Case Number 11-16255

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADAM RICHARDS, et al.,

Plaintiffs-Appellants,

vs.

ED PRIETO; COUNTY OF YOLO,

Defendants-Appellees.

On Appeal From:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Case No. 2:09-CV-01235-MCE-DAD
Honorable Morrison C. England, Jr.

RESPONSE TO PETITION FOR FULL COURT REHEARING EN BANC

JOHN A. WHITESIDES, SBN 125611
SERENA M. WARNER, SBN 264799
ANGELO, KILDAY & KILDUFF, LLP
601 University Avenue, Suite 150
Sacramento, CA 95825
Telephone: (916) 564-6100
Facsimile: (916) 564-6263

Attorneys for Defendants-Appellees
ED PRIETO and COUNTY OF YOLO

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I. OVERVIEW OF PETITIONS

The petitions assert the *en banc* majority decided a question not presented to that court – whether the Second Amendment encompasses concealed carrying of firearms in public places – rather than the broader actual issue of the right to some manner of carry beyond one's residence the parties actually litigated. Per Plaintiffs, a permit to carry a concealed weapon is merely the *remedy* they seek for violation of their general right to public carry.

Unquestionably, all Plaintiffs consistently *argued* the legal theory that a lack of open carry ability under state law spawns a right to concealed carry. But the *Richards* Plaintiffs also argued that concealed carry *directly* falls within the Second Amendment. More importantly, and irrespective of what arguments their attorneys advanced, because: (a) no plaintiff in *Richards* or *Peruta* either was arrested for openly carrying a firearm in public or (b) facially challenged the constitutionality of California's statutory restrictions on open carry; and (c) sheriffs in Yolo and San Diego counties lack statutory authority to grant exceptions from open carry restrictions; Plaintiffs' suits *necessarily* limited themselves to whether the Second Amendment compelled issuance of a concealed carry permit. The *en*

banc court decided that concealed carry question because it was the only factually and procedurally *ripe* matter before it.

Moreover, both these appeals arose from cross-motions for summary judgment. Sheriff Prieto's motion successfully asserted that concealed public carry falls outside the Second Amendment. He and the *Richards* Plaintiffs continued to debate this issue through the *en banc* oral argument. Thus *Richards* directly put before the *en banc* court the question it ultimately decided. By that decision, the court implicitly rejected Plaintiffs' argument the Second Amendment protects concealed carry wherever a state substantially burdens the putative right to open carry, and explicitly declined to address whether the Second Amendment protects open carry in urban public areas or if California law substantially burdens any such right. *See generally Webster v. Reproductive Health Services,* 492 U.S. 490, 526 (1989) (conc, op. of J. O'Connor – "Quite simply, '[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case,'" quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)).

Thus the *en banc* opinion's narrow scope mirrors the parties' factual positions pre-suit, the Plaintiffs' strategic decisions to name solely the Sheriffs as defendants and not to directly challenge open carry laws, and Sheriff Prieto's legal defense to liability in the district court.

II. THE PROCEEDINGS' HISTORY SHOWS THE *EN BANC* COURT DECIDED A QUESTION PROPERLY BEFORE IT

A. THE DISTRICT COURTS

In the district courts, the sole defendants were the counties and sheriffs. *Peruta v. County of San Diego,* 758 F.Supp.2d 1106 (S.D. Cal. 2010); *Richards v. County of Yolo,* 821 F.Supp.2d 1169 and 1172, fn. 2 (E.D. Cal. 2011) (noting that the State was not a party). The *Richards* complaint sought a declaration that various portions of California's concealed carry statute were unconstitutional both on its face and as applied to those plaintiffs. ER Vol. II, 71.[1] The *Peruta* plaintiffs pursued a similar, though more local, course. *See* 758 F.Supp.2d at 1115, fn. 7 ("Plaintiffs contend they are challenging only

[1] Accordingly, that many of the complaint's other allegations and prayer portions were vague about the manner of carry lacks procedural significance, especially in light of the Plaintiffs' subsequent disavowal of a desire to open carry.

the Defendant's policy of issuing concealed weapons licenses, both as applied and on its face").

In each case, the parties brought cross-motions for summary judgment. *Richards*, 821 F.Supp.2d at 1171; *Peruta*, 758 F.Supp.2d at 1109. Each district judge's decision stated that the dispute arose from the sheriff's denial of those plaintiffs' concealed carry permit applications. *Peruta*, at 1109; *Richards*, at 1173. In *Richards*, Sheriff Prieto's motion asserted concealed public carry did not qualify as a constitutional right. *See Richards*, at 1174 (describing Sheriff Prieto's position as "the Second Amendment has never been interpreted as granting citizens the right to carry a concealed weapon in public").[2]

Because all Plaintiffs asserted California law banned effective (i.e., loaded) open carry as the premise for their arguments the Sheriffs' policies resulted in a *de facto* prohibition on all public carry, each district court discussed the availability of open carry in public places. Neither decision indicated any Plaintiff directly challenged

[2] In *Peruta*, Sheriff Gore unsuccessfully made the same argument via Rule 12(b) motion. *See* 758 F.Supp.2d at 1114 ("in its order denying Defendant's motion to dismiss, this Court emphasized that not all concealed weapons bans are presumptively lawful").

California's statutory restrictions on open carry; rather *Peruta* confirmed the absence of such a challenge. *Id*. at 1114 ("Plaintiffs have elected not to challenge section 12031").

Although both district courts held for the Defendants without deciding whether (or where) the Second Amendment pertains outside one's residential premises, they diverged somewhat in their actual rulings. *Peruta* declined to categorically pronounce concealed public carry as outside the Second Amendment. 758 F.Supp.2d at 1114. In contrast, the *Richards* court expressly concluded that "the Second Amendment does not create a fundamental right to carry a concealed weapon in public." 821 F.Supp.2d at 1174.

B. THE PANEL APPEALS

The *Richards* plaintiffs' opening brief expressly described the issue presented as whether Sheriff Prieto could condition issuance of a concealed carry permit on a discretionary assessment of need, and confirmed the district court had decided that issue. Dkt. # 11 at 13–14 [pp. 1–2 of brief]. Similarly, the *Peruta* opening brief described the matter as "a constitutional challenge to the policies and practices of the County in issuing permits to carry a concealed firearm." Dkt. # 13 at 15 (p. 4 of brief). The *Richards* opening brief added that, in more

populous counties, California law prohibits sheriffs from permitting unrestricted open carry, leaving solely concealed carry as within that sheriff's domain (dkt. # 11 at 43 [p. 31 of brief]), and warned *against* judicially questioning California's open carry restrictions (*id*. at 47 [p. 35 of brief - "California validly chose to render the open carrying of handguns for self-defense largely impossible"]). The *Peruta* Plaintiffs likewise noted that, due to gun free school zones and sociological norms, urban open carry "may no longer be a viable alternative." Dkt. # 13 at 52, fn. 25.

Sheriff Prieto's answering brief cited the Supreme Court's favorable recognition of concealed carry prohibitions. Dkt. # 24-1 at 28–29 (pp. 19–20 of brief). After the Sheriffs filed their answering briefs, California amended its statutes to more restrict loaded open carry in urban areas. Yet, during oral arguments, the panel confirmed that no party to either case sought a remand for consideration of the new statutes. Peruta's counsel repeatedly disclaimed any challenge to California law ("our beef is not with the California statutes"), which general point both he and Sheriff Gore's counsel confirmed in explaining why the California Attorney General need not participate in the case. Richards' counsel similarly explained that their sole

facial statutory challenge concerned the legislative grant of discretion to sheriffs to define "good cause" for concealed carry permits.[3]

The *Peruta* panel majority found that the Second Amendment protects a right to concealed public carry, at least where open carry is unavailable, and held that, because California (purportedly) bans open carry, its sheriffs must issue concealed carry permits to otherwise qualified applicants desiring general self-defense. *Id*. at 1170–1173. The panel majority forgave the Plaintiffs' for solely challenging the "licensing scheme for concealed carry" because that permit was the only "practical" way to lawfully carry a weapon in public. 742 F.3d 1144, 1171 and 1172–1173 ("a narrow challenge to the San Diego County regulations on concealed carry, rather than a broad challenge to the state-wide ban on open carry, is permissible"). But that allowance unduly discounted the Plaintiffs' ability to facially challenge California's open carry statutes as unconstitutional.

Thus (then) Judge Thomas' dissent criticized the majority as unnecessarily deciding statutory questions not presented rather than whether the Second Amendment protects concealed public carry and, if so, whether Sheriff Gore's permitting policy infringed such a right.

[3] http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010111

Id. at 1179–1180 ("[i]n this case, we are not presented with a broad challenge to restrictions on carrying firearms outside the home") and 1181 ("[t]he Plaintiffs are not seeking a general license to carry firearms in public for self-defense—they are seeking a license to carry concealed firearms in public"). The dissent explained: (a) because colonial, antebellum, and post-Civil war era laws upheld concealed carry restrictions, culminating with the Supreme Court's corresponding (and unqualified) proclamation by illustration in *Robertson v. Baldwin* (1897) 165 U.S. 275, 281–282, carrying a concealed weapon falls outside the Second Amendment; and (b) because that putative right was the only one the Plaintiffs sought to exercise, and they had not named the State as a defendant, the existence of a different form of carry that might be protected was immaterial. *Id.* at 1194 ("If carrying concealed firearms in public falls outside the Second Amendment's scope, then nothing—not even California's decision to restrict other, protected forms of carry—can magically endow that conduct with Second Amendment protection")

and 1196 (noting the *Peruta* plaintiffs' failure to formally notify and name the state attorney general).[4]

C. THE *EN BANC* REHEARING

Sheriff Prieto's petition for rehearing *en banc* included the contention the panel majority erroneously and without authority tethered the constitutionality of a state's concealed carry prohibitions to its allowance of open public carry, which led the majority to the factually and legally erroneous conclusion California's ban of open carry required it to tolerate concealed carry. Dkt. # 72 at 14 (p. 10 of petition). Richards' opposition to the petition argued that concealed carry bans were historically upheld only where open carry was available, and reiterated that no basis existed to hold "that California must allow the open carrying of handguns." Dkt. # 85 at 13–14 (pp. 6–7 of brief).

At oral argument, Peruta's counsel confirmed his clients' non-challenge to California's public carry statutes and asserted the immateriality of whether the Second Amendment embraces concealed

4 The *Richards* Plaintiffs did formally notify the state attorney general about their facial challenge to the concealed carry statute but did not name the state as a defendant.

carry per se.[5] When asked about *Robertson*'s statement that concealed carry falls outside the Second Amendment, counsel replied that the Supreme Court must have assumed the availability of open carry, as it did in *Heller,* which view Richards' counsel later endorsed. Richards' counsel added that *Heller*'s defining "bear" to include placing guns in clothing and pockets showed the Court meant to include concealed carry within the Second Amendment.[6] In response, the Solicitor General asserted *Heller* rendered clear that the Second Amendment did not encompass concealed carry in urban public areas, which Sheriff Prieto's counsel echoed in rebutting the clothing/pockets argument.[7]

D. SYNOPSIS OF PROCEEDINGS BELOW

The foregoing history confirms:

1. No Plaintiff ever sought to carry openly, either by conduct before suit or by declaratory/injunctive relief prayed for in suit. *See* generally *Hightower v. City of Boston*, 693 F.3d 61, 70 (1st Cir. 2012)

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[5] http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007886 at 1:00, 2:00, and 3:40 marks.

[6] *Id*. at 10:50 and 29:30. The *Richards* Plaintiffs' petition ironically continues to advance this same substantive argument. Dkt. # 225 at 8.

[7] *Id*. at 40:50 and 1:00:50.

(plaintiff lacked standing to allege Second Amendment violations re open carry laws where she never sought to open carry pre-suit);

2. No Plaintiff ever directly facially challenged, by pleading or otherwise, the constitutionality of California's open carry laws; rather all Plaintiffs disavowed any such intent;

3. The *Richards* Plaintiffs did facially challenge the constitutionality of California's concealed carry law;

4. Sheriff Prieto moved for summary judgment on the ground concealed public carry lies outside the Second Amendment, and the district court so ruled. Sheriff Gore mounted the same challenge in the district court and lost on the pleadings;

5. On appeal, Sheriff Prieto continued to argue that concealed public carry lies outside the Second Amendment;

6. Relying in part on the panel opinion dissent, Sheriff Prieto's petition for *en banc* rehearing expressly rested on the proposition concealed public carry does not come within the Second Amendment, regardless of open carry ability;

7. During the *en banc* oral argument, counsel directly debated whether the Second Amendment encompasses concealed carry

without any objection by Plaintiffs that question wasn't properly before the court.

In short, the Plaintiffs exclusively attempted to carry concealed, and exclusively challenged such laws and policies, Sheriff Prieto at all case levels asserted concealed public carry fell outside the Second Amendment, as did Sheriff Gore and the State, with which proposition the *Richards* district court and *Peruta* panel dissent agreed, and the *merits* of which counsel for both sides debated during *en banc* oral argument. For these dispositive reasons, Plaintiffs challenge to the *en banc* decision as addressing a non-issue fails.

III. THE *EN BANC* DECISION DOES NOT CONFLICT WITH PRECEDENT

The *Peruta* Plaintiffs contend the *en banc* holding clashes with decisions from the Second, Third, and Fourth Circuits in that the latter all "accepted the premise" the Second Amendment extends beyond the home, then analyzed the challenged concealed carry policy in tandem with that state's open carry laws, whereas the *en banc* opinion fails to address the prerequisite question of where the Second Amendment pertains or to discuss concealed carry relative to open carry rights. The *Peruta* Plaintiffs also assert the *en banc* decision unduly requires California to prefer open carry to concealed carry.

The *Richards* Plaintiffs join in these positions and add that the *en banc* opinion substantively conflicts with *Heller*.

Most of these points depend on the flawed notion that a central issue was whether the Second Amendment extends beyond "the home" for any manner of carry.

A. THE SECONDARY ISSUE WAS CARRY IN MUNICIPAL PUBLIC AREAS

During *en banc* oral argument, both Sheriff Prieto's counsel and the Solicitor General confirmed that their clients' positions did *not* rest on limiting the Second Amendment to the gun-bearer's residence, acknowledged that historical factors indicated Second Amendment rights for wilderness carry, and explained in detail that California law generally allows open carry in unincorporated/rural areas, as well in many private property places within city limits. Likewise, during the panel oral argument, Richards' counsel confirmed that the dispute centered on those public places within incorporated areas where landowner permission to carry wouldn't be

needed, i.e., the streets.[8] *See generally GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264–66 (11th Cir. 2012) (upholding state law giving private property owners a right to exclude firearms); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (noting that the common property right of businesses to ban guns on their premises could render public carry of little practical value). In short, the parties (especially in *Richards*) did not contest whether the Second Amendment extends beyond the "home;"[9] rather they disputed

[8] http://cdn.ca9.uscourts.gov/datastore/media/2012/12/06/11-16255.wma [during rebuttal - "[t]he issue here is not what you do in a bar or supermarket, the issue is what you do on a sidewalk or on a road in front of those establishments"]. *See Richards* dkt. # 37 at 17 (p. 10 of brief – expressing Plaintiffs' disinterest in carry outside cities). This point arose again several times during the *en banc* argument, e.g., when Sheriff Prieto's counsel answered questions from the court regarding the importance of carrying arms if one wants to stroll up and down the street without entering any business or residence, and when counsel analogized to the restrictions on urban hunting.

[9] The term "home," though convenient as a brief substitute for "residential premises," can mislead by connoting a purely interior setting like a condominium or apartment atypical of early American life. For example, *Moore* reached the conclusion the Second Amendment must extend to public carry by mistakenly assuming that "home" would not include the adjacent outdoor areas where one might bear a weapon for hunting or protection from the indigenous threats faced by early Americans. 702 F.3d at 936 (stating "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage").

whether and to what extent the Second Amendment protects carrying firearms in select urban public areas.

1. The Putative Conflict With Other Circuits Is Illusory

The clarification between outside the home and in urban public places has two important consequences to the pending petitions.[10] First, it directly defeats the notion the *en banc* court had to resolve whether the Second Amendment extends outside one's residential premises, as no such dispute existed. A more apt argument would have been that the court had to decide whether the Second Amendment extends to public areas within cities but, as explained above, Plaintiffs' failures to seek open carry before suit or challenge those laws by pleading obviated that necessity, allowing the *en banc* court to decide solely concealed carry status under the Second Amendment. *See Peterson v. Martinez*, 707 F.3d 1197, 1208 and 1211–1212 (10th Cir. 2013) (refusing to consider total public carry

[10] Because *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. den*. 135 S.Ct. 2799 (2015), solely involved "home" defense rights, Plaintiffs' assertion it analytically conflicts with the *en banc* decision stumbles at the threshold. Moreover, because they function as one mechanical unit, analyzing bullets without considering guns would be artificially narrow. Addressing concealed carry divorced from open carry raises no such logical concerns – each can function independent from the other.

ban argument where plaintiff directly challenged solely concealed carry statute and disclaimed any challenge to open carry ordinance).

Accordingly, that the Second, Third, and Fourth Circuits chose to reach their no violation conclusions by assuming (twice *arguendo*)[11] a constitutional right to carry outside the "home" existed creates no true conflict with the *en banc* decision – those courts merely travelled a different analytical path. *See Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("[w]e hew to a judicious course today, refraining from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections. That is, we merely assume that the *Heller* right exists outside the home and that such right of Appellee Woollard has been infringed"), *cert. den*. 134 S.Ct 422 (2013); *Drake v. Filko* 724 F.3d 426, 431 (3d Cir. 2013) (stating "we decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home," and recognizing such extension *might* exist), *cert. den*. 134 S.Ct. 2134

[11] Plaintiffs overstate by claiming the Third and Fourth Circuit decisions "accepted" the premise the Second Amendment applies outside the home.

(2014). *Compare Peterson*, 707 F.3d at 1209 (deeming concealed public carry outside the Second Amendment).

Furthermore, *how* the Second Circuit explained its perception the Second Amendment extends, to *some* extent, outside the home wholly defeats Plaintiffs' substantive position. *See Kachalsky v. County of Westchester*, 701 F.3d 81, 90 (2d Cir. 2012) (noting at least four states after the Civil War barred both concealed and open public carry), and 100 (summarizing that historically state laws viewed the Second Amendment to allow "complete prohibitions on carrying the weapon in public"), *cert. den*. 133 S. Ct. 1806 (2013).

In short, the other circuit decisions essentially support the *en banc* opinion – the only disparity between them lies in jurisprudential approach, not in substantive analysis.

2. The *En Banc* Decision Poses No Threat To California's Scheme

The second consequence of the actual issue being municipal public area carry relates to the faulty generalization that California law has elected concealed carry over open carry, which legislative choice the *en banc* decision supposedly threatens. The reality is that California law favors neither as a conclusive matter – each can occur under certain conditions and in certain places. If any current leaning

exists, it is toward unloaded open carry, because of its general availability outside cities and that, within cities, one needs only informal landowner permission for it rather than an official license conditioned on paying a fee and meeting other requirements.

B. THE *EN BANC* DECISION COMPORTS WITH HELLER

The *Richards* Plaintiffs also contend the *en banc* decision conflicts with *Heller* because the former restricts any right to public carry to open bearing of arms whereas the latter recognizes concealed carry as within the Second Amendment, subject to the state's right to opt for open carry instead.[12] This misconstruction of *Heller* lacks linguistic foundation and judicial support.

As discussed during the *en banc* oral argument, *Heller* referenced Justice Ginsburg's dissent in *Muscarello v. United States*, 524 U.S. 125, 143 (1998) to define the phrase "bear arms" in a lay *historical* sense, which includes both open and hidden carry (and thus to separate it from the technical *military* meaning advocated by the *Heller* dissents), rather than to delineate the scope of constitutional

[12] Petition at 8 ("The *en banc* majority should have addressed the Supreme Court's express holding that concealed carry is a form of exercising the right to bear arms").

protection afforded that activity. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008). Sheriff Prieto's view flows from:

(a) the context of the passage in question (see *ibid* ["In numerous instances, 'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia"), as shown by the immediately subsequent discussion;

(b) the *Heller* opinion's later example of concealed carry as one historical limitation on the right to bear arms (*id*. at 626); and

(c) *Heller*'s references to hunting as part of the core right (see *id*. at 598 [referencing hunting and self-defense] and 615 [quoting from a congressional committee report]), because, if construed as a definitive literal delineation of the right to bear arms, Justice Ginsburg's definition would foreclose hunting or animal defense as protected rights – one does not there carry a gun "for offensive or defensive action in a case of conflict with another person." The same can be said for skeet shooting, target practice, and shooting competitions.

Plaintiffs' companion view that *Heller* excludes concealed carry as a constitutional right only where a state chooses not to allow open carry both misfits California's scheme and stands unsupported

by precedent. *Heller* placed no such qualifier on its approval of concealed carry prohibitions, nor did *Robertson*. Unsurprisingly, no appellate decision otherwise construes those precedents. *See Kachalsky*, 701 F.3d at 90 (noting at least four states after the Civil War barred both concealed and open public carry), and 95–96 (citing *Heller* and *Robertson* for the notion concealed carry lies outside the Second Amendment, without any perceived condition that open carry be available); *Drake*, 724 F.3d at 433 (quoting *Kachalsky* for the notion bans on concealed carry do not necessarily depend on the availability of open carry); *Hightower*, 693 F.3d at 73 [concluding "the government may regulate the carrying of concealed weapons outside of the home" citing *Heller* and *Robertson*]; *Peterson*, 707 F.3d at 1209-1211 [discussing *Robertson* and *Heller* as approving concealed carry bans, without mention of open carry alternative].) And, despite *Moore*'s conclusion that Illinois had to permit *some* people *some* degree of public carry where a total ban on urban public carry existed, it nowhere stated that concealed carry was constitutionally protected, much less analyzed *Heller* and *Robertson* in this respect. 702 F.3d 933. Instead, *Moore* simplistically (and mistakenly) reasoned that because one doesn't truly "carry" a gun

inside a dwelling, the Second Amendment must extend outside. *See* fn. 9, *ante*.

IV. CONCLUSION

The *en banc* court decided the issue created by the facts, as shaped by pleading and presentation in the district courts and arguments during appeal – the constitutional entitlement to concealed carry in certain urban public areas. The *en banc* opinion resolved that question both in terms of general constitutional principle and specific relief sought in a manner that, while differing in method from some other circuits, created no substantive conflict. That the *en banc* court did not reach every supporting and ancillary legal argument advanced is, though professionally dissatisfying to Plaintiffs' counsel, procedurally unremarkable and constitutionally prudent.

Dated: July 15, 2016

ANGELO, KILDAY & KILDUFF, LLP

/s/ John A. Whitesides

By: _____

JOHN A. WHITESIDES
SERENA M. WARNER
Attorneys for Defendants/Appellees ED PRIETO and COUNTY OF YOLO

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 11-16255

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Response to Petition for Full Court Rehearing En Banc is:

Proportionately spaced, has a typeface of 14 points or more and contains 4,026 words (petitions and answers must not exceed 4,200 words)

DATED: July 15, 2016

ANGELO, KILDAY & KILDUFF, LLP

/s/ John A. Whitesides
By: _____
JOHN A. WHITESIDES

9th Circuit Case Number 11-16255

CERTIFICATE OF SERVICE

I hereby certify that 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 on July 15, 2016.

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 declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of July, 2016 at Sacramento, CA

/s/ John A. Whitesides

John A. Whitesides