No. 12-15498

In The
**United States Court of Appeals**
For The Ninth Circuit

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RICHARD ENOS, et al.;
*Plaintiffs-Appellants*,

v.

ERIC J. HOLDER, JR., et al.;
*Defendants-Appellees*.

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On Appeal From The United States District Court
For The Northern District Of California

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# BRIEF OF CALIFORNIA RIFLE AND PISTOL ASSOCIATION AND SELF DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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## CORPORATE DISCLOSURE STATEMENT

California Rifle and Pistol Association has no parent corporations. Because it has no stock, no publicly held company owns 10% or more of its stock.

Self Defense Foundation has no parent corporations. Because it has no stock, no publicly held company owns 10% or more of its stock.

Date: December 26, 2014

Respectfully Submitted,

/s C. D. Michel
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## IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rules of Appellate Procedure rule 29(c)(4) and Ninth Circuit Rule 29-2, California Rifle and Pistol Association and Self Defense Foundation, as amici curiae, respectfully submit this amicus brief in support of Appellants.

Founded in 1875, California Rifle and Pistol Association ("CRPA") is a non-profit organization that seeks to defend Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in litigation challenging unconstitutional or illegal gun control laws. And it works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting the shooting sports, providing education, training, and organized competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, the general public, and loving parents.

Self Defense Foundation ("SDF") is a non-profit 501(c)(3) formed in 2014 whose purpose is to advocate and provide education regarding the law and practice of self-defense. SDF provides law-abiding individuals with the tools necessary for the safe, ethical, and legal use of firearms in self-defense, and it seeks to challenge

laws or policies that prohibit or hinder an individual's right to engage in lawful self-defense.

Amici offer their unique experience, knowledge, and perspective to aid the Court in the proper resolution of this case. They have at their service preeminent Second Amendment law scholars, as well as reputable firearms and self-defense experts and lawyers with decades of experience in firearms litigation. As such, amici respectfully submit that they are uniquely situated to bring an important perspective to the resolution of the issues raised in this appeal.

## RULE 29 STATEMENT

Pursuant to Federal Rule of Appellate Procedure rule 29(c)(5), amici curiae attest that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission.

## INTRODUCTION

In 1996, Congress enacted legislation intended to restore federal firearm rights for persons convicted of a misdemeanor crime of domestic violence ("MCDV"), so long as the state where the prohibiting offense occurred has also reinstated those individuals' firearm rights. Pursuant to that federal law, a state may revive one's Second Amendment rights vis-á-vis an expungement or a pardon,

or through a general restoration of core civil rights stripped as result of the conviction. The State of California has opted to deny firearm rights to all MCDV offenders for ten years, and it has chosen to restore those civil rights for each offender upon conclusion of that ten-year period. No other civil rights are lost as a result of these offenses. California reinstates firearm rights for all MCDV offenders in this manner—it does not restore them via expungement or pardon.

The controversy in this case stems from the federal government's current refusal to recognize California's chosen means of restoring firearm rights. As a direct consequence, hundreds of thousands of citizens are forever barred from owning firearms—despite crystal clear intent by both Congress and the California legislature to restore firearm rights to these individuals. The federal government's refusal hinges on a mistaken belief that Second Amendment is not among the core civil rights that, once restored under state law, trigger the rehabilitation of firearm rights under federal law. The panel's brief memorandum opinion sanctioned this view, despite relying largely on case law decided prior to the Supreme Court's historic pronouncements that the Second Amendment protects an individual—and indeed fundamental—civil right. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791 (2010). To date, the courts have not yet considered whether, in the wake of these watershed decisions,

Second Amendment rights may be rightfully excluded from the core rights previously associated with civil rights restorations.

En banc review is necessary to properly consider and decide this important question, particularly given the far-reaching impacts it has on the lifetime exercise of a fundamental right by hundreds of thousands of Americans. Review by the full Court is also warranted to determine whether an individual has his civil rights restored in circumstances where the only right or rights that were removed are later reinstated.

If allowed to stand, the federal government's rejection of California's rights restoration procedures will continue to undermine Congress' goal of restoring firearm rights under federal law once the prohibiting state restores those rights. And it will promote a puzzling dichotomy, whereby states are authorized reinstate firearms rights by an expungement after any period of time it chooses; all the while individuals who have had their civil Second Amendment rights restored by the state after a mandatory ten-year prohibition would remain forever barred.

# ARGUMENT

## I. CALIFORNIA LAW PROVIDES A MECHANISM FOR THE RESTORATION OF FIREARM RIGHTS FOR THOSE WITH MISDEMEANOR DOMESTIC VIOLENCE CONVICTIONS, AND THE FEDERAL GOVERNMENT HAS NO BASIS TO REJECT IT

In 1996, Congress enacted the "Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence," often referred to as the "Lautenberg Amendment" after its sponsor, Senator Frank Lautenberg. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). Under the Lautenberg Amendment, an individual "shall not be considered to have been convicted of [an MCDV] . . . if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(33)(B)(ii).

The Lautenberg Amendment was recently referred to by Justice Ginsberg as a "less-than-meticulous[ly]" drafted statute. *United States v. Hayes*, 555 U.S. 415, 423 (2009). Indeed, the Amendment has been the source of much confusion since its enactment nearly 20 years ago. But despite the statute's use of imprecise language, Congress plainly intended for those with MCDV convictions to regain

their firearm rights if the state where the prohibiting offense occurred determines that the individual is fit to own firearms and consequently restores that individual's firearm rights. By the Amendment's express terms, states may restore firearm rights following MCDV convictions in one of three ways: (1) an expungement or set aside; (2) a pardon; or (3) the restoration of the individual's civil rights that were lost as a result of the offense. 18 U.S.C. § 921(a)(33)(B)(ii).

The State of California imposes a relatively harsh penalty for MCDV offenders—the mandatory loss of fundamental Second Amendment rights for a period of ten years, regardless of the circumstances. California has never authorized the restoration of firearm rights within this ten year period, or anytime thereafter, pursuant to an expungement or pardon. While California offers expungement to misdemeanants who committed their offenses before the age of 18, Cal. Welf. & Inst. Code § 781, it is unavailable for any other misdemeanant. Moreover, expungement offers no relief for firearm prohibitions. Cal. Penal Code § 1203.4(a)(2). And while California technically authorizes individuals to petition the governor for a pardon for any criminal conviction ten or more years after the

completion of one's sentence, California has never restored firearm rights to MCDV offenders in this manner.[1]

Instead, California has opted to rehabilitate firearm rights for MCDV offenders by restoring their Second Amendment rights (the only civil rights generally lost following an MCDV conviction in California) following a ten-year mandatory prohibition. California thus recognizes these individuals' renewed rights to own and possess firearms by way of a mechanism for general civil rights restoration.

California's chosen path for restoring firearm rights complies with the plain terms of the Lautenberg Amendment. Of course, the state could have opted to restore rights on a case-by-case basis through pardon or expungement, imposing shorter firearm restrictions for some offenders, and longer restrictions for others. But California instead opted to impose a ten-year prohibition for all MCDV offenders. And, as Lautenberg authorizes, it opted to restore these individuals' Second Amendment civil rights after a period of ten years.

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[1] California's pardon process was designed for individuals with felony histories and is only applied to misdemeanor convictions under very unusual circumstances. Letter from Timothy Baker, Investigation Support Manager, State of California - Dep't of Corrections, Bd. of Parole Hearings, Investigations Div. (May 8, 2014) (attached as Exhibit A).

The federal government has no basis to reject California's restoration of these rights after congress authorized it to do precisely that. *See* Part II., *infra*. As Petitioners explain, Congress expressly stated its intent to defer to states on firearm regulations where, as here, federal laws act concurrently with, and in fact rely upon state law. Appellants' Pet. Reh'g En Banc at 16. The federal government's recent interpretation of rights procedures does not, and cannot, override the state's intended means of restoring firearms rights.

The three-judge panel nonetheless sided with the government in this case, taking issue with California's preferred means of restoring firearm rights for MCDV offenders because "Appellants' civil rights (the right to vote, to sit as a juror, or to hold public office) were never lost under California law." *Enos v. Holder*, No. 12-15498, slip op. at 3 (9th Cir. Oct. 16, 2014) (*citing United States v. Brailey*, 408 F.3d 609, 611-612 (9th Cir. 2005)) Thus, it concluded, "Appellants' rights were not restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii)." *Id.* (citing *United States v. Chovan*, 735 F.3d 1127, 1131-33 (9th Cir. 2013), and *Brailey*, 408 F.3d at 611-13). But the cases the panel relied upon do not compel a conclusion that an individual has not had his or her rights restored under Lautenberg if the state restores the one fundamental civil right that *was* lost as a result of a conviction.

In *Brailey*, this Court concluded that Utah's statutory restoration of firearm rights for MCDV offenders did not fall within with the Lautenberg Amendment exception because Brailey had not lost, and therefore could not have restored, any core civil rights. 408 F.3d at 611-13. That decision was rendered in 2005, before the Supreme Court issued it's landmark rulings in *Heller* (2008) and *McDonald* (2010), confirming that the Second Amendment enshrines an individual, civil right that is "fundamental to *our* scheme of ordered liberty." *Heller*, 554 U.S. at 595; *McDonald*, 767, 778. Accordingly, this Court did not consider in *Brailey* whether an individual who has been stripped of his core right to keep and bear arms for self-defense has lost civil rights under federal law. Likewise, this Court did not consider whether an individual who loses one civil right, but retains others, qualifies as having his rights restored when the only rights that have been stripped are restored by the State.

That said, after *Heller*, a panel of this Court did conclude in *Chovan* that an MCDV offender did not have his civil rights restored under Lautenberg because he never lost the rights to vote, sit on a jury, or hold public office. *Chovan*, 735 F.3d at 1133. That small portion of the opinion, however, focused narrowly on Chovan's argument that the federal government's interpretation created *equal protection* problems by permitting individuals who committed graver offenses (and

thus lost more rights) to regain their firearm rights than those who did not. *Id.* at 1131-33. But regardless of whether such seemingly unjust circumstances rise to the level of an equal protection violation, the question remains: if an individual is stripped of his or her fundamental Second Amendment rights after *Heller*, has he or she lost a core civil right for purposes of the civil rights restoration exception? Without discussion, the *Chovan* panel simply deferred to pre-*Heller* case law holding that an individual has not been deprived of those civil rights if the rights to vote, to sit on a jury, or to hold public office had not been lost. *Id.*

The question of whether individuals have lost any civil rights after being denied their fundamental rights to keep and bear arms for self-defense in *Heller*'s wake is a critical question, one that is worthy of careful consideration by the en banc Court. Of course, Amici believe it a rather dubious proposition that the right to keep and bear arms ought to be excluded from the list of "core" civil rights, including the right to vote, sit on a jury, and hold public office, in light of the Supreme Court's emphatic description of the importance of Second Amendment liberties in *Heller* and *McDonald*. But at minimum, the question warrants closer examination than was afforded by the panels in this case and in *Chovan*.

Amici also note that while a number of circuits have concluded that civil rights are not restored when some, but not all, civil rights are restored,[2] whether civil rights are restored when the *only* right that was lost *is* restored remains an open question. The First Circuit expressly recognized this point in *United States v. Caron*, 77 F3d 1, 6 (1st Cir. 1996). After finding that a felon's civil rights were not restored because he was still barred from sitting on a jury, the court carefully disclaimed:

> We leave till another day the question whether, when one civil right is restored but two were never taken away, the same answer would prevail, together with the basic question whether the literal application of "restore" to a case where no civil rights were taken away is so lacking in sense as to command the same result.

*Id*.

The notion that one should be deemed to have civil rights "restored" when he or she has been made whole by rehabilitating the only right or rights that were revoked also falls in line with Supreme Court precedent. In *United States v. Logan*, 552 U.S. 23 (2007), another pre-*Helle*r decision, the High Court confirmed that an individual who has lost *no* civil rights has not had civil rights restored. *Id.* at 23.

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[2] *See, e.g.*, *United States v. Horodner*, 91 F.3d 1317, 1319 (9th Cir. 1996); *United States v. Flower*, 29 F.3d 530, 536 (10th Cir. 1994); *United States v. Essig*, 10 F.3d 968, 976 (3d Cir. 1993); *United States v. Driscoll*, 970 F.2d 1472, 1478 (6th Cir. 1992). In each of these cases, the court concluded that civil rights were not restored where the individual was still precluded from serving on a jury.

But nothing in *Logan* suggests that an individual must lose *multiple* civil rights to have his or her civil rights restored. Instead, the Supreme Court framed the issue in that case as follows:

> Does the "civil rights restored" exemption contained in § 921(a)(20) encompass, and therefore remove from ACCA's reach, state-court convictions that at no time deprived the offender of civil rights? We hold that the § 921(a)(20) exemption provision does not cover the case of an offender who *retained civil rights* at all times, and whose legal status, post conviction, *remained in all respects unaltered by any state dispensation*.

*Id.* at 26. (emphasis added).

En banc review is thus warranted to properly consider, post-*Heller*, whether an individual's civil rights are restored where he or she is stripped solely of Second Amendment civil rights and subsequently has those rights reinstated. Resolution of this issue is particularly critical in this case, lest hundreds of thousands of individuals will be forever barred from owning firearms, irrespective of California's intention to restore those individuals' Second Amendment rights, and notwithstanding Congress' express intent to allow states to do so.

## II. REJECTING CALIFORNIA'S CHOICE TO RESTORE THE FIREARMS RIGHTS OF THOSE CONVICTED OF AN MCDV AFTER TEN YEARS DOES NOT FURTHER THE CONGRESSIONAL INTENT OF THE LAUTENBERG AMENDMENT AND INSTEAD LEADS TO ABSURD AND UNJUST RESULTS

Appellees indicate, and several courts have accepted, that the Lautenberg Amendment was adopted to close a perceived "loophole" in federal felon-in-

possession laws because Congress recognized that " ' "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies," ' " but are convicted of just misdemeanors. Appellees' Br. 7, 24, 42 (quoting *Hayes*, 555 U.S. at 426 (quoting 104 Cong. Rec. 5241-5243 (1996) (statement of Sen. Frank R. Lautenberg), *available at* http://thomas.loc.gov/cgi-bin/query/ D?r104:35:./temp/~r1044iEqZR::)).[3] Ignoring the infinitely diverse facts behind all convictions, these statements reveal a belief that most persons convicted of MCDVs *actually* committed felonies and so pose

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[3] "Congress" recognized no such thing. Only a single Senator—Senator Lautenberg—articulated this view. "[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). Tellingly, the Justice Department's own Office of Legal Counsel has cautioned against use of Senator Lautenberg's explanations for introducing the Amendment. *See When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence"*, 31 Op. O.L.C. 1, 10 n.4 (2007) ("Reliance on a floor statement in such a case would give Members of Congress 'both the power and incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.") (quoting *Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 568 (2005)).

In any event, Appellees offer only Senator Lautenberg's statements from the floor and some statistics about intimate partner homicide cited by other circuits in similar cases to establish Congress's intent behind enacting the Lautenberg Amendment. Appellees' Br. 24-25. They have not shown that Congress considered, or sought to address, the more pertinent question of recidivism among offenders who commit misdemeanor crimes of domestic violence. Indeed, they have made precious little effort to establish that the law is sufficiently tailored to the government's purported interest under *any* level of heightened scrutiny that Appellees' constitutional claims would require.

the same threat to society that felons do.[4] To combat that threat, Appellees suggest, Congress passed the Lautenberg Amendment to reduce intimate-partner violence by ensuring that all who have demonstrated a propensity for such violence will have their access to firearms restricted unless and until their state of residence determines they are no longer a danger. Appellees' Br. 24-25, 48-50.

Though little in the congressional record supports these claims regarding the intent of the law, *see supra* note 3, interpreting it to exclude California's restoration of firearms rights from the civil rights restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii) does not further that goal. California's restoration of firearm rights after ten years for all domestic violence misdemeanants, regardless of the facts of their conviction and their propensity for future violence, is onerous to be sure. But it represents California's clear policy choice in favor of restoring those rights for this class of offenders at a period sufficiently distant from their offenses, so long as they commit no other disqualifying crime. In other words, California has concluded that ten years after a conviction, MCDV offenders no longer pose a threat sufficient to deny them of their firearms rights. Because the state has made that determination, the federal government cannot credibly assert

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[4] Both are dangerous assumptions in a nation that cherishes the presumption of innocence as among the most fundamental guarantees of due process. *See In re Winship*, 397 U.S. 358 (1970).

that continuing to deprive these misdemeanants of their rights furthers any government interest, compelling or otherwise. Further, rejecting California's choice to restore rights for all domestic violence misdemeanants ten years post-conviction bucks the express intent of the law which, *by its terms*, leaves it to states to decide when a person with an MCDV conviction can regain his or her firearm rights. 18 U.S.C. § 921(a)(33)(B)(ii).[5]

Rather than further the legislative intent, this leads to unjust and wholly absurd results. An individual does not generally lose his or her traditional civil rights as a result of a misdemeanor conviction in California (or in most jurisdictions), and so until *Heller*, there were no traditional civil rights to "restore." *See Logan*, 552 U.S. at 26 (holding that a person who had been convicted of a crime which did not result in the revocation of any civil right could not be deemed as having those rights restored). So depending primarily on the jurisdiction—and not the offense or the offender—a person may be forever denied the restoration of firearm rights via the restoration of civil rights exception. More absurd, persons

[5] Again, it is no answer to say that other avenues for rights restoration exist pursuant to 18 U.S.C. § 921(a)(33)(B)(ii) (i.e., expungement, set aside, pardon). In most jurisdictions, including California, these procedures for forgiveness are either unavailable or applicable only to felonies, not to misdemeanors—a fact which underscores the fact that extending disarmament to misdemeanants is, at minimum, problematic.

convicted of crimes so minor that the state will not revoke their rights to vote, serve on a jury, or hold public office may be disarmed for a lifetime, while those convicted of crimes so serious that the state will revoke their rights may have all those rights, including the right to arms, restored.[6]

What's more, California could change its laws and policies at any time, authorizing set aside or expungement after five years or increasing the availability of pardons for misdemeanor crimes. Appellees would be bound to accept these choices for purposes of 18 U.S.C. § 921(a)(33)(B)(ii), but California's more-burdensome firearm rights restoration after ten years would remain excluded, resulting in, essentially, a lifetime federal ban.

Whether one considers these results unjust, odd, or downright absurd, one thing is certain. Such results were *not* what Congress intended when it enacted the Lautenberg Amendment. Because Appellees' policy and practice of rejecting

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[6] Amicus attaches for the Court's reference, two comprehensive, state-by-state surveys summarizing rights restoration mechanisms in each jurisdiction. Margaret C. Love, NACDL Restoration of Rights Resource Project, *Chart #1 - Loss and Restoration of Civil Rights and Firearms Privileges* (Aug. 2014), *available at* http://ccresourcecenter.org/wp-content/uploads/2014/12/Loss_and_Restoration_of_Civil_Rights_and_Firearms_Privileges.pdf (reproduced here as Exhibit B); Margaret C. Love, NACDL Restoration of Rights Resource Project, *Chart #2 - State Law Relief from Federal Firearms Act Disabilities* (Aug. 2014), *available at* http://ccresourcecenter.org/wp-content/uploads/2014/12/State_Law_Relief_from_Federal_Firearms_Act_Disabilities.pdf (reproduced here as Exhibit C).

California's determination that domestic violence misdemeanants should recover their firearm rights after ten years leads to such irrational results, the interpretation must be rejected. For it is a settled principle of statutory construction that "statutory interpretations which would produce absurd results are to be avoided." *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004). This maxim holds true even when a natural reading of the law at issue would yield an irrational result the legislature did not intend. *Az. State Bd. for Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) (citing *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Serv., Inc.*, 435 F.3d 1140, 1146 (9th Cir.2006) (court replaced the word "less" with "more" to achieve rational results)); *see also Aponte v. Gomez*, 993 F.2d 705, 708 (9th Cir. 1993) ("a statute need not be given its literal meaning if doing so renders an absurd result").

## CONCLUSION

There are issues of exceptional importance at stake here as hundreds of thousands of Americans have been denied their fundamental, civil firearm rights for misdemeanor crimes under the Lautenberg Amendment. And they have little or no practical hope of ever having them restored even though the law expressly provides for such. This case provides a perfect vehicle for the entire Court to consider the important issue of whether the rights protected by the Second

Amendment are considered core, civil rights for purposes of a general civil rights restoration clause alongside the rights to vote, serve on juries, and run for office. For the foregoing reasons, Amici CRPA and SDF urge this Court to rehear this matter en banc.

Date: December 26, 2014

Respectfully submitted,
**MICHEL & ASSOCIATES, P.C.**

/s/ C.D. Michel

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Ninth Circuit Rule 29-2 because it contains 4013 words. I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word Perfect X5 in 14-point Times New Roman font.

Date: December 26, 2014

/s/ C.D. Michel
C.D. Michel
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## CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2014, I served the attached BRIEF OF CALIFORNIA RIFLE AND PISTOL ASSOCIATION AND SELF DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC by electronically filing it with the court's ECF/CM system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: December 26, 2014

/s/ C.D. Michel
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