beyond. There is no inconsistency here: Congress's requirement of fully State-certified teachers cannot be met without viable preparation programs, and thus it is expected that Congress would fund preparation programs that will produce tomorrow's fully-certified graduates.

ED next challenges Plaintiffs' standing to sue on the ground that California, which is not a party here, might simply ignore the invalidation of ED's regulation and thus Plaintiffs' injuries are not redressable. But both state and federal law expressly obligate California to comply with and enact regulations consistent with NCLB. Far from assuming the State will ignore the legal effect of the challenged regulation's rescission, courts presume public entities will follow the law. *Utah v. Evans*, 536 U.S. 452, 460 (2002); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). The theoretical possibility that California might not, or might even attempt to alter its teacher certification statutes in such a way as to restore the *status quo ante,* is precisely the kind of speculation that the courts have consistently found do not defeat standing. Moreover, Plaintiff Californians for Justice has already *twice* successfully sued under the State Administrative Procedures Act ("APA") to force California regulations into compliance with NCLB's highly qualified standard. Because the Court's invalidation of ED's regulation plainly alters the legal regime

to which California is subject—exposing it to both a violation of federal law and another State APA challenge—Plaintiffs meet the redressability requirement.

Finally, implicit in ED's request for an *en banc* rehearing is the notion that the panel's ruling will adversely affect public school education in California and elsewhere. ED has it backwards: it is the regulation that has watered down teacher quality and deprived the system of the accountability Congress sought, resulting in disproportionate numbers of underprepared, novice teachers in the poorest and highest minority schools. NCLB does not prohibit the use of non-highly qualified teachers, but it does require that their use be restricted to situations of genuine teacher shortages, and subject to reporting their use to parents, the public and Congress and a plan for lessening their prevalence. Invalidating ED's regulation will not deprive children of a single teacher, but it will deprive states and districts of the ability to hide behind the regulation to mask their continued use of intern teachers-in-training and their concentration of those interns in the schools most in need of fully-prepared, experienced teachers.

Although Plaintiffs-Appellants do not dispute the importance of the issues raised by this case, Plaintiffs-Appellants respectfully submit that *en banc* rehearing is neither warranted nor necessary in light of the issues raised by ED.

FACTUAL STATEMENT

A key component of NCLB's promotion of academic achievement and accountability is that students be taught by "highly qualified" teachers. Congress specified that a "highly qualified" teacher is one who "has obtained full State certification as a teacher (including certification obtained through alternative routes to certification) or passed the State teacher licensing examination, and holds a license to teach in such State . . . ." 20 U.S.C. § 7801(23)(A). NCLB provided that by the end of the 2005-2006 school year, only "highly qualified" teachers should teach the core curricula. 20 U.S.C. § 6319(a)(2)-(3).

At the same time, Congress understood that 100% compliance with the "highly qualified" teacher requirement might well not be met by 2005-2006, and thus it required states and districts *even after that deadline* to: (a) continue to report which teachers are not highly qualified,[1] (b) continue to develop plans for 100% compliance, (c) report on their ongoing progress, and (d) distribute non-highly qualified teachers in an equitable manner. 20 U.S.C. §§ 6311(a), 6312(b)(1)(N), 6319(b)(1), 6311(b)(8)(C).

[1] Parents in low-income Title I schools, for example, are to be notified if their children are taught by a non-highly qualified teacher for more than four weeks. 20 U.S.C. § 6311(h)(6)(B)(ii). School, districts, and states are required to report to the public and states are required to report to Congress through ED on the number of not-highly qualified teachers employed. 20 U.S.C. §§ 6311(h), 6319(b)(1).

Congress also sought to ensure an adequate supply of fully-certified, "highly qualified" teachers by funding preparation programs such as "Troops-to-Teachers" and "Transition-to-Teaching," whose participants must be assigned to "high-need" districts and/or schools experiencing teacher shortages where they commit to remain after graduating. *See* 20 U.S.C. §§ 6674, 6682-83. Even still, Secretary Spellings stated that "[s]tates that do not quite reach the 100 percent goal by the end of the 2005-06 school year *will not lose federal funds* if they are implementing the law and making a good-faith effort to reach the HQT goal in NCLB as soon as possible." ER447 (emphasis added).

When NCLB was enacted, ED acknowledged that Congress meant exactly what it said in its definition of "highly qualified" teachers. For example, guidance to states issued in June 2002, answered the question "What is meant by 'full State certification'?," by asserting that it "means that the teacher *has fully met* those State requirements that apply to the years of experience the teacher possesses." ER709 at C-2 (emphasis added), which typically means, like in California, *completion* of teacher preparation. Nonetheless, ED shortly thereafter conceded it was making an "exception" (ER680-681) to the requirement that a teacher have "obtained full State certification" and that such requirement not be temporarily or provisionally waived by enacting the regulation challenged here, which provides

that interns who are merely making *"progress toward full [State] certification*," may be deemed "highly qualified" by states and districts. 34 C.F.R. § 200.56(a)(2)(ii) (emphasis added).

The consequence of ED's regulation has been a vast increase in the number of intern teachers in California, particularly in schools and districts with large numbers of low-income and minority students. The number of interns in California rose approximately 50%, from 7,251 in 2001-2002, immediately prior to the regulation's promulgation, to 10,716 in 2006-2007. *See* ER516, 518. Students in schools that are nearly entirely minority are five times more likely to have intern teachers than students in schools with the lowest minority concentration, and the poorest performing schools are disproportionately saddled with interns. ER339, 330. Moreover, because ED's regulation permitted California to mislabel these interns as "highly qualified" from the first day of their enrollment in an alternative preparation program, California has not had to report their continued and growing use either to parents, the public, or Congress and has not had to develop a plan to decrease their numbers.

Prior Proceedings

On June 17, 2008, the District Court granted summary judgment in favor of ED, concluding that the relevant part of the statute—"has obtained full State

certification as a teacher (including certification obtained through alternative routes to certification)"—was ambiguous and deferred to ED's authority to interpret ambiguous provisions. 2008 U.S. Dist. LEXIS 49369 at *20-21 (N.D. Cal. 2008).

On July 23, 2009, the initial panel decision of this Court, making no mention of the District Court's analysis, nonetheless disagreed with the determination that ED's regulation was ambiguous and that it did not conflict with NCLB. *See, e.g.,* Opinion, 573 F.3d 903, 907-08, 911 n.8 (9th Cir. 2009) (noting that interns do not have full certification in California and that "there is no disagreement based on the law" with the dissent). The majority differed from Judge Fletcher's dissent only on the question of redressability, holding that a favorable ruling would not redress Plaintiffs' injuries because "[t]his court could order a revision of the regulation, but California is free to disregard the Secretary." *Id.* at 912.

On September 27, 2010, in response to Plaintiffs' petition for rehearing, the panel withdrew its prior opinion and concluded (with Judge Tallman dissenting) that Plaintiffs have standing. The heart of Plaintiffs' petition was a refutation of the original majority's conclusion that California State Board of Education ("SBE") regulations implementing the "highly qualified" requirement could expand either NCLB's "highly qualified" definition or California's full certification standard. The SBE is required by state and federal law to implement a

"highly qualified" definition consistent with NCLB (20 U.S.C. § 6573(a)(1); Cal. Educ. Code §§ 12000, 12032) and utterly lacks any authority to modify the State's full certification standard, such being the exclusive province of the Legislature and a separate state agency, the California Commission on Teacher Credentialing. Pltfs Rehearing Pet. at 7, 5-10. Agreeing, the new panel majority held that Plaintiffs could meet their "relatively modest" burden (quoting *Bennett v. Spear*, 520 U.S. 154, 171 (1997), Opinion at 16336) because the relevant SBE regulations "do not change the definition of fully credentialed under California law" but rather "piggyback[ed]" on the federal regulation to label teachers enrolled in intern programs as "highly qualified." Opinion at 16337. Thus, because intern teachers are not, in fact, fully-certified under California law, the invalidation of the federal regulation would necessarily involve a change in legal status sufficient to render the SBE regulations inconsistent with NCLB and satisfy redressability. *Id.*

The panel further ruled that ED's regulation contradicted Congress's unambiguous directive that only a teacher who "has obtained" full State certification may be highly qualified. *Id.* at 16333. Notably, the dissent agreed with the majority's interpretation of the statute and the regulation's conflict with it, disagreeing, again, only on redressability. *Id.* at 16341.

ARGUMENT

I. Congress's Funding of Certain Alternative Teacher Preparation Programs Is Consistent With NCLB.

The main premise of ED's request for rehearing is false. ED argues that because Congress funded alternative route programs such as Troops-to-Teachers, Transition-to-Teaching and Teach For America, it could not possibly have meant a heightened definition of "highly qualified" teachers in NCLB to exclude those same teachers from the classroom.

This argument fails for two reasons. *First*, Congress understood that creating a pipeline of new teachers was essential to meeting the future goal of having highly qualified teachers in every classroom, and it looked to teacher preparation programs (both traditional and alternative routes) as means to this end. NCLB's provisions show that, when enacted in 2001, Congress contemplated it would take several years for districts and states to comply—*e.g.*, full compliance with the "highly qualified" requirement was not expected until five years after enactment. To aid the process along, Congress provided support for robust teacher preparation channels. Programs such as Troops-to-Teachers and TFA were funded to create a pipeline of highly qualified teachers. Nothing in the language of these

statutes suggests that Congress believed these new interns to *be* highly qualified from the get-go.

To the contrary, the very statutes cited by ED confirm that Congress did not view these new teacher recruits as highly qualified *ab initio*. Title II, Part A of the ESEA, for example, provides funds for the training of "teachers who *become* highly qualified through State and local alternative routes to certification." 20 U.S.C. § 6623(a)(2)(C)(iii) & (a)(7) (emphasis added). The 2008 Higher Education Opportunity Act ("HEOA") similarly gave a grant to TFA to "provide highly qualified teachers" to areas of "high need." 20 U.S.C. § 1161f(c)(1).[2] Nowhere in either NCLB or the HEOA, however, does Congress state its belief or understanding that new interns *are* highly qualified before they have completed their alternative preparation program and "obtained full State certification."[3]

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[2] ED suggests that because Congress did not act to strike down the regulation, it should be deemed to have acquiesced to it. But Congressional acquiescence may only be assumed in the rare circumstance "when there is evidence that Congress considered and rejected the 'precise issue' presented before the Court[,]" which is not the case here. *Rapanos v. United States*, 547 U.S. 715, 737-38 (2006) (emphasis in original) (citing *SWANCC v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-170 n.5 (2001)); *see also Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980). Here, Congress has failed to make a single amendment to NCLB since it was first passed in 2001, much less considered and rejected any amendment to NCLB's "highly qualified" teacher definition.

[3] *Amici* TFA, et al. (hereinafter *Amici* TFA) wrongly contend that "lawmakers specifically identified alternative certification programs as a key element in state

Second, ED's argument fails to take into account the important role that non-highly qualified teachers continue to play in the statutory scheme even after the 2005-06 deadline for 100% highly qualified teachers. NCLB anticipates that there will be areas of teacher shortages, emergencies and similar contingencies in which it will be necessary to employ interns or other non-fully-certified teachers. These teachers are not prohibited from a classroom role, even in the core curricula, but rather a state or district that employs them is obligated to report their resort to such teachers (to parents, the public, and Congress), must equitably distribute them so that the burdens are not borne disproportionately by low-income and minority students, and must develop a plan for lessening reliance on such less-than-fully-prepared and fully-certified teachers. *See, e.g.,* 20 U.S.C. §§ 6311(a),

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plans for the Race to the Top grant program competition." TFA Br. at 4-5. The American Recovery and Reinvestment Act ("ARRA") says nothing about alternative certification programs, and in fact reiterates—word for word—Congress's directive in NCLB to states to "address inequities in the distribution of highly qualified teachers between high- and low-poverty schools, and to ensure that low-income and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers." P.L. 111-5, § 14005(d)(2) (2009). Thus, as recently as 2009, Congress evidenced its recognition that states had not yet met the 100% highly-qualified teacher goal and required additional incentives to achieve equity in teacher distribution. Moreover, ARRA and the HEOA, like Title II of NCLB, simply define highly qualified teachers by reference back to the plain language of 20 U.S.C. § 7801(23)(A). *See* P.L. 111-5 § 14013(6), 20 U.S.C. § 1161f(a).

6312(b)(1)(N), 6311(b)(8)(C), 6311(h), 6319(b)(1).[4] In other words, it is illogical for ED to argue that non-highly qualified interns will have to be replaced with even less qualified substitutes. Instead, intern teachers will continue to play a "stop gap" role, but subject to accountability, fairness and the specific safeguards established by Congress in NCLB. NCLB, as properly construed by the Court, in no way obviates the need for or use of alternative preparation programs.

As noted above, ED itself has made clear that states that resort to non-highly qualified teachers after 2005-06 to address shortages are not subject to the loss of federal funds. ER447. The use of some number of non-highly qualified teachers is contemplated by the statutory scheme—and by ED itself—as inevitable and potentially probative of "good faith" interim efforts to meet the statutory standard in high-need areas. *Id*.

[4] "Troops-to-Teachers" and "Transition-to-Teaching" participants must be assigned to "high-need" districts and/or schools experiencing teacher shortages that are, by definition, *already out of compliance* with NCLB's highly qualified teacher requirement. *See* 20 U.S.C. §§ 6674, 6682-83. *See also* 20 U.S.C. §§ 6613, 6623 (Title II, Part A grant funds may be used, *inter alia*, to redress teacher shortages through alternative route programs). Hiring non-highly qualified alternative route participants does not put districts in further violation of NCLB. Instead, districts with teacher shortages are able to fill teacher vacancies and replace substitute or other underprepared teachers with alternative route participants who—though they are not yet fully-certified, highly qualified teachers—have subject matter knowledge, are in a fast-track program to obtain full certification and become "highly qualified," and have committed to stay in the district for at least three years. 20 U.S.C. §§ 6674, 6683.

Thus, ED is correct that statutes must be construed if at all possible to fit into "an harmonious whole." Defs. Pet. at 15, quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). Plaintiffs' reading clearly does that—harmonizing Congress's desire that all core classes be taught by fully-certified teachers with its support in Title II for alternative preparation routes as one means to that eventual end. ED's attempt to manufacture an inconsistency so as to override the plain language requirement that all highly qualified teachers "ha[ve] obtained full State certification" must be rejected as inconsistent with this "fundamental canon of statutory construction." *Id*.; *California Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) (courts "must presume that Congress acts with deliberation, rather than by inadvertence").

II. PLAINTIFFS HAVE STANDING AS THEIR INJURIES ARE REDRESSABLE.

The panel correctly found Plaintiffs' injuries redressable and rejected ED's contention (raised for the first time on appeal) that Plaintiffs lacked standing. ED's rehash of this argument fails for several reasons.

First, it is incorrect that California is at liberty to ignore the invalidation of ED's regulation as federal law compels compliance. Because California receives funds under NCLB, it must comply with NCLB's conditions and requirements.

See Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); *Riles v. Bennett*, 831 F.2d 875, 877 (9th Cir. 1987); *Woods v. United States*, 724 F.2d 1444, 1449 (9th Cir. 1984). NCLB itself requires that state regulations be consistent with the Act, 20 U.S.C. § 6573(a)(1), and it explicitly provides that the Secretary may withhold funds or take other enforcement action if a state fails to comply with NCLB. *See* 20 U.S.C. § 1234c.[5] This is more than sufficient to create a coercive effect on California to confer standing. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

Second, state law also binds California to comply with NCLB. California Education Code § 12000 only authorizes the SBE to act to implement federal education spending statutes "insofar as consistent with the requirements prescribed by the federal law and implementing rules and regulations." *See also id.* § 12032 (SBE must act under NCLB "in accordance with these acts of Congress and any

[5] In a 2005 letter to all chief state school officers, Secretary Spellings stated:

> [F]or states that either are not in compliance *with the statutory HQT requirements* or are not making good-faith effort to meet the goal of having all teachers highly qualified, *the Department reserves the right to take appropriate action such as the withholding of funds. As a first requirement in a State's effort to implement the law, it must have a definition of a "highly qualified teacher" that is consistent with the law. . . .*

ER447 (emphases added); *see also* ER662 (July 23, 2007 Secretary's Letter to States).

rules and regulations adopted thereunder."). In addition, California's APA requires that state regulations be consistent both with the statute they implement (Cal. Gov't Code § 11342.2), and with "existing statutes, court decisions, or other provisions of law." *Id*. at §§ 11349(d), 11349.1(a)(4).[6]

Far from a theoretical possibility that the SBE could be liable under the State APA for ignoring the rescission of ED's regulation, in fact, Plaintiff Californians for Justice ("CFJ") has twice brought such actions to enforce the highly qualified teacher standard in California. When the SBE initially adopted a highly qualified definition that incorporated emergency credentialed teachers and did so without promulgating its new rule as a regulation, CFJ sued to force the SBE to adopt the very regulations now at issue in this action, knowing that doing so, *inter alia*, would force the SBE to make such regulations consistent with NCLB and, thereby, exclude emergency credentialed teachers. *See* Plaintiffs' Request for Judicial Notice (November 15, 2010) at RJN1-43.[7] Similarly, when the California

[6] *See Morris v. Williams*, 67 Cal. 2d 733, 737-38 (1967) (affirming judgment declaring state regulations invalid as inconsistent with state and federal law under California APA); *Woods v. Superior Court*, 28 Cal. 3d 668, 672, 682 (1981) (same).

[7] CFJ's petition for a writ of mandate was denied as moot and/or not yet ripe inasmuch as, at the time of the decision, the SBE had foresworn enforcing the challenged highly qualified definition, Pltfs. RJN at 21-22, and later instituted APA proceedings to promulgate the regulations at issue in this case. In later

Commission on Teacher Credentialing ("CTC") sought to recharacterize some 3,000 emergency credentialed teachers as "Individualized Interns" and fit them, thereby, under the exception to full certification created by ED's regulation, CFJ successfully sued again to void the CTC's rule as having been promulgated in violation of the State APA. *Id.* at RJN44-66.

The notion that California might someday alter its teacher certification requirements to evade the Court's ruling does not defeat standing. "Nothing in [the Supreme Court's] cases requires a party seeking to invoke federal jurisdiction to negate . . . speculative and hypothetical possibilities . . . to demonstrate" redressability. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78 (1978). In fact, even the possibility that a defendant may later reimpose the same legal regime upon compelled reconsideration "does not defeat plaintiffs' standing" under the redressability prong. *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998).

Redressability exists where a court-ordered "change in a legal status" results in a "significant increase in the likelihood that plaintiff would obtain relief." *Utah*,

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granting CFJ's request for attorneys' fees—made solely under a "catalyst" theory—the Superior Court implicitly found CFJ's suit had catalyzed the SBE's decision to abandon its unlawful definition and adopt a new definition under the APA. *Id.* at RJN23-43.

536 U.S. at 464. There is little doubt that that is the case here. The invalidation of ED's regulation affirmatively requires, as a matter of both federal and state law, that California revise its copycat SBE regulations to remove the intern exception.

III. THE PANEL'S RULING WILL IMPROVE EDUCATION IN CALIFORNIA.

The invalidation of ED's regulation will not result in a parade of horribles, but its opposite. As noted, the regulations' voiding does not mean that interns can no longer teach in California or elsewhere, or that groups like TFA will have no role to play. Instead, the invalidation of the regulation will simply, and for the first time, apply rigor and daylight to what has previously lacked both. States and districts will not be at liberty to rely indefinitely on underprepared novice interns and concentrate them in low-income, high minority schools, and they will not be able to mislabel brand new interns as "highly qualified" teachers in communications with parents or reports to the public and Congress. If districts and states use interns to fill shortages or for other purposes, they will, for the first time, be held accountable. They will bear the political consequences of failing to supply fully-credentialed teachers and will have incentives, previously lacking, to provide inducements to attract such teachers and improve teacher preparation pipelines. Tellingly, Defendants (and *Amici* TFA) fail to mention NCLB's critical

transparency and accountability provisions related to highly qualified teachers in attempting to rebut Plaintiffs' standing or otherwise.[8]

In short, the regulation has allowed California not only to evade its obligation to improve the preparedness of its teachers, but to deflect scrutiny from its actions. This is precisely the opposite of what Congress intended. The panel was correct to invalidate the regulation and end its undermining of NCLB's core teacher quality provisions.

[8] *Amici* TFA's attempt to manufacture an injury-in-fact issue by quibbling with Congress's full State certification standard has no place here. Plaintiffs need not prove the correctness of the standard Congress chose, only that they are being denied the benefits of having that standard operate as Congress intended. *See, e.g., Alaska Ctr. for the Environment v. Browner*, 20 F.3d 981 (9th Cir. 1994) (rejecting defendants' standing argument as "untenable, because Congress has determined that the relief plaintiffs seek [there, procedural compliance with the Clean Water Act] is the appropriate means of achieving desired water quality"); *see also Federal Election Comm'n v. Akins,* 524 U.S. 11, 21-22 (1998) (injury-in-fact met where plaintiff denied "information which must be publicly disclosed pursuant to a statute"). (In fact, as the brief of *Amici* Title I Parents demonstrates [*see* Docket 48], there exists ample empirical evidence to support Congress's standard.)

CONCLUSION

ED's submission poses no grounds that warrant rehearing or rehearing *en banc*, and the request should be denied.

Dated: November 15, 2010

Respectfully submitted,

s/ John T. Affeldt
s/ Tara Kini
s/ Jeffrey A. Simes

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Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1

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CERTIFICATE OF SERVICE
Case No. 08-16661

My business address is 131 Steuart Street, Suite 300, San Francisco California 94105-1241 and I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to this action.

I hereby certify that on November 15, 2010, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

1. **PLAINTIFFS'-APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND REHEARING *EN BANC***
2. **PLAINTIFFS'-APPELLANTS' MOTION TO STRIKE TFA ET AL. AMICUS BRIEF, OR, IN THE ALTERNATIVE, ORDER IT CORRECTED**
3. **PLAINTIFFS'-APPELLANTS' REQUEST FOR JUDICIAL NOTICE**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on November 15, 2010, I caused true and correct copies of the above named documents to be served upon the person named below by electronic mail.

Alisa B. Klein
Civil Division, Appellant Staff
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Tel. (202) 514-1597
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I declare under penalty of perjury the foregoing is true and correct, and that I executed this certificate of service in San Francisco, California this 15th day of November 2010.

s/ Tara Kini