Appellate Case No.: 07-15763

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs and Appellants,

v.

MARY V. KING, et al.,

Defendants and Appellees.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HON. MARTIN J. JENKINS
(CASE NO. CV-99-04389-MJJ)

APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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INTRODUCTION

Appellants' Petition for Panel Rehearing asks the Court to consider a state law preemption claim that was never argued or briefed in the appeal, and is therefore an improper basis for seeking panel rehearing. *See* F.R.A.P., Rule 40.

Most of Appellants' Petition for Rehearing En Banc is dedicated to Appellants' quarrel with the "substantial burden" test the Court used in considering their Second Amendment claim. However, by vacating the District Court order denying leave to amend that claim, Appellants now have the opportunity to re-plead that claim. Moreover, Appellants fail to identify an opinion of another court of appeals with which the panel's decision on this issue (or any other issue) directly conflicts, or any rule of national application affected by the decision. Instead, Appellants argue that Alameda County's decision to prohibit firearms possession on its Fairgrounds without making an exception for gun shows must be reviewed under "strict scrutiny" – a test no appellate court has held is appropriate to regulation of firearms on non-residential, publicly-owned property or in any other context. In short, the Petition fails to meet either the procedural or the substantive requirements for rehearing and should be denied.

RESPONSE TO PETITION FOR PANEL REHEARING

Rule 40 governs petitions for panel rehearing and provides in pertinent part that "[t]he petition must state with particularity each point of law or fact the petitioner believes the court *has overlooked or misapprehended* and must argue in support of the petition." F.R.A.P., Rule 40, subd. (a)(2)(emphasis added). The Nordykes' Petition for Panel Rehearing is devoid of any such reason because the point of law on which they seek panel rehearing (an alleged change in state preemption law) was not raised in the instant appeal at all. The panel cannot have "overlooked or misapprehended" an issue that was not presented to it in the appeal, and was not raised in the District Court in the motion for leave to amend that resulted in the order from which the appeal is taken.

The Ninth Circuit has long reiterated that new arguments cannot be first asserted in a petition for rehearing. *See Partenweederei et al. v. Weigel*, 313 F.2d 423 (9th Cir. 1962) (per curiam):

> It is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal, nor, a fortiori, as herein, in a petition for rehearing on appeal. . . . It gives the appellate court the benefit of the district court's wisdom, and it prevents a

litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below. (*Id.* at 425).

"Panel rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing." *See Easley v. Reuss*, 532 F.3d 592, 593-94 (7th Cir. 2008) (per curiam) (citing decisions of the First, Second, Third, Fifth, Sixth and Eleventh Circuits to the same effect). The Nordykes' petition fails to identify any extraordinary circumstance that would make appropriate rehearing by this Court.

The Nordykes' Petition for Panel Rehearing does not include any "question of exceptional importance" to which this alleged change in state preemption law gives rise (and there is no change – *see* footnote 1, *infra*). Had the alleged change given rise to any question germane to this appeal, the Nordykes should have briefed the matter in the supplemental briefing ordered by this Court on July 19, 2010. This Court ordered supplemental briefs on the impact of *McDonald v. City of Chicago* and on **"any other issue properly before this court** . . . ." (Emphasis added.)

The Nordykes have abandoned the state preemption issue. *See DeWeerth v. Baldinger*, 38 F.3d 1266, 1274 (2d Cir. 1994) ("arguments raised for the first time

on a petition for rehearing are deemed abandoned unless manifest injustice would otherwise result"). The Nordykes cannot claim "manifest injustice" because this alleged change in state preemption law is no sudden development: *Fiscal v. City and County of San Francisco*, 158 Cal.App.4th 895 (2008) (*Fiscal*), the case the Nordykes rely on in arguing for panel rehearing was decided on January 9, 2008, and review was denied on April 9, 2008, **more than two months before** *District of Columbia v. Heller*, 554 U.S. 570 (2008) was decided, and **two years before this Court entered the foregoing order for supplemental briefing.** Yet, the Nordykes waited until now to raise this argument.[1]

The Nordykes present no extraordinary circumstance that would make it appropriate for this Court to rehear the case. The Nordykes on remand may seek leave to amend to allege a state law claim based on *Fiscal*. But they cannot do so

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[1] *Fiscal* did not work a change in state preemption law and has no bearing on this appeal. *Fiscal* carefully distinguished Alameda County's Ordinance from the ordinance at issue in *Fiscal* and carefully distinguished the preemption inquiry in *Nordyke v. King*, 27 Cal.4th 875 (2002) and in the companion case, *Great Western Gun Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853 (2002) from the preemption inquiry appropriate to the San Francisco ordinance challenged in *Fiscal*. *See Fiscal*, 158 Cal.App.4th at 917-18, noting that in these companion cases the California Supreme Court found there was "acceptable interplay between the local government's exercise of its power to control the use of its property and the state government's regulation of gun shows to permit local governments to ban the sale of firearms and ammunition at gun shows on county-owned public property…[citations omitted]. **Neither case can be properly read to extend that limited preemption inquiry to a case such as this one involving a local government's attempt to enact an absolute and total ban of firearm and ammunition sales on all property, public and private, within its geographic jurisdiction."** *Id*. at 918 (emphasis added).

here; petitions for rehearing are not designed to make the proceedings less burdensome for the litigants and more burdensome for the appellate panel.

The Nordykes' Petition for Panel Rehearing does not comply with Rule 40, and does not present any "questions of exceptional importance" that would merit panel rehearing on an argument the Nordykes chose not to raise in this appeal or in their prior motion for leave to amend.

RESPONSE TO PETITION FOR REHEARING EN BANC

I. THE SUPREME COURT'S DECISION IN *HELLER* DEFEATS THE NORDYKES' THEORY OF A FUNDAMENTAL RIGHT TO ENGAGE IN ANY ACTIVITY INVOLVING FIREARMS.

In *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (*Heller*), the Court holds that the Second Amendment protects the right to possess a handgun in the home for self defense. 554 U.S. at 628-29, 636. The Court recognizes that "the right secured by the Second Amendment is not unlimited;" historically, "commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. Thus, the Court does not "read the Second Amendment to protect the right of citizens to carry arms for *any*

sort of confrontation." 554 U.S. at 595. *Heller* identifies as "presumptively valid regulatory measures" those laws prohibiting firearms in "sensitive places" and laws regulating the commercial sale of arms. 554 U.S. at 626-27 & n.26. *Heller* mentions as examples of sensitive places government buildings and schools, and specifies that the list of examples "does not purport to be exhaustive." 554 U.S. at 627, n.26.

Heller cannot be squared with the Nordykes' novel theory that any activity or subcategory of activity relating to firearms acquisition or use is a fundamental right. No court has held there is a fundamental constitutional right "to engage in the lawful purpose of commerce in firearms." (Petition at p. 9.) The availability of firearms through commerce is linked to the Second Amendment right identified in *Heller*, but that link does not ipso facto elevate commerce in firearms to a fundamental right. Nor does that link ipso facto compel the County of Alameda to allow a gun show on its own property on whatever terms the Nordykes dictate. Otherwise, *Heller's* recognition that regulation of commercial sales of firearms is presumptively valid (554 U.S. at 626-27 & n.26), and all of *Heller's* cautionary language about the limited contours of the Second Amendment right, would be rendered a dead letter. *Heller* did not recognize a fundamental right to engage in firearms sales on publicly-owned property and neither did *McDonald v. City of Chicago*, 561 U.S. __, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (*McDonald*).

Lawful activity involving firearms may be limited just as lawful speech may be limited. *Heller* recognizes this symmetry and so does this Court. *See Nordyke*, 2011 WL 1632063 at *7. "[T]he [Second Amendment] right was not unlimited, just as the First Amendment's right of free speech was not." 554 U.S. at 595. *Heller* does not read the Second Amendment to protect all activities involving firearms, "just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." 554 U.S. at 595. There is no constitutional right to enter government-owned property to say whatever one wants, whenever one wants, without restriction. Likewise, the Second Amendment does not create a fundamental right to demand that government open its property to any and every firearms-related activity.

The recent decision in *Ezell v. City of Chicago* (7th Cir., July 6, 2011) (separately submitted by the Nordykes), does not authorize unlimited lawful activity involving firearms. As a condition of obtaining a required permit for a handgun, Chicago mandates one hour of training at a firing range. Slip Op. at p. 6. But Chicago also bans firing ranges. Slip Op. at p. 7. The court found Chicago's regulatory scheme seriously encroaches upon the meaningful exercise of the core right to possess a firearm for self-defense. Slip Op. at p. 44. In the court's view, Chicago's regulatory scheme is tantamount to the prohibition invalidated in *Heller*.

Nothing in *Ezell* suggests that the court viewed all lawful activities involving firearms as protected by the Second Amendment.

The Nordykes interpret Congress's statement in the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7901, *et seq.*, as defining the scope of the Second Amendment right. *See* Petition at pp. 11-12. It does not and cannot. The U.S. Supreme Court continues to make clear that under the U.S. Constitution, the judicial branch, not the executive or legislative branch, determines what the law is. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch. 137 (1803). *See also Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S.Ct. 2204, 65 L.Ed.2d 144 (1980). For example, Congress announced through the PLCAA in 2005 that a Second Amendment right to bear arms is among the "privileges and immunities" guaranteed to citizens under the Fourteenth Amendment. 15 U.S.C. § 7901(b)(3). But in *McDonald*, every Supreme Court Justice, except Justice Thomas, rejects that proposition. *See McDonald*, 130 S.Ct. at 3030, 3089, 3120. The PLCAA has no relevance to the scope of the Second Amendment.

The County's Ordinance was enacted in response to a mass shooting on the County Fairgrounds. The Ordinance simply prohibits the possession of firearms on County-owned property, with certain exceptions. *Nordyke*, 2011 WL 1632063 at *1 and n.1. The Nordykes' own allegations admit that the "County did not close the fairgrounds to the possession of all guns." Petition at p. 10. Indeed, the

County allows possession when it falls within the excepted categories in subsection (f)(4) of the Ordinance. *Nordyke*, 2011 WL 1632063 at *1, n.1. When the manager of the County fairgrounds requested a written plan from the Nordykes showing how their next event would fall within one of the excepted categories, the Nordykes refused to submit a plan and instead filed this lawsuit. *Nordyke*, 2011 WL 1632063 at *1.

As the panel concluded, this case is about the Nordykes' decision that they cannot *profitably* conduct their event under the terms of the Ordinance. The Nordykes' own allegations prove the point. "[T]he Nordykes have made clear that the Second Amendment violation . . . stems wholly from the Nordykes' inability to conduct a *successful* gun show at the county fairgrounds." *Nordyke*, 2011 WL 1632063 at *1, n.4 (emphasis added). The Nordykes "do[] not assert that the Ordinance makes it materially more difficult to obtain firearms. Nor [do they] allege a shortage of places to purchase guns in or near Alameda County." *Nordyke*, 2011 WL 1632063 at *8. "Indeed, the Proposed Second Amended Complaint repeatedly notes that simply excepting gun shows from the ban on possessing guns on county[-owned] property 'would have been sufficient to prevent this particular lawsuit from being filed.'" *Nordyke*, 2011 WL 1632063 at *7, n.10.

The Nordykes desire to bring thousands of weapons onto County-owned property (*Nordyke*, 2011 WL 1632063 at *1) for purposes of conducting a profitable event. This does not implicate the Second Amendment. As the panel recognized, this case is not about the right of self-defense. *Nordyke*, 2011 WL 1632063 at * 1, n.4 & * 7. It is not about any right which any court has recognized in the realm of the Second Amendment.

The Petition for Rehearing En Banc should be denied.

II. THE COUNTY'S ORDINANCE IS NOT REVIEWED UNDER HEIGHTENED SCRUTINY BECAUSE IT DOES NOT BURDEN ANY RIGHT PROTECTED BY THE SECOND AMENDMENT.

Even if a fundamental right was at stake here (and it is not), the County's Ordinance would not be reviewed under a heightened scrutiny standard. This Court correctly observes that "the Supreme Court does not apply strict scrutiny to every law that regulates the exercise of a fundamental right . . . ." *Nordyke*, 2011 WL 1632063 at *6. The Court correctly states "heightened scrutiny does not apply unless a regulation substantially burdens the right to keep and bear arms for self-defense." *Nordyke*, 2011 WL 1632063 at *3.[2]

[2] It is not clear that every regulation involving firearms should be subject to the "substantial burden" test. Some regulations are presumed valid. *Heller* expressly (Continued...)

This Court properly recognizes that heightened scrutiny does not apply to every regulation involving firearms. *Nordyke*, 2011 WL 1632063 at *6. As this Court noted, *Heller* contrasted burdens imposed by the District of Columbia's ban on handguns with permissible firearms regulations. *Nordyke*, 2011 WL 1632063 at *3-*4. A heightened scrutiny standard is inconsistent with *Heller's* express rejection of any standard that second-guesses the legislative decision to protect public safety (*see Nordyke*, 2011 WL 1632063 at *4-*5), particularly where, as here, there has been a violent shooting on the property in question.

This Court contributes to an established line of cases by first analyzing whether the Ordinance substantially burdens a recognized right. In addition to the voting rights and abortion cases cited (*see Nordyke*, 2011 WL 1632063 at *6), other cases recognize that a court must find that the challenged law directly burdens a protected fundamental right before any level of heightened scrutiny is triggered. *See, e.g., Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) ("Statutes are subjected to a

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(...Continued)

does not "cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27. But if the "substantial burden" test does apply, surely not every regulation involving firearms will substantially burden the core right of self-defense. Assuming the test applies here, the County's Ordinance is just one example of a regulation that does not substantially burden that right and, therefore, is not subject to further means/ends scrutiny.

higher level of scrutiny ***if*** they interfere with the exercise of a fundamental right . . .") (emphasis added). In the Second Amendment context, courts have adopted the same approach. "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. [Citation.] If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny." *United States v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir. 2010), *cert. denied*, 131 S.Ct. 958 (2011) (*Marzzarella*). *See also United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (citing *Marzzarella* for same proposition); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 2476 (2011) (citing *Marzzarella* for same proposition).

The recently decided *Ezell* case, discussed above, does not compel a different approach here. *Ezell* holds that the threshold issue in evaluating a local regulation under the Second Amendment is whether the asserted right was publicly understood as protected by the Second Amendment when the Fourteenth Amendment was ratified. Slip Op. at 32. If it was not, the analysis ends. If it was, the court must then "evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve. . . . [T]he rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." Slip Op. at pp. 32-33.

Ezell's analytical approach is not substantially different from this Court's

threshold inquiry of whether the regulation "substantially burdens" a protected right. Under *Ezell*, if the right was publicly understood historically, the court then looks to "the law's burden on that right" and the proximity of the law "to the core of the Second Amendment right." Slip Op. at 33. Although this Court in *Nordyke* did not require a nexus between the asserted right and the historical understanding of the Second Amendment, *Ezell's* burden inquiry is substantially similar to this Court's threshold inquiry into whether the "regulation substantially burdens the right to keep and to bear arms for self-defense." *Nordyke*, 2011 WL 1632063 at *3. If it does, this Court applies heightened scrutiny. *Id.* Similarly, if the law severely burdens a right close to the core of the Second Amendment right of self-defense, as in *Ezell*, that court applies heightened scrutiny. *Ezell*, Slip Op. at 40-44.

Also, the *Ezell* approach would yield the same result this Court reached. The Nordykes have never offered evidence that a right to sell guns at gun shows on public property was understood when the Fourteenth Amendment was ratified. In fact, the County has shown that there is no historical understanding of such a right. As discussed in the County's supplemental brief regarding *McDonald* (filed August 18, 2010), gun shows involving large-scale firearms sales, such as the Nordykes', are of recent vintage. These shows developed as a result of rule changes by the Bureau of Alcohol, Tobacco & Firearms ("ATF") in 1984, when

ATF liberalized restrictions regarding sales by licensed firearms dealers. *See* 27 C.F.R. § 178.100 (1984) (redesignated 27 C.F.R. § 478.100 on Jan. 24, 2003). The new rule allowed dealers to sell firearms at gun shows in the state in which they were licensed. Prior to the rule change, licensed dealers were permitted to sell firearms only from a fixed address specified on their licenses. In the absence of any historical understanding of a right to sell guns at gun shows, let alone a right to do so on public property, the *Ezell* court would end the analysis here and would never subject the County's regulation to heightened scrutiny.[3] Thus, the result reached by the panel would have been the same had it engaged in the slightly different *Ezell* approach. Accordingly, *Ezell* does not provide a basis for en banc review.

This Court properly identified the threshold issue as whether the County's regulation substantially burdens a fundamental right. It does not. The analysis

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[3] The Nordykes misread *Ezell* as requiring evidence to justify every restriction on any activity related to firearms in any way. *Ezell* required Chicago to show serious risks to public safety only after the court concluded that heightened scrutiny applied; In the court's view, Chicago's ban on firing ranges, coupled with the requirement of training at a firing range to obtain a permit, effectively prohibited the exercise of the core right of self-defense. In that context, Chicago had to "establish a close fit between the range ban and the actual public interests it serves." Slip Op. at 45. That approach is far different from the Nordykes' view that government should be required to produce evidence justifying a regulation that does not even burden any recognized Second Amendment right. Such a requirement would subject to heightened scrutiny the regulation of any activity involving firearms. Both this Court and *Ezell* reject this approach. Moreover, the findings in the County's Ordinance are more than sufficient to justify it under any level of scrutiny.

ends here, rendering the Nordykes' discussion of heightened scrutiny superfluous. The Petition for Rehearing En Banc should be denied.

III. HEIGHTENED SCRUTINY IS NOT TRIGGERED HERE FOR THE SEPARATE AND INDEPENDENT REASON THAT THE COUNTY'S ORDINANCE IS PRESUMED VALID.

As noted above, *Heller* identified as "presumptively valid regulatory measures" a non-exhaustive list of laws prohibiting firearms in "sensitive places" and laws regulating the commercial sale of arms. 554 U.S. at 626-27 & n.26.

The County Fairgrounds is a sensitive place. The County adopted the Ordinance after a shooting that occurred on the Fairgrounds during the annual county fair. *Nordyke*, 2011 WL 1632063 at *1. The Nordykes' gun shows involve thousands of weapons where thousands of people will be in attendance. *Nordyke*, 2011 WL 1632063 at *1.

Like government buildings and schools, the Fairgrounds is maintained primarily for government-sponsored activity. Alameda County must manage all County-owned property in the interests of its inhabitants. Cal. Gov. Code § 23004(d). The County must operate and manage the Fairgrounds for the principal purpose of the County agricultural fair. *See* Cal. Gov. Code §§ 25900 *et seq*. The

Fairgrounds may be leased for events that "will not interfere with the use of such property for fair purposes." Cal. Gov. Code § 25908.

The Fairgrounds is a public place where children often are present. The County, as proprietor, may legitimately consider the public safety concerns associated with the presence of children on County-owned property. The Fairgrounds share many key characteristics with government buildings and schools and qualifies as a "sensitive place" under *Heller*.

The presumption of validity cannot be harmonized with subjecting the Ordinance to strict scrutiny as the Nordykes urge, or with a fundamental right to possess weapons on government property. The strict scrutiny standard imposes "a strong presumption of invalidity." *Vieth v. Jubelirer*, 541 U.S. 267, 294, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004); *accord Nordyke*, 2011 WL 1632063 at *16 (Gould, J. concurring). "It is well settled that . . . if a law 'impinges upon a fundamental right . . . secured by the Constitution [it] is presumptively unconstitutional'. [Citation.]" *Harris v. McRae*, 448 U.S. 297, 312, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

The Petition for Rehearing En Banc should be denied for these additional reasons.

IV. THE PETITION PROVIDES NO REASON FOR THIS COURT TO REVISIT ITS CONSISTENT AND SOUND REJECTION OF THE NORDYKES' FIRST AMENDMENT CLAIM.

This Court has consistently rejected the Nordykes' First Amendment claim. Refusing to apply strict scrutiny reserved for content-based regulations under *Texas v. Johnson*, 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), the Court has properly applied the test set forth in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and has upheld the County's Ordinance on that basis. The Petition for Rehearing En Banc offers nothing new in this area and regurgitates the same unsuccessful arguments the Nordykes have advanced for more than a decade. While Second Amendment jurisprudence has developed significantly during that time period, First Amendment case law regarding expressive conduct has not. There is no basis for further review of the Nordyke's First Amendment claim.

V. THE REQUEST FOR FURTHER REVIEW OF THE EQUAL PROTECTION CLAIM FLOWS FROM THE NOW DISCREDITED PREMISE THAT THIS CASE INVOLVES A FUNDAMENTAL RIGHT TO POSSESS A WEAPON ON GOVERNMENT-OWNED PROPERTY.

This Court also has consistently rejected the Nordykes' Equal Protection claim. The Petition advances as the sole ground for rehearing the flawed premise that there is a fundamental right to bring a weapon for sale onto government-owned property. Therefore, according to the Nordykes, any regulation which impinges on that right must be evaluated under strict scrutiny for Equal Protection purposes. The Nordykes are wrong again.

The County explains above that its Ordinance does not implicate any fundamental right recognized under the Second Amendment. As this Court has correctly and repeatedly observed, any difference between the way the Ordinance applies to the Nordykes and the way it applies to others is valid so long as it is rational. The Nordykes assert nothing more than the same discredited arguments previously asserted. There is no basis for rehearing the panel's decision on the Equal Protection claim.

VI. CONCLUSION

For all of the foregoing reasons, the Petition for Panel Rehearing and the Petition for Rehearing En Banc should be denied.

Dated: July 11, 2011

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CERTIFICATE OF COMPLIANCE

In accordance with Ninth Circuit Rule 32-3, subparagraph (3), this certifies that this proportionally spaced brief contains 4,174 words (excluded tables of contents and authorities, and this certificate [FRAP 32(a)(7)(B)(iii)]), which, divided by 280, yields 14.9 pages in compliance with the 15-page limit set by the Order filed June 13, 2011. This brief's type face and type style comply with FRAP 32(a)(5) and (a)(6).

I declare that the foregoing is true and correct.

Executed on July 11, 2011

s/ T. Peter Pierce
T. Peter Pierce

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 11, 2011.

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

s/ Clotilde Bigornia
Clotilde Bigornia

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