

No. 08-17094

**In the United States Court of Appeals
for the Ninth Circuit**

MARIA M. GONZALEZ, et al.,
Plaintiff-Appellants,

v.

STATE OF ARIZONA, et al.,
Defendant-Appellees,

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., et al.,
Plaintiff-Appellants,

v.

STATE OF ARIZONA, et al.,
Defendant-Appellees,

**On Appeal from the United States District Court
for the District of Arizona
Case Nos. CV-06-1268-PHX-ROS and CV06-1362-PCT-JAT**

**BRIEF *AMICUS CURIAE* OF
THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES
IN SUPPORT OF THE GONZALEZ RESPONDENTS' OPPOSITION TO
APPELLEE'S PETITION FOR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the League of Women Voters of the United States hereby states that it has no parent corporation, and no publicly held corporation owns 10% or more of the League's stock.

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INTEREST OF *AMICUS CURIAE*¹

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 150,000 members and supporters, and is organized in more than 850 communities and in every State.

For nearly 90 years, the League has worked to protect every American citizen's right to vote. As part of its mission, the League has been a leader in the effort to remove the unnecessary barriers that too many Americans face in registering to vote and casting a ballot. To that end, the League has strongly supported the enactment and enforcement of the National Voter Registration Act of 1993, which aims to increase the number of eligible citizens who register to vote by providing for uniform, nondiscriminatory voter-registration procedures.

¹ All parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Amicus hereby adopts the statement of the case of the Gonzalez Respondents as to the procedural posture of this case. However, amicus herein provides a statement of the case focused primarily on the history of the National Voter Registration Act and the provisions relevant hereto to demonstrate that the panel reached the correct result and en banc review is not warranted.

In 1993, finding that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation,” 42 U.S.C. § 1973gg(a)(3), and pursuant to its plenary authority under the Elections Clause, Congress enacted the National Voter Registration Act of 1993 (NVRA) to “establish procedures that will increase the number of eligible citizens who register to vote,” *id.* § 1973gg(b)(1). One of the NVRA’s new procedures was a uniform national mail voter-registration application form that all States were required to “accept and use.” *Id.* § 1973gg-4(a)(1). As enacted in 1993, the NVRA vested the Federal Election Commission (“FEC”) with the sole authority to develop this application form (in consultation with the States’ chief election officers). *Id.* § 1973gg-7(a)(2).

Notably, the NVRA also prescribed the application form’s content, setting forth six requirements. *First*, the application form can “require only such identifying information . . . and other information . . . as is necessary to enable the

appropriate State election official to assess the eligibility of the applicant.” *Id.* § 1973gg-7(b)(1). **Second**, the form must specify that U.S. citizenship is an eligibility requirement for voting. *Id.* § 1973gg-7(b)(2)(A); *see* 11 C.F.R. § 8.4(b)(1). **Third**, the form must contain an attestation that the applicant meets all eligibility requirements, including U.S. citizenship. 42 U.S.C. § 1973gg-7(b)(2)(B). **Fourth**, the form must require that the applicant sign under penalty of perjury. *Id.* § 1973gg-7(b)(2)(C). **Fifth**, the form must list the “penalties provided by law for submission of a false voter registration application.” *Id.* §§ 1973gg-6(a)(5)(B), 1973gg-7(b)(4)(i). **Sixth**, the form “may not include any requirement for notarization or other formal authentication.” *Id.* § 1973gg-7(b)(3).

Congress thoroughly debated what information was needed for state election officials to assess whether an applicant was a U.S. citizen. Most Members of Congress thought applicants should be required to attest, under penalty of perjury, that they were U.S. citizens; others wanted to go further, demanding *documentary* proof of citizenship, such as a passport or birth certificate. The Senate Committee was in the former camp. Its report expressed “confiden[ce] that this Act provides sufficient safeguards to prevent noncitizens from registering to vote,” given that (1) every application “must include a statement that sets forth all the requirements for eligibility, including citizenship, and requires that the applicant sign an attestation clause, under penalty of perjury, that the applicant meets those

requirements” and (2) the Act included criminal penalties of up to five years in prison for anyone who falsifies a registration form. S. Rep. No. 103-6, at 11, 37 (1993) [hereinafter “Senate Report”].

The dissenters on the Senate Committee complained that “mail registration under this bill would preclude” a State from requiring documentary “proof of citizenship at the time of registration.” *Id.* at 55 (minority views). On the floor of the Senate, the Committee dissenters sponsored an amendment stating that “[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration.” 139 Cong. Rec. 5094, 5098 (1993). The amendment passed in the Senate, but the House took the opposite position. *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.) [hereinafter “Conference Report”]. The Conference Committee ultimately rejected the Senate amendment, finding that it was “not necessary or consistent with the purposes of this Act” and “could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the [Act’s] mail registration program.” *Id.*

After the bill was reported out of conference, its House opponents moved to recommit the bill to the Committee on House Administration, specifically to direct reinsertion of the Senate amendment permitting States to require documentary proof of citizenship. That motion was defeated, 259 to 164. *See* 139 Cong. Rec.

9219, 9231-32 (1993). Thus, the final version of the NVRA did not include any provision permitting States to require documentary proof of citizenship.

Following the NVRA's enactment, the FEC commenced official notice-and-comment rulemaking proceedings to develop the Federal Form for mail registration. *See* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994). The Federal Form the FEC developed includes a single sheet of cardstock that the applicant can simply fill out, stamp, and mail as a postcard to the appropriate state election official. *See* 11 C.F.R. § 8.5. It does not require applicants to submit any documentation. *See* 11 C.F.R. § 8.5(b).

The Federal Form contains the following attestation:

I have reviewed my state's instructions and I swear/affirm that:

- I am a United States Citizen.
- I meet the eligibility requirements of my state and subscribe to any oath required.
- The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.

See League of Women Voters Amicus Brief Addendum at 29-30.

The Federal Form remained largely unchanged until 2002, when Congress passed the Help America Vote Act ("HAVA"). HAVA transferred responsibility for the Federal Form from the FEC to the newly created Election Assistance

Commission (“EAC”). 42 U.S.C. § 15532. HAVA also required the Form to include the question, “Are you a citizen of the United States of America?” and check-boxes for the applicant to answer that question. *Id.* § 15483(b)(4)(A)(i). The EAC revised the Federal Form to meet these new requirements. No change was made to the NVRA directives that the Form include an attestation of eligibility (including citizenship) and that the applicant sign under penalty of perjury.

SUMMARY OF ARGUMENT

This brief does not address the issues regarding law of the case and law of the circuit, but adopts the analysis of Respondents. Instead, this brief shows that the panel majority correctly concluded that the National Voter Registration Act (NVRA) preempts the registration requirements in Arizona’s Proposition 200 under the Elections Clause.

Contrary to the claims of petitioner and its amici, *see, e.g.*, Brief of American Unity Legal Defense Fund, every tool of statutory interpretation supports the panel’s decision. **First**, the NVRA’s plain text mandates that each State “shall accept” the Federal Form prescribed by the EAC, and expressly provides that the applicant’s attestation, signed under penalty of perjury, punishable by up to five years’ imprisonment, constitutes satisfactory proof of U.S. citizenship. 42 U.S.C. § 1973gg-4(a)(1). **Second**, the NVRA’s purpose — stated directly in the statute’s text — was to replace state laws that harm voter

participation with uniform national procedures in order to increase voter registration. *Third*, Congress rejected an amendment to the NVRA that would have expressly permitted state laws like Proposition 200. *Fourth*, the EAC, exercising authority that Congress delegated to it in the NVRA, has determined that documentary proof of citizenship is not needed with the Federal Form and that Arizona's Proposition 200 therefore is preempted by federal law. Thus, en banc review is not warranted.

I. THE NVRA CLEARLY PREEMPTS AND PROHIBITS ARIZONA'S REFUSAL TO ACCEPT THE FEDERAL FORM.

As the panel recognized, the NVRA mandates that state and local election officials must accept Federal Forms that prove citizenship by way of a check-box, attestation, and signature under penalty of perjury. Because Proposition 200 mandates a conflicting scheme of voter registration, it is preempted under the Elections Clause.

Proposition 200 requires that an Arizona "county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship" and lists the documents that must be submitted to prove citizenship. Ariz. Rev. Stat. § 16-166(F). An applicant's attestation that she is a U.S. citizen, signed under penalty of perjury, is no longer satisfactory evidence of citizenship, in direct conflict with NVRA's mandate. *See id.* § 16-166(F)(1)-(6). Thus, Proposition 200 has rendered it impossible for Arizona's county recorders to

comply with both federal and state law in many cases. Indeed, Proposition 200 caused the rejection of more than 31,500 applications in Arizona, frustrating Congress's goal of "increas[ing] the number of eligible citizens who register to vote." 42 U.S.C. § 1973gg(b)(1).

A. The NVRA's Plain Language Requires Arizona to Accept the Federal Form Prescribed by the EAC.

The panel properly found that the NVRA is clear on its face that the Arizona law cannot stand. The NVRA unambiguously requires that "[e]ach State *shall accept* and use the mail voter registration form prescribed by the [Election Assistance] Commission . . . for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1) (emphasis added); *see id.* § 15532. Arizona law unambiguously requires that Arizona county officials "*shall reject* any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F) (emphasis added). Because Arizona law does not consider the evidence of United States citizenship provided on the Federal Form to be "satisfactory" evidence of citizenship, *see id.*, Arizona officials reject Federal Forms that are not accompanied by additional, documentary evidence.

As the panel majority correctly concluded, "[t]he NVRA mandates that states 'shall accept and use' the Federal Form when applicants register by mail." *Gonzalez v. Arizona*, 624 F. 3d 1162, 1182 (9th Cir. 2010). "The Federal

statutory scheme provides that states may design their own voter registration forms The statutes provide further, however, that *in any event, all states must accept the national registration form.*” *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1214 (S.D. Fla. 2006) (emphasis added). “Congress simply did not allow the states to impose restrictions that would permit denial of an application that otherwise satisfies the federal requirements.” *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1367 (N.D. Ga. 2004), *aff’d*, 408 F.3d 1349 (11th Cir. 2005).

The dissenting opinion is simply wrong when it argues that it is “perfectly accurate” to assume that the NVRA permits a state to “rely exclusively on the federal form or, in the alternative, also develop a state form.” *Gonzalez*, 624 F.3d at 1205 (Kozinski, J., dissenting). Rather, the statute provides that “a State *may* develop and use” its own mail registration form “[i]n *addition to* accepting and using” the Federal Form. 42 U.S.C. § 1973gg-4(a)(2) (emphasis added). Under the statute’s plain language, the State simply does not have the option of developing a state form that conflicts with the requirements set forth in the federal form. Rather, the NVRA mandates that all States must accept and use the Federal Form prescribed by the EAC. 42 U.S.C. § 1973gg-4(a)(1).

Moreover, the panel rightly concluded that the reading of the NVRA suggested by the dissent would make consultation with the EAC an “empty

exercise.” *Gonzalez*, 624 F.3d at 1188. The NVRA delegated to the EAC all authority for developing the Federal Form and directed the EAC to “provide information to the States with respect to [their] responsibilities” under the Act. *See* 42 U.S.C. §§ 1973gg-7(a)(1), (2), (4). Indeed, the chief election officers of each State were to serve only in a consultative capacity while the EAC developed the Federal Form. *See id.* § 1973gg-7(a)(2). Thus, under the statute’s plain text, the Arizona Secretary of State has no authority to set conditions for Arizona’s acceptance of the Federal Form. Rather, the EAC has determined that an applicant’s attestation of eligibility, affirmative answer to the question “Are you a citizen of the United States of America?” and signature under penalty of perjury on the Federal Form are the “*only* . . . information . . . necessary” for election officials to determine citizenship. *Id.* (emphasis added). With respect to the Federal Form, Arizona is not free to amend the EAC’s determinations as to the “only” information necessary, and the majority correctly concluded that Proposition 200 “falls under the umbrella of laws displaced” by the NVRA. *Gonzalez*, 624 F.3d at 1182.

B. The NVRA’s Language Must Be Read in Light of Its Stated Purpose to Increase Registration of Eligible Voters.

The panel majority correctly concluded that the clear language of the statute preempted Proposition 200. *See Gonzalez*, 624 F.3d at 1183 & n.15. However, to the extent the Court finds the NVRA ambiguous, it may consult the legislative

history of the statute, as well as the federal agencies' interpretations of it. *Id.* at n.15. "It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose." *Spilker v. Shayne Labs., Inc.*, 520 F.2d 523, 525 (9th Cir. 1975).

Here, the dominant legislative purpose is expressly stated in the statute itself. *See* 42 U.S.C. § 1973gg (section titled "Findings and purposes"). In the NVRA, Congress expressly found that "the right of citizens of the United States to vote is a fundamental right" and that it was the "duty of the Federal, State, and local governments to promote the exercise of that right." 42 U.S.C. § 1973gg(a)(1)-(2). Congress further found that "discriminatory and unfair [state] registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." *Id.* § 1973gg(a)(3). Thus, the purposes of the NVRA were "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and "to make it possible for Federal, State, and local governments to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." *Id.* § 1973gg(b)(1)-(2).

Arizona's requirement of documentary proof of citizenship has already resulted in the rejection of more than 31,500 voter-registration applications. Clearly, Arizona's determination that it will not accept the Federal Form to register

eligible citizens to vote unless it is accompanied by documentary proof of citizenship is frustrating the NVRA's stated purpose of "establish[ing] procedures that will *increase* the number of eligible citizens who register to vote." 42 U.S.C. § 1973gg(b)(1) (emphasis added). That Proposition 200 actively impedes the accomplishment of Congress's goal to enfranchise eligible citizens is of paramount importance here because the "purpose of Congress is the ultimate touchstone in every preemption case." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citations and internal quotation marks omitted).

C. The NVRA's Legislative History Indisputably Establishes that Congress Rejected the Very Requirement Arizona Has Imposed.

"Although the Supreme Court has advised that recourse to legislative history is not necessary where a statute's plain meaning is clear, the Court does suggest that [an appellate court] review the legislative history to ensure that there is no clearly contrary congressional intent." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 884 (9th Cir. 2001) (en banc) (citations omitted). Fortunately, "[t]his happens to be a case in which the legislative history is pellucidly clear." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 555 U.S. 81, 106 (2007) (Stevens, J., concurring). Congress addressed the precise issue facing this Court when it considered and rejected an amendment to the NVRA that expressly would have permitted States to require documentary evidence of citizenship at the time of registration.

Whether to permit States to require documentary proof of citizenship was a topic of fierce debate during congressional deliberations on the NVRA. The House bill contained no such provision, but the Senate passed an amendment stating: “Nothing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration.” 139 Cong. Rec. at 5098.

In reconciling the House and Senate bills, the Conference Committee explicitly rejected this amendment, noting that it “*is not necessary or consistent with the purposes of this Act,*” and expressing “concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act.” Conference Report at 23 (emphasis added).

The Court should recognize this Conference Report “as the most reliable evidence of congressional intent because it represents the final statement of the terms agreed to by both houses.” *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996) (internal quotation marks omitted); *see In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 977 (9th Cir. 1999); *see also Garcia v. United States*, 469 U.S. 70, 76 (1984). Here, the conferees found that allowing States to require documentary proof of citizenship was inconsistent with the

NVRA's purpose and could "seriously interfere" with the mail registration procedures established by the Act. Conference Report at 23.

In addition, after the NVRA was reported out of conference, the entire House voted not to include the amendment in the final bill in response to attempts to recommit the bill to the Committee on House Administration to reinsert the amendment. The motion was defeated by a vote of 259 to 164. *See* 139 Cong. Rec. at 9231-32. Thus, the final version of the NVRA passed by both Houses of Congress did not include any provision permitting States to require documentary proof of citizenship. The bill's opponents lamented that "mail registration under this bill would preclude" a State from requiring documentary "proof of citizenship at the time of registration." Senate Report at 55 (minority views).

The legislative history could not be clearer that Congress did not intend to permit States to require documentary proof of citizenship. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quotation marks omitted). "To read language into a statute that Congress has considered and rejected 'is not a construction of [the] statute, but, in effect an enlargement of it by the court To supply omissions transcends the judicial function.'" *DeLeon v. Ashcroft*, 105 F. App'x 176, 180 (9th Cir. 2004) (quoting *Iselin v. United States*, 270 U.S. 245, 251

(1926) (alterations in original)). The dissent is thus wrong when it says that the NVRA “can plausibly be read as authorizing the type of ‘identifying information’ that Arizona requires,” *Gonzalez*, 624 F.3d at 1207 (Kozinski, J. dissenting), for Congress clearly did not intend to permit states to require the documentary proof as evidenced by its ultimate rejection of the Senate amendment.

In sum, the fact that Congress considered and rejected an amendment to the NVRA that would have permitted precisely the state law challenged here — not only in the Conference Report (passed by both houses of Congress and signed by the President), but also in a separate vote on this issue in the House before final passage— makes it indisputable that Arizona is prohibited from applying Proposition 200’s citizenship-documentation requirement to the Federal Form. Rarely is there a case in which the legislative history is so “pellucidly clear.”

D. The EAC’s Determinations Regarding Arizona’s Proposition 200 Deserve Deference.

Proposition 200 is preempted not only by the NVRA but also by the federal regulations implementing the NVRA and establishing the Federal Form’s format and contents, 11 C.F.R. §§ 8.1-8.6. It is well established that agency views on the preemptive effects of regulations are entitled to deference. “The agency is likely to have a thorough understanding of its own regulation and its objectives and is ‘uniquely qualified’ to comprehend the likely impact of state requirements.” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000) (quoting *Medtronic v.*

Lohr, 518 U.S. 470, 496 (1996)). “[I]f the agency’s choice to pre-empt ‘represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, [courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.’” *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)); see *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) (considering agency understanding of preemptive effect of regulations “dispositive”).

Here, as the agency charged with developing the Federal Form, the EAC is uniquely qualified to opine on the NVRA’s preemptive effect on Proposition 200 and it has found that Proposition 200 is indeed preempted. When Arizona’s Secretary of State asked the EAC to apply Proposition 200’s documentation requirement to the Federal Form, the EAC’s Executive Director replied that Proposition 200 was “preempted by Federal law” and that Arizona “may not mandate additional registration procedures that condition the acceptance of the Federal Form.” See *League of Women Voters’ Amicus Brief Addendum* at 33. The EAC further explained that “[n]o state may condition acceptance of the Federal Form upon receipt of additional proof.” *Id.* at 32-33. Regardless of whether this letter ruling carries the force of law, the EAC’s determination

“certainly may influence courts facing questions the agencies have already answered.” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

But the EAC’s formal regulations clearly do carry the force of law. *See, e.g., Watson Land Co. v. Commissioner*, 799 F.2d 571, 579 (9th Cir. 1986) (“[L]egislative regulations, if consistent with statutory authorization, adopted pursuant to proper procedure, and reasonable, have the force of law.”). Through its regulations at 11 C.F.R. § 8.4, the Commission determined that an applicant’s attestation of eligibility (including U.S. citizenship), affirmative answer to the question “Are you a citizen of the United States of America?” and signature under penalty of perjury are the “only [information] . . . necessary” on the Federal Form to allow state officials to determine an applicant’s citizenship. 42 U.S.C. § 1973gg-7(b)(1); *see id.* § 15483(b)(4)(A)(i). Indeed, during the rulemaking proceeding to develop the Federal Form, the Commission specifically found that “[t]he issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury.” 59 Fed. Reg. at 32,316; *see also id.* at 32,311 (describing extensive notice and comment during the Commission’s rulemaking proceedings).

Amicus does not contest that additional, documentary proof of citizenship might be helpful to state officials in assessing some applicants’ eligibility to vote. But Congress’s clear mandate to the Commission was to require on the Federal

Form “*only* such . . . information . . . as is *necessary*,” not “all” or “any” such information as “might be helpful” to state election officials. *Compare* 42 U.S.C. § 1973gg-7(b) (emphasis added) *with* 11 C.F.R. § 8.4; *see also* 59 Fed. Reg. at 32,312 (“The Commission has determined that the following information items are necessary to assess the eligibility of the applicant or to administer voter registration or other parts of the election process, and thus has included them on the national mail voter registration form as specified at 11 CFR 8.4.”). The Commission’s determination that documentary proof of citizenship is not necessary to enable state election officials to assess voter eligibility is certainly a permissible construction of the statute, especially since the NVRA expressly committed to the federal agency’s discretion the decision as to what information is or is not necessary. Federal courts accord *Chevron* deference “because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996).

Under the NVRA, the EAC is the sole agency charged with promulgating regulations to develop a national voter-registration form. *See* 42 U.S.C. § 1973gg-7(a)(2). It did so in the rulemaking that resulted in 11 C.F.R. §§ 8.1 to 8.6. These regulations do not include requests for documentary proof of citizenship. Because

the EAC's construction of the NVRA's requirements is not only permissible, but eminently reasonable, this Court must defer to it.

CONCLUSION

This Court should deny the petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains 4,200 words or less.

February 10, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following:

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