APPEAL NO. 10-35542

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAMPA CLASSICAL ACADEMY, INC., ET AL.,
Plaintiffs-Appellants,
v.
WILLIAM GOESLING, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Idaho
Civil Case No. 1:09-cv-00427-EJL (Honorable Edward J. Lodge)

PETITION FOR REHEARING EN BANC OF PLAINTIFFS-APPELLANTS NAMPA CLASSICAL ACADEMY, INC., ET AL.

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INTRODUCTION

A high school student assigned to read *Moby Dick* in his literature class opens the book one day and encounters the iconic opening line "Call me Ishmael." He asks his teacher why Herman Melville would begin this novel with such a strange sentence uttered by a character with an even stranger name. His teacher then takes a copy of the Bible from among the many classic works in the class library, turns to Genesis 21, and explains that Ishmael was the name of a child born to Abraham by his wife's maidservant. Out of jealousy, Abraham's wife, Sarah, forever banished Ishmael from the land. The teacher explains that Melville's use of the name symbolizes Ishmael's status as an outcast alienated from society.

In most schools, this teacher would be applauded for helping her students understand the important symbolism in Melville's writing.

In Idaho, the teacher would lose her job and the school would be closed for violating Def.-Appellee Public Charter School Commission's ("Commission") unprecedented state-wide Book Ban on the objective and educational use of <u>any</u> religious documents or text at <u>any</u> public school, college, or university in the state. ER722 (enacting the Book Ban); ER662 (Ban applies "equally to all public charter schools and traditional public schools").

Under the Book Ban upheld by the panel, thousands of classic literary works like the *Iliad*, *Odyssey*, *Epic of Gilgamesh, Code of Hammurabi*, and even works

by our Founding Fathers[1] are now banned in every school in the state because such works would be considered "religious."[2] But no state educational agency—at any level—should ever be able to ban books without a compelling educational reason for doing so. None exists here.

In its 5-page opinion that contained little to no analysis, the panel completely avoided the important constitutional issues raised by the Book Ban, instead focusing solely upon technical issues (such as municipality standing and the government speech doctrine, both of which are irrelevant to whether the Book Ban violates the constitutional rights of teachers, students, and parents) and ruling incorrectly on those.

The panel inexplicably upheld this act of blatant academic censorship that resulted in the retaliatory closing of Nampa Classical Academy, Inc. (a private, non-profit corporation authorized to operate a charter school in Idaho), its teachers losing their jobs, and the students being forced to find new schools.

En banc review is therefore necessary to answer the important question of whether the government can enact a broad content and viewpoint-based ban on the entire category of religious documents (which the Supreme Court has said is

[1] *See* the Academy's Reading List. ER187-91.

[2] The term "religious" encompasses all works "relating to or manifesting faithful devotion to an acknowledged ultimate reality or deity; of, relating to, or devoted to religious beliefs or observances." MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/%20religious.

"worthy of study for its literary and historic qualities," *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 225 (1963)) from objective study in public schools. The panel ignored that there is a tremendous difference between choosing what the curriculum will be and banning certain books used to teach that curriculum. This case involves the latter.

The panel's opinion also merits *en banc* review because it conflicts with rulings from the Ninth Circuit, Supreme Court, and other Circuits holding that: (1) local school boards have the authority to select curriculum, (2) teachers and students, including Plaintiffs-Appellants Isaac Moffett, Maria Kosmann, and M.K., have a right to use relevant educational materials once chosen by the school, (3) even political subdivisions have enforceable constitutional rights, (4) private, non-profit corporations, like the Academy, are not the same as political subdivisions and have protected First Amendment rights, (5) a ban on religious sources is vague, discriminates against religious content and viewpoint, and creates a prior restraint, and (6) religious sources may be used in the objective study of a variety of subjects.

ARGUMENT

I. The Panel's Decision Conflicts with Defs.-Appellees' Own Admissions Concerning State Law and With Ninth Circuit Precedent That Local School Boards (i.e. the Academy) Have Authority Over Their Own Curriculum.

Along with its erroneous conclusion that the Academy is a political

subdivision of the state (*see infra* Part IV), the panel erred by concluding that Idaho is the "speaker" for purposes of a school's curriculum under a government speech analysis. Opinion at 4 n.2. But the panel's opinion directly conflicts with Defs.-Appellees' own admissions and Ninth Circuit precedent holding that the Academy is the speaker because it was delegated the authority by the state to select its own curriculum. And the panel ignores the larger issue that, regardless of whether the State Board of Education or the Academy is the "speaker," the Commission has no authority to unilaterally interfere with this speech by enacting the Book Ban.

The Defs.-Appellees repeatedly admit that under Idaho law, the Academy's board is the equivalent of a traditional school board/district and is given broad authority to select curriculum.

- Def.-Appellee Luna: Charter schools have the "constitutional authority" to decide "which curriculum to use, which textbooks to adopt." ER634.
- Def.-Appellee Commission Program Manager Tamara Baysinger: "[Public charter schools] may design their own curriculum." ER101.
- Idaho Dept. of Education School Choice Coordinator Shirley Rau: "[C]urriculum design was one of the areas…of flexibility for charter schools." ER604.
- Defs.-Appellees' Answer: "The State Department of Education…does not prescribe the curriculum to be taught in public elementary and secondary schools." ER750-51.

Instead, somewhat remarkably, the panel ignored both the law and the

undisputed evidence and held that the Academy does not have the right to select its own curriculum. Opinion at 4-5. While the panel acknowledged that "[a] public school's curriculum…is an example of the government opening up its own mouth," *id*. at 4 (citing *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000)), it ignored that, even under the government speech doctrine, Idaho has delegated sole authority to the Academy's board in matters of curriculum selection for the school.[3] The panel's decision therefore directly conflicts with *Downs*' holding that "curriculum is only one outlet of a school district's expression." *Id*. at 1015-16.

As the authorized speaker, the Academy chose the best resources for its teachers and students, including some primary religious sources. ER137-38 (the Academy's curriculum provides "a comprehensive educational experience that exposes the students to the original historical texts, including some religious texts," rather than textbooks subject to "a textbook editor's biases or revisionism"); *see also* ER187-91 (the Academy's Reading List).[4]

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[3] This plenary authority is only subject to state thoroughness standards, ER 217-33, which have been met. The Academy's student body surpassed every one of Idaho's standardized testing goals. *See* IDAHO STANDARDS AND TEST SCORES, http://www.sde.idaho.gov/site/assessment/ISAT/docs/results/2010/2010%20ISAT%20School%20Results.pdf.

[4] The State Thoroughness Standards require schools to teach about religion, including the "historical origins, central beliefs, and spread of major religions, including Judaism, Christianity, Islam, Hinduism, Buddhism, and Confucianism." ER218.

The Commission then banned these primary sources, in violation of the Academy's authority. By upholding the Book Ban, the panel ignored that the Commission is not a "speaker" in this case as it has no right to determine curriculum at all. Reply ER12 (Defs.-Appellees admitting that "the Commission cannot prescribe a charter school's curriculum"). The State Board of Education "spoke" by granting authority to charter schools, who then "spoke" by selecting their curriculum. But under no circumstances does the Commission have any authority to enter into this conversation and circumscribe the speech of the Academy (or the State Board of Education's delegation of authority) by enacting the Book Ban.

The panel's decision upholding the Commission's unauthorized Book Ban also directly conflicts with *Monteiro v. Tempe Union High Sch. Dist.*, which prohibits efforts to ban books by third parties [such as the Commission here] because it would "significantly interfere with the District's [here, the Academy's] discretion to determine the composition of its curriculum." 158 F.3d 1022, 1029 (9th Cir. 1998). It also conflicts with the Eighth Circuit's holding that school boards have "the authority to determine the curriculum that is most suitable for students and the teaching methods that are to be employed." *Pratt v. Indep. Sch. Dist.*, 670 F.2d 771, 775 (8th Cir. 1982). *En banc* review is necessary to correct the panel's misapplication of the government speech doctrine.

II. The Panel's Ruling That Neither Teachers, Students, nor Parents Have the Right to Use Religious Sources, Even Though Approved by the Academy, Conflicts with the Ninth Circuit and Other Circuits.

Based solely on its conclusion that the curriculum is the speech of the government, the panel held that "[t]he First Amendment's speech clause does not [give]…Idaho charter school students, or the parents…a right to have primary religious texts included as part of the school curriculum." Opinion at 4. But regardless of whose speech it is (the state board's or the local school board's), the Commission's Book Ban violates the First Amendment rights of teachers and students to use and receive relevant educational materials, especially when they have been approved by the Academy.

The panel's holding to the contrary thus directly conflicts with *Monteiro*, which upheld "students' [First Amendment] rights to receive a broad range of information so that they can freely form their own thoughts," 158 F.3d at 1027 n.5, and with the Supreme Court's ruling in *Bd. of Educ. v. Pico,* 457 U.S. 853, 867 (1982), that "the Constitution protects the right [of students] to receive information and ideas." These rights are "directly and sharply implicated by the removal of books." *Id*. at 866. Here, the Academy chose its curriculum and book list, ER187-91, and the Commission then followed by banning any "religious" books selected, ER813. The panel's decision likewise conflicts with the Eighth Circuit's ruling in *Pratt* that a ban of an educational film violated "the students' right to receive

information." 670 F.2d at 779.

Monteiro further held that "when a school board identifies information that it believes to be a useful part of a student's education, that student has the [First Amendment free speech] right to receive the information." 158 F.3d at 1028 (emphasis added). Here, the Academy chose to use religious primary sources in its curriculum, and Plaintiffs-Appellants M.K. and Kosmann (M.K.'s parent) have the right to receive those sources. The panel's conclusion that students "have no First Amendment right" to receive instruction from the religious primary sources, Opinion at 4, directly contradicts these cases.

Furthermore, the panel's holding that teachers have no First Amendment right to challenge a ban of relevant educational materials, Opinion at 4, directly conflicts with the ruling in *Monteiro* that book censorship has a "significant effect on the First Amendment rights of teachers." *Id*. at 1031 n.13. "Freedom of expression of teachers [is] a special concern of the First Amendment." *Id*.[5]

The panel's opinion also conflicts with several other circuits that have upheld the right of teachers to use relevant educational materials in class. *Keefe v.*

[5] While the panel correctly ruled that Moffett and Kosmann, who were both teachers at the Academy, "[have] standing to pursue [their challenge to the Book Ban]," Opinion at 3, it ignored Ninth Circuit precedent holding that when "students [are] being denied free access to information in the continuing process of their education," they and their parents have standing to challenge the denial, *Johnson v. Stuart*, 702 F.2d 193, 197 (9th Cir. 1983).

Geanakos, 418 F.2d 359, 362 (1st Cir. 1969) (ruling in favor of a teacher who was suspended for assigning an educational magazine article, stating that "it is hard to think that any student could walk into the library and receive a book, but that his teacher could not subject the content to serious discussion in class"); *Cockrel v. Shelby County Sch. Dist*., 270 F.3d 1036, 1055 (6th Cir. 2002) (ruling that a teacher's free speech rights were violated when she was punished for inviting a speaker to discuss industrial hemp, especially since the school district had given permission "permitting the [teacher] to engage in that speech").

In all of the above cases, it did not, nor would not, alter the outcome that the speech in question was the government's. It is generally assumed that the curriculum is that of the school itself.

Finally, the panel's holding conflicts with a recent Ninth Circuit opinion reiterating the academic freedom rights of teachers, even when making statements blatantly hostile to religion. *C.F. v. Capistrano Unified Sch. Dist.,* 2011 WL 3634159 (9th Cir. 2011). "[T]eachers must…be given leeway to challenge students to foster critical thinking skills and develop their analytical abilities….[W]e must be careful not to curb intellectual freedom by imposing dogmatic restrictions that chill teachers from adopting the pedagogical methods they believe are most effective." *Id*. at *11. Can it be that a teacher has a greater free speech interest in

curriculum speech that is hostile to religion than in objectively teaching about religion using relevant primary sources?

III. Contrary to the Panel's Holding, Political Subdivisions Have Enforceable Constitutional Rights.

Notwithstanding that the Academy is a private, non-profit corporation, the panel further erred by holding that it is a political subdivision and, as such, is *per se* "incapable of bringing an action against the state." Opinion at 3. The panel's holding directly conflicts with *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 487 n.31 (1982), where the Supreme Court permitted a school district to sue the state under the Equal Protection Clause and 42 U.S.C. §1983, and even awarded attorney's fees as a prevailing party under §1988.

It is long overdue for the *en banc* court to fully analyze, decide, and correct this circuit's political subdivision standing doctrine. It conflicts with jurisprudence from the Supreme Court and several appellate courts. Even several judges from this circuit have questioned it. Judge Reinhardt recognized that the doctrine conflicts with *Seattle School District*. "The majority concludes that two Arizona school districts lack standing to bring suit…to prevent enforcement of a state statute that allegedly violates federal law….Because the majority's analysis contravenes *Seattle School District* and creates both an inter-circuit and an intra-circuit conflict, I respectfully dissent." *Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1996) (Reinhardt, J., dissenting).

Chief Judge Kozinski suggested *en banc* review of the issue. *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998) (Kozinski, J., concurring) ("[T]he fact that three other circuits seem to have recognized an exception to the per se rule of [political subdivision standing] might be a reason to reconsider the matter en banc").

It has even been directly questioned by at least one member of the U.S. Supreme Court. *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1041-42 (1980) (White, J., dissenting from denial of certiorari) (The Ninth Circuit's "*per se* rule [against political subdivision standing] is inconsistent with *Allen*, in which one of the appellants was a local board of education").

The panel's holding also conflicts with several federal circuits that have held that "school district[s]…have the power to bring their federal claims against the state." *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998) (standing under the Supremacy Clause). *See also Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979) (standing under the Supremacy Clause); *Sch. Bd. of City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987) (standing when state action "impede[s] the School Board's ability to carry out its own constitutional duty").

This error is compounded because the panel relied upon its ruling that the Academy lacked standing to deny the Plaintiffs-Appellants' claims of retaliation, Equal Protection Clause violations, and ultra vires actions in violation of state law. Opinion at 5. *En banc* review should be granted to clarify this important standing issue and to address Plaintiffs-Appellants' additional claims.

IV. The Panel Disregarded Binding Precedent That Charter Schools Can Be Private Entities Afforded Constitutional Protection and Are Not *Per Se* Political Subdivisions of the State.

The panel incorrectly held that the Academy is a "government entity" for purposes of suing the state. Opinion at 3. This directly conflicts with this Court's holding in *Caviness v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806, 814 (9th Cir 2010), that an Arizona charter school was not *per se* a state political subdivision.

The panel dismissed *Caviness* in a footnote with no analysis. Opinion at 3. But a comparison of Arizona's statutes, as discussed in *Caviness*, with Idaho's shows that the panel ignored the nearly identical statutory framework of Arizona and Idaho when ruling that the Academy is a political subdivision.

Arizona (from *Caviness*)	**Idaho (from Idaho Code)**
"Charter schools serve as alternatives to traditional public schools by provid[ing] additional academic choices for parents and pupils, and they are intended to provide a learning environment that will improve pupil achievement." 590 F.3d at 809.	"Public charter schools…operate independently from existing traditional school district structure but within the existing public school system as a method to…improve student learning," and "[p]rovide parents and students with expanded choices." I.C. §33-5202.

"Charter schools are publicly funded, although they are authorized to accept private grants and gifts." *Id.*	Charter schools are publicly funded, but may accept funds from "any private person or organization." I.C. §33-5208(6).
"Charter schools are a political subdivision of th[e] state for purposes of [employee retirement eligibility definitions]." *Id*. at 810.	"For the purposes of [the public employees retirement system], a public charter school…shall be deemed a governmental entity." I.C. §33-5204(1).
"Except as otherwise specified in Arizona statutes regulating charter schools, or in the school's own charter, a charter school is exempt from all statutes and rules relating to schools, governing boards and school districts." *Id*.	"Each public charter school is otherwise exempt from rules governing school district…with the exception of [teacher certification, accreditation, student qualifications for attendance, and background checks]." I.C. §33-5210.

Charter schools in Arizona and Idaho have virtually the same legal status and obligations under state law. But as a result of the panel's decision, private charter schools in these states are treated differently even though they are based on nearly identical laws. Moreover, regardless of whether the Academy is deemed a private entity, a government entity, or some hybrid, it is the entity or "speaker" which has the authority to select the curriculum—a fact ignored by the panel.

V. The Panel's Decision Ignores Binding Ninth Circuit and Supreme Court Precedent That a Ban on Religious Documents and Text Violates the First Amendment.

The panel's cursory opinion completely ignored the Plaintiffs-Appellants' First Amendment claims and the case law striking down similar vague, discriminatory censorship by the government. The panel's decision allows the

broadest book ban ever enacted to stand, while also paving the way for future discriminatory literature bans (e.g. literature by African-American authors) that censor educationally important works. Contrary to the panel, such categorical book bans cannot survive strict constitutional scrutiny.

a. The Panel's Decision Conflicts with Ninth Circuit Precedent Striking Down Vague Policies That Chill Teachers' and Students' Speech.

The panel denied the Teacher-Plaintiffs' First Amendment vagueness challenge to the Book Ban of "religious documents and text." Opinion at 4. *See* ER758 (Book Ban applies to teachers and would prohibit using "original sacred text from Egyptian history"). This directly conflicts with the Ninth Circuit's holding in *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996), that a teacher can bring a First Amendment challenge to a vague policy restricting his curricular speech.

The panel rejected this claim based solely on its conclusion that the Idaho government decides the curriculum. Opinion at 4. But this is a non-starter. Whichever government agency decides the curriculum (in Idaho, it is the local school district), teachers cannot be punished under vague regulations.

The *Cohen* court struck down the vague policy because "officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years." *Id*. at 972. The

Court identified three problems with vague policies: they (1) lack "fair warning," (2) "discourage[] the exercise of first amendment freedoms," and (3) "impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis." *Id*.

The panel's opinion conflicts with *Cohen* because the prohibition on all "religious documents and text" is a vague term subject to numerous logical meanings, leaving schools, teachers, and students without "fair warning" of what is prohibited. Teachers and students are now chilled from using important literary works. ER615 (Education expert expressing concern over the "negative impact on the study of literature, art, and music" when teachers avoid important works out of fear that they are "religious"). Finally, the Commission (which has no authority over the Academy's curriculum selection) gave itself veto power over what is "religious." ER105 (Commission warning that the Book Ban encompasses even "less obviously religious texts").

b. The State-Wide Book Ban Discriminates Against Religious Content and Viewpoints.

The panel's ruling upholding the Book Ban that facially discriminates against religious content and viewpoints directly conflicts with the Supreme Court holding that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*,

515 U.S. 819, 829 (1995). The panel's ruling also ignores the Defs.-Appellees' admission that "certain religious viewpoints—those that promote or disparage a particular religious point of view—are 'banned.'" Ans.Br. at 13 n.16.

Specifically in the context of school curriculum, the Supreme Court has ruled against a state-wide ban of books teaching certain viewpoints. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) ("It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees"). The panel ignored that Idaho's Book Ban goes far beyond the narrow scope of *Epperson*. It bans teachers and students from using any documents and text that provide a religious viewpoint in subject matters such as history, literature, social studies, music, etc.

The panel's decision to uphold the content-based Book Ban also conflicts with the Supreme Court's holding in *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2738 (2011), that "restrictions on the content of protected speech [are] invalid unless [the government] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." There is absolutely no educational purpose in banning the entire category of religious works from all Idaho schools and universities. And a ban that excludes all religious documents and text is not narrowly tailored.

c. The Panel's Opinion Conflicts with the Supreme Court's Holding Prohibiting Prior Restraints on Speech.

The panel erred by upholding the unconstitutional prior restraint created by the Book Ban. Prior restraints like the Book Ban of all "religious documents and text" are prohibited unless they contain "narrow, objective, and definite standards" to guide the decision maker. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

Despite the Academy's multiple written requests for "documentation specifically telling us what will constitute religious materials," ER860, the Commission repeatedly refused to provide any guidance, telling the Academy that "it would be impossible…to offer a thorough description of what materials you may or may not use," ER205. A standard that is "impossible" to describe is far from being "narrow, objective, and definite."

In sum, the panel's failure to follow direct case law striking down vague, content and viewpoint-based prior restraints on speech necessitates *en banc* review.

VI. The Panel's Affirmation that the Book Ban is Required by the Establishment Clause Contradicts Precedent Holding That Religious Documents and Text May Be Used Constitutionally in School.

The panel held that the Book Ban complies with the Establishment Clause by ensuring that "public money [is used] for secular purposes." Opinion at 5. This affirms the District Court's erroneous holding that the Academy's use of religious documents and text has a religious purpose, ER24, and "would be in violation of

the Establishment Clause," ER19. The panel's affirmation of this conclusion directly contradicts cases from both the Supreme Court and Ninth Circuit holding that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Graham,* 449 U.S. 39, 42 (1980). *See also Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380 (9th Cir. 1994) ("reading, discussing or contemplating" religion in school curriculum is permissible); *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985) (the "literary or historic study of the Bible is not a prohibited religious activity").

The panel also disregarded that the Book Ban fails to comply with the clear language of Article IX, §6 of the Idaho Constitution that prohibits "documents of a political, sectarian, or denominational character," not "religious documents and text."[6] *En banc* review is required to rectify the panel's errors.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants Nampa Classical Academy, Inc., et al. respectfully request rehearing *en banc*.

[6] Def.-Appellee Commission enacted the Book Ban based in part on an "informal and unofficial response" from the Idaho Attorney General that use of such documents "would *likely* violate" Article IX, §6 of the Idaho Constitution. ER724, 728.

Dated: August 29, 2011

Respectfully submitted,

/s/David A. Cortman
David A. Cortman
Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4(a) AND 40-1(a)

I certify that pursuant to Circuit Rule 35-4(a) and 40-1(a), the attached petition for rehearing en banc is proportionally spaced, has a typeface of 14 point or more and contains 4,198 words.

Dated: August 29, 2011

Respectfully submitted,

/s/David A. Cortman
David A. Cortman
Attorney for Plaintiffs-Appellants

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 August 29, 2011. 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.

/s/David A. Cortman
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Attorney for Plaintiffs-Appellants