No. 13-56069

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL DIGITAL NETWORK, LLC,

Plaintiff-Appellant,

v.

JACOB APPELSMITH, AS DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL BOARD

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. CV11-09065 (BMCPJWX)
Hon. Consuelo B. Marshall, U.S.D.J.

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a non-profit, non-stock organization. No publicly traded entity holds any form of ownership interest in Public Citizen, Inc.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a non-profit organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long been involved with the development of commercial speech doctrine. Public Citizen's attorneys have represented parties seeking to invalidate overbroad restraints on commercial speech when those restraints harmed competition and injured consumers, including in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Public Citizen has also defended commercial speech regulations as amicus curiae in cases where those regulations were important to protecting public health or served other important government and public interests, for example in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001), and *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015).

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[1] Public Citizen has moved for leave to file this brief. No counsel for a party authored this brief in whole or in part; no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

Public Citizen has become increasingly concerned that corporate and commercial interests are promoting stringent applications of commercial speech doctrine to stifle legitimate economic regulatory measures. The panel's decision in this case, by adopting a new, higher level of scrutiny for "content-based" commercial speech regulations, implicates this concern because it may unnecessarily tilt the First Amendment balance against laws and regulations that serve important public interests. Public Citizen submits this brief in the hope that it will be helpful to the Court in determining whether to give further consideration to the important issues posed by this case.

ARGUMENT

I. The panel's decision conflicts with binding circuit precedent.

A. The Court's prior decision in *Actmedia* is binding unless clearly irreconcilable with intervening precedent.

As part of a set of restrictions designed to prevent financial support of liquor retailers by manufacturers and wholesalers of alcoholic beverages, the statutory provisions at issue in this case prohibit manufacturers and wholesalers from paying retailers for advertisements. *See* Cal. Bus. & Prof. Code § 25503(f)–(h). The statute does not prohibit

either retailers or manufacturers from engaging in advertising; indeed, it expressly permits a manufacturer to provide a retailer with advertising materials for the manufacturer's products, as long as the manufacturer does not pay the retailer for displaying those materials. *See id.* §§ 25503(g), 25611.1.

In *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (1986), this Court upheld the statute's prohibition on payments for advertisements against a First Amendment challenge. Subjecting the statute to the intermediate scrutiny applicable to restrictions on commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court held that the statute directly advanced, and was not broader than necessary to achieve, substantial state interests in regulating the alcoholic beverage industry. *See* 830 F.2d at 965–68.[2]

The failure of the panel in this case to recognize *Actmedia*'s continuing validity and follow its holding warrants panel or en banc

[2] Under Central Hudson, a court considers (1) whether commercial speech is false or misleading or concerns unlawful activity (in which case it is unprotected); if not, the court determines (2) whether there is a substantial government interest in restricting it, (3) whether the restriction directly advances that interest; and (4) whether the restriction is broader than reasonably necessary to serve the interest. *Actmedia*, 830 F.2d at 965

rehearing. As explained below, the reason the panel gave for declining to follow *Actmedia*—that the standard of scrutiny applied in that case has been superseded by a more stringent standard announced in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011)—is erroneous and therefore does not justify the panel's failure to follow a precedential opinion of a prior panel in this Circuit. Rehearing is thus necessary to "maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). The correctness of the panel's holding that *Sorrell* created a new standard of review between intermediate and strict scrutiny for content-based commercial speech restrictions also poses a question of "exceptional importance" that has divided the lower federal courts. Fed. R. App. P. 35(a)(2) & (b)(1)(B).

This Court has emphasized that its precedents are binding on subsequent panels unless "intervening Supreme Court authority is *clearly irreconcilable* with … prior circuit authority." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (emphasis added). Under this "high standard," *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011), it is not enough that the intervening authority "cast doubt" on an earlier ruling, *id.*, or that there is "'some tension' between

the intervening higher authority and prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citation omitted). The Court is "bound by [its] prior precedent if it can be reasonably harmonized with the intervening authority." *Id.* at 1206 (citation omitted). If the "'overall analytic framework' of the intervening Supreme Court case [is] 'consistent with [the] overall analytic approach' in prior circuit precedent," *id.* (citation omitted), this Court's precedent remains binding unless the intervening Supreme Court decision's "specific application" of that framework would "mandate" a contrary result in the circumstances presented by this Court's precedent. *Id*. (citation omitted).

B. *Sorrell* is not clearly irreconcilable with *Actmedia* because it did not create a new level of review for content-based commercial speech restrictions.

The panel correctly acknowledged the principle that circuit precedents are binding unless clearly irreconcilable with intervening Supreme Court precedent, but applied the principle improperly. *Sorrell* is not clearly irreconcilable with *Actmedia*. Far from it.

Sorrell applied the same "overall analytic framework" as did this Court in *Actmedia*—the *Central Hudson* standard of intermediate scrutiny for commercial speech restrictions—and nothing in *Sorrell*'s

"specific application" of that standard would "mandate" invalidation of California's advertising-payment law. *Lair*, 697 F.3d at 1206. Indeed, the panel decision acknowledges that *Sorrell* does not mandate a particular outcome here by remanding for further consideration under its newly announced standard of scrutiny.

The panel's view that *Sorrell* adopted an analytical framework incompatible with the *Central Hudson* intermediate scrutiny applied by the Court in *Actmedia* rested on its understanding that "[i]n *Sorrell*, … the Supreme Court held that content-or speaker-based restrictions on nonmisleading commercial speech regarding lawful goods or services must survive 'heightened judicial scrutiny.'" 810 F.3d at 648. The panel regarded *Sorrell*'s reference to "heightened scrutiny" as a "modifi[cation]" of the *Central Hudson* test, *id*. at 650, requiring something more than intermediate scrutiny. *See id.* at 650–51 ("[S]ection 25504 is now subject to heightened judicial scrutiny, not the intermediate scrutiny applied in *Actmedia*."). Although the panel stated that heightened scrutiny could be applied using the framework of the *Central Hudson* test, it held that heightened scrutiny requires a more

stringent analysis of the fit of ends and means than does intermediate scrutiny. *See id*. at 648–49.

The panel's analysis reflects a misconstruction of *Sorrell's* use of the term "heightened scrutiny." That term does not denote a level of scrutiny somewhere between intermediate and strict scrutiny, as the panel thought (*see id*. at 648 & n.3)—or, at a minimum, it does not do so so plainly as to render *Sorrell*'s holding "clearly irreconcilable" with *Actmedia*. Rather, the Supreme Court's opinions, including *Sorrell*, demonstrate that "heightened scrutiny" is a *generic* term indicating a level of scrutiny higher than rational-basis scrutiny. "Heightened scrutiny" includes both intermediate and strict scrutiny; it does not specify one or the other, nor does it refer to some new level of scrutiny in between.

For example, the Court's equal protection precedents frequently use the term "heightened scrutiny" to describe the intermediate scrutiny applicable to gender classifications. *See*, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996); *Clark v. Jeter*, 486 U.S. 456, 463, 465 (1988). In the First Amendment area, the Court has likewise referred to the intermediate scrutiny applied to limits on political contributions as a

form of "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). More generally, the Court has used the term "heightened scrutiny" in contradistinction to the rational-basis review that is applied when (for example) a law involves no restriction of First Amendment rights, no invidious classifications, and no infringement of other fundamental rights. *See Minn. State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 291 (1984); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (stating that although economic regulations are subject to rational-basis review, "some degree of heightened scrutiny" is required for laws that infringe First Amendment interests); *United States v. Am. Library Ass'n*, 539 U.S. 194, 216 (2003) (opinion of Breyer, J.) (using "heightened scrutiny" to refer to a level of review intermediate between rational-basis and strict scrutiny).

The Court's opinion in *Sorrell* uses the term "heightened scrutiny" in the same way—as a general description of the elevated scrutiny, whether intermediate or strict, that usually applies when First Amendment rights are implicated, rather than as a specific designation of a new level of scrutiny between intermediate and strict scrutiny, as the panel thought. When it used the term, the Court in *Sorrell* was

addressing the state's argument that the law at issue was not a speech regulation at all and was thus subject only to the rational-basis review applicable to economic regulations that implicate no fundamental rights. The Court held that the statute imposed a burden on protected speech (by operating through content- and speaker-based restrictions) and thus was subject to First Amendment review, necessitating heightened scrutiny as opposed to the rational-basis review advocated by the state. *See* 131 S. Ct. at 2659, 2664–67.

The *Sorrell* Court went on to acknowledge that the *form* of heightened scrutiny applicable to a content-based restriction of commercial speech is the intermediate scrutiny defined in *Central Hudson*, *id*. at 2667–68, under which "commercial speech can be subject to greater governmental regulation than noncommercial speech." *Id*. at 2672 (citation omitted). The Court, however, found that the law at issue failed that level of heightened scrutiny—a finding it reached by applying each element of the *Central Hudson* intermediate scrutiny standard without imposing an increased burden on the state under any of them. *Id*. at 2668–72. It was therefore unnecessary for the *Sorrell* Court to address the challengers' argument that the law was subject to strict

scrutiny on the ground that it restricted fully protected speech rather than commercial speech. *See id.* at 2667.

Thus, contrary to the panel's assertion in this case, it is not correct that the *Sorrell* majority "did not actually apply heightened scrutiny." Slip op. 16. *Sorrell* expressly stated that the Court found that the law "cannot satisfy" heightened scrutiny. 131 S. Ct. at 2659. The Court reached that determination by applying the *form* of heightened scrutiny applicable to content-based commercial speech restrictions: *Central Hudson* intermediate scrutiny.

The panel's conclusion that *Sorrell* is clearly irreconcilable with *Actmedia* is therefore erroneous. *Sorrell* applied the same "analytic framework," *Lair*, 697 F.3d at 1206, as did *Actmedia* by testing the constitutionality of a commercial speech restriction under the intermediate level of heightened scrutiny defined by *Central Hudson*. *Actmedia* was binding on the panel, and the panel erred by not following that binding circuit precedent. In the process, the panel created inconsistent circuit precedent, which en banc review is needed to correct.

II. The panel's interpretation of *Sorrell* presents a question of exceptional importance.

A. The creation of a new standard of review between intermediate and strict scrutiny will unnecessarily complicate and distort commercial speech doctrine.

Even if the panel had not declined to follow an on-point precedent of this Court, its holding that *Sorrell* adopted a new level of scrutiny for commercial speech restrictions would be sufficiently important to merit en banc review. Not only does the panel's holding reflect a misconstruction of *Sorrell*, it is likely to cause considerable confusion and disruption of commercial speech doctrine. Sandwiching a new standard of review between intermediate scrutiny and strict scrutiny will complicate the task of courts in commercial speech cases. Confusion is all the more likely because of the manner in which the panel has defined the new standard, which, although more stringent than intermediate scrutiny, continues to use the intermediate scrutiny "framework" with a vaguely defined overlay of greater strictness. *See* 810 F.3d at 648–49. In particular, it appears that under the panel's standard, courts are supposed to apply the third and fourth *Central Hudson* factors in a way that requires a "fit" between ends and means that is tighter than

required under *Central Hudson* but still short of the least-restrictive-means standard applicable under strict scrutiny.

The erection of a new standard is particularly unnecessary because *Central Hudson* already requires that a regulation directly serve a substantial state interest and that it be no broader than necessary to serve that interest. That standard has been fatal to many speech restrictions. *See*, *e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 768–73 (1993). Moreover, as the Supreme Court has emphasized, the *Central Hudson* standard, by requiring a reasonable but not necessarily perfect fit, recognizes the "difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989). The panel's more-than-intermediate-but-less-than-strict scrutiny will compound that difficulty by requiring courts to calibrate a new level of fit that is more than reasonable but less than perfect. Under *Central Hudson*, the fit must be "something short of" that required by least-restrictive-means analysis, *id*. at 477; under the majority's test, a law must apparently be a little less short than "something short of" least restrictive to pass muster.

In addition, the panel's view that this new level of scrutiny is triggered by content- or speaker-based commercial speech restrictions, while ordinary intermediate scrutiny will continue to apply to commercial speech restrictions that are not content- or speaker-based, has exceptionally far-reaching implications. Commercial speech restrictions are always, or virtually always, content- or speaker-based in the broad sense in which the panel has applied those terms. That is, commercial speech restrictions by definition apply to commercial messages and commercial speakers, and "the classification of speech between commercial and noncommercial" may itself be "a content-based distinction." *CTIA—The Wireless Ass'n v. City of Berkeley*, __ F. Supp. 3d __, 2015 WL 5569072, at *10, n.9 (N.D. Cal. 2015). Thus, as one commentator has observed, "this argument, that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial speech doctrine because, by definition, the commercial speech doctrine is applicable only to a specific type of content—commercial content." Tamara Piety, *The First*

Amendment and the Corporate Civil Rights Movement, 11 J. Bus. & Tech. L. 1, 20 (2016).[3]

The panel's reading of *Sorrell* thus posits that the Supreme Court implicitly overruled prior decisions that used intermediate scrutiny to uphold commercial speech restrictions that applied to particular commercial messages or speakers. *See*, *e.g.*, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 634–35 (1995); *Fox*, 492 U.S. at 480–81. Indeed, *Central Hudson* itself concerned a content- and speaker- based restriction on advertising by electric utilities. Under the panel's interpretation of *Sorrell*, the Court in *Central Hudson* applied the wrong standard of review—in the very case in which the standard was created. Had the *Sorrell* Court intended such a broad transformation of commercial speech doctrine, it surely would have said so.

[3] Another commentator, who advocates a very broad reading of *Sorrell* and "heightened scrutiny," likewise acknowledges the sweeping effect of such a reading: "If heightened scrutiny is to be applied to any commercial speech regulation that is based on the content of the speech being regulated, one could reasonably conclude that *all* such regulations will be subject to heightened scrutiny." Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2011 Cato S. Ct. Rev. 129, 135 (2010–2011).

B. The panel's reading of *Sorrell* is at odds with the way other courts have interpreted the decision.

Other federal courts read *Sorrell* markedly differently from the panel—notwithstanding the panel's effort to reconcile the decisions. For example, in *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014), the Eighth Circuit, as the panel states, held that *Sorrell* provides that "heightened scrutiny" applies to "content-based" commercial speech regulations. It pointed out, however, that "*Sorrell* … did not define what 'heightened scrutiny' means," *id.*, and it concluded that *Central Hudson*'s intermediate scrutiny is the appropriate level of heightened scrutiny for commercial speech restrictions: "The upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*." *Id.*

Similarly, in *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 604 (7th Cir. 2012), the Seventh Circuit cited *Sorrell* for the boilerplate proposition that, "[i]n commercial-speech cases, the government must establish that the challenged statute 'directly advances a substantial governmental interest and that the measure is drawn to achieve that interest,'" *id.*, or, "[s]tated differently," that "*intermediate scrutiny*"

applies. *Id*. (emphasis added). And in *King v. Governor of the State of New Jersey,* 767 F.3d 216 (3d Cir. 2014), the Third Circuit applied *Central Hudson* "intermediate scrutiny" to a professional-speech restriction, *id*. at 234, and *rejected* the argument that *Sorrell* required a more stringent standard of review because the restriction was content-based. *Id*. at 236–37.

The Eleventh Circuit likewise held that "intermediate scrutiny" remains applicable to content-based commercial speech restrictions after *Sorrell*. It characterized that standard as the "level of heightened scrutiny" applicable to commercial speech. *Dana's R.R. Supply v. Atty. Gen., Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015).

A panel of the Tenth Circuit similarly recognized that "intermediate scrutiny" is the form of "heightened scrutiny" applied by the Court in *Sorrell*. *Okla. Corrections Prof. Ass'n v. Doerflinger*, 521 F. Appx. 674, 677 n.3 (10th Cir. 2013) (nonprecedential opinion).[4]

[4] *See also Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n*, 597 F. Appx. 342, 365 (6th Cir. 2015) (Moore, J., dissenting in part and concurring in judgment in part) ("[A]lthough *Sorrell* stated that 'heightened judicial scrutiny' applied, it reaffirmed the use of the *Central Hudson* test ...."). The Fourth Circuit has noted uncertainty concerning the meaning of "heightened scrutiny" as used in *Sorrell*. *See Educ.*

District court opinions in this Circuit, prior to the panel's opinion, also held that intermediate scrutiny remains applicable after *Sorrell* to content-based commercial speech restrictions. *See Contest Promotions, LLC v. City & County of San Francisco*, 100 F. Supp. 3d 835 (N.D. Cal.), *reconsid. denied*, 2015 WL 4571564 (N.D. Cal. 2015), *appeal pending*, No. 15-16682 (upholding San Francisco ordinance prohibiting off-site commercial signs); *San Francisco Apt. Ass'n v. City & County of San Francisco*, __ F. Supp. 3d __, 2015 WL 6747489 (N.D. Cal. 2015), *appeal pending*, No. 15-17381 (upholding San Francisco ordinance regulating buyout agreements between landlords and tenants).[5]

The judicial interpretation of *Sorrell* most similar to the panel's may be that of the Second Circuit in *United States v. Caronia*, 703 F. 3d 149 (2d Cir. 2012). But *Caronia* acknowledged that *Sorrell* "did not decide the level of heightened scrutiny to be applied, that is, strict, intermediate, or some other form of heightened scrutiny." *Id*. at 164.

Media Co. at Va. Tech., Inc. v. Insley, 731 F.3d 291, 298 n.4 (4th Cir. 2013).

[5] *See also Lamar Cent. Outdoor, LLC v. City of Los Angeles*, 199 Cal. Rptr. 3d 620 (Cal. Ct. App. 2016) (applying intermediate scrutiny to uphold a billboard ban, and noting that *Sorrell* neither overruled *Central Hudson* nor explained the nature of "heightened scrutiny").

That observation, which recognizes that intermediate scrutiny is a form of heightened scrutiny, is at odds with the panel's view that *Sorrell*'s use of the words "heightened scrutiny" is clearly irreconcilable with *Actmedia*'s application of intermediate scrutiny. Moreover, *Caronia* illustrates the broad and undesirable consequences of treating *Sorrell* as a significant change in commercial speech doctrine, as the decision has been understood by at least one district court in the Second Circuit as barring the Food and Drug Administration from enforcing the federal prohibition on the marketing of prescription drugs for unapproved uses, an essential part of the longstanding regulatory scheme developed to protect patients from snake oil. *See Amarin Pharma, Inc. v. FDA*, 119 F. Supp. 3d 196 (S.D.N.Y. 2015).

In sum, the panel's holding that *Sorrell* requires a new level of scrutiny for content-based commercial speech restrictions is not supported by *Sorrell* itself, complicates and distorts commercial speech doctrine, and is at odds with the way other circuits read *Sorrell*. The correctness of the panel's interpretation of *Sorrell* thus presents a question of exceptional importance warranting rehearing.

III. Whether the statute imposes a speech restriction at all is also an important question meriting rehearing.

In addition to the conflict between the panel's opinion and *Actmedia*, and the important underlying question of whether *Sorrell* displaces intermediate scrutiny for content-based commercial speech restrictions, the petition presents the important antecedent question whether the California law at issue is properly viewed as a speech restriction at all. As the petition explains, the statute does not prevent either retailers or liquor manufacturers and wholesalers from advertising: It regulates only the terms of transactions between manufacturers/wholesalers and retailers as part of a suite of restrictions on payments from suppliers to retailers.

Such regulations of payments, prices, and business relations are properly viewed as economic regulations subject to rational basis review, not as speech restrictions. *See*, *e.g.*, *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (holding that a city ordinance imposing wage requirements on businesses operating as franchises was not a restriction on speech); *Rowell v. Pettijohn*, __ F.3d __, 2016 WL 825396 (5th Cir. 2016) (holding that a law prohibiting surcharges for use of credit cards is not a speech restriction); *Expressions Hair Design v.*

Schneiderman, 808 F.3d 118 (2d Cir. 2015) (same); *People v. Guiamelon*, 140 Cal. Rptr. 3d 584, 608–09 (Cal. Ct. App. 2012) (holding that a law prohibiting payment for patient referrals and physician marketing services is not a regulation of speech); *United States v. Mathur*, 2012 WL 4742833, at *10 (D. Nev. 2012) (holding that the federal Anti-Kickback Act, prohibiting payment for referral of Medicare patients, is not a regulation of speech). Rehearing would allow consideration of the important preliminary question whether regulation of economic relations between retailers and suppliers implicates the First Amendment at all, before the Court takes on the very consequential issue of the scope of First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, this Court should grant panel or en banc rehearing.

Respectfully submitted,

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March 31, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(C) and Circuit Rule 29-2(c)(1), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word 2010), contains 3,825 words (which does not exceed the 4,200 words permitted by Circuit Rule 29-2(c)(2)).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief 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 March 31, 2016, that all participants in the case are registered CM/EFC users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott L. Nelson
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