No. 12-35392

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES COURTNEY; CLIFFORD COURTNEY,

Plaintiffs-Appellants,

v.

JEFFREY GOLTZ, chairman and commissioner; PATRICK OSHIE, commissioner; PHILIP JONES, commissioner, in their official capacity as officers and members of the Washington Utilities and Transportation Commission; DAVID DANNER, in his official capacity as executive director of the Washington Utilities and Transportation Commission,

Defendants-Appellees.

On Appeal from the United States District Court
Eastern District of Washington at Spokane
The Honorable Thomas O. Rice, Judge

BRIEF OF *AMICUS CURIAE* ARROW LAUNCH SERVICE, INC., IN SUPPORT OF DEFENDANTS-APPELLEES
(FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a))

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), appellant, provides the following information:

Arrow Launch Service, Inc. ("Arrow Launch") has no parent company and no publicly held corporation owns 10 percent or more of Arrow Launch's stock. Arrow Launch is affiliated with two sister corporations, Arrow Marine Services, Inc. and Expeditions NW, Inc., which, like Arrow Launch, are both Washington closely-held corporations.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Arrow Launch was started by Jack L. Harmon, Jr. and his wife in 1989, who together with a then-partner, purchased an existing business and applied to transfer the certificate issued to its predecessor by the Washington Utilities and Transportation Commission ("WUTC"), BC-97, in order to be approved to operate the business. Mr. Harmon had been a licensed boat operator for a number of years and was very familiar with the maritime industry, but his dream was to own and operate a business. Today, Arrow Launch is a commercial ferry company regulated by the WUTC that provides launch service as defined in Wash. Admin. Code § 480-51-020 between various fixed termini and a number of ports in Puget Sound, Washington.

Arrow Launch utilizes Coast Guard certificated vessels operated by licensed boat operators and has vessels of varying length from 40 feet to 120 feet that serve the shipping public consisting of grain, oil, car, and container carriers along with the tug and barge industries. It ferries passengers, freight, customs agents, medical supplies, and various other personnel, equipment, and supplies to and from ships at anchor, at docks, or while the vessel is underway in multiple ports in Puget Sound on an around-the-clock, 24 hour/365 day a year basis. Its employees are subject to strict substance abuse testing and safety training, including hazardous material spills and other environmental exposure circumstances. Like airline carriers,

Arrow Launch holds the safety and security of its passengers, crew and freight in the balance with every move its vessels make upon the waters of the state. Since 9/11, concern for shipping lanes, port security and cargo has substantially increased and local, state and federal regulations governing maritime operations for service providers are evolving to address these challenges.

The public convenience and necessity ("PCN") process described by the Courtneys in their opening brief is neither prohibitively expensive nor a paper-pushing, superfluous exercise of bureaucracy. For Arrow Launch, it is an important threshold evaluation process by which the operational and financial fitness of the service proponent is tested and the economic viability of the service is considered. Should this Court reverse the district court ruling and find, *inter alia*, that Wash. Rev. Code § 81.84.010 is unconstitutional, the certificate of public convenience and necessity that Arrow Launch has held since 1989 and, indeed, the entire supporting infrastructure of its operations in Puget Sound would be adversely affected. Thus, Arrow Launch has a direct interest in the outcome of this appeal.

No party's counsel authored any portion of this brief. No party, party's counsel or any other person other than *Amicus Curiae* contributed any money intended to fund the preparation and submission of this brief.

ARGUMENT

Wash. Rev. Code § 81.84.010, in relevant parts, requires a PCN certificate to operate any "vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state, including the rivers and lakes and Puget Sound . . . " The Courtneys challenge the constitutionality of Wash. Rev. Code § 81.84.010's PCN certification requirement, claiming that it violates their Fourteenth Amendment constitutional right to use navigable waters of the United States on two bases: (1) as applied to the provision of public ferry service on Lake Chelan in Washington; and (2) as applied to the provision of a boat transportation service on Lake Chelan solely for patrons of specific business or groups of businesses. *See* Brief of Plaintiffs-Appellants at 2-3. This brief addresses the Courtneys' second claim and the reasons why the district court properly dismissed it on standing, ripeness, and abstention grounds.

At the outset, although Arrow Launch does not necessarily disagree with the Courtneys' claim that their proposed ferry services may require a PCN certificate under Wash. Rev. Code § 81.84.010, whether or not their proposed private ferry services would require a PCN certificate is not properly before the Court. The Courtneys have not demonstrated an injury in fact because they have not attempted to obtain a certificate for their proposed services. And as the district court properly noted, there is also "lingering uncertainty" about whether the Courtneys are even

required to obtain a PCN certificate to operate their proposed ferry services, ER 21-22, as no administrative record has been developed on this issue over the past almost 15 years. Thus, whether the Courtneys' varying service proposals require state certification cannot be adduced.

The record reflects that James Courtney applied for a PCN certificate to operate a ferry in 1997, and, by final order, the WUTC affirmed an administrative law judge's initial order that he did not meet his burden of proof to obtain the certificate. ER 5-6. James Courtney never sought judicial review of the WUTC's order under Wash. Rev. Code § 34.05.570. Instead, since that time, the Courtneys have made a series of proposals for Chelan ferry services and requests for exemption under the statute, which included informal resolution by WUTC staff after reconsideration and, in 2006, a withdrawn petition for a declaratory order by the United States Forest Service to the WUTC on a related limited service issue. ER 6-8. Since the WUTC's final order on James Courtney's 1997 initial certificate application, however, there has been no formal WUTC review of any developed administrative or evidentiary record concerning the Courtneys' precatory ferry service proposals and no final agency action has occurred.

On January 14, 2010, the WUTC issued a report entitled "Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan"

("Ferry Report").[1] The Ferry Report, cited frequently by the parties and the district court, reflects an updated assessment as mandated by the legislature of the requirements for certification of ferry services on Lake Chelan. It does not represent any administrative or judicial fact finding or legal conclusions that would support the Courtneys' current presumptions that: (1) an appropriate application would be either futile or denied or (2) the Courtneys' currently configured service proposal would require a PCN certificate to proceed. The record simply does not contain any perfected proposal for regulated or exempt service to validate the Courtneys' underlying standing to raise the claim, or any unequivocal indication that the Courtneys' service proposal is ripe. Moreover, the lack of any articulated and perfected service proposal upon which a reviewing court could base its review supports the district court's ruling in favor of abstention under *Texas Railroad Commission v. Pullman Company*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1946).

[1] The Washington State Legislature passed Laws of 2009, ch. 557, § 6, which required the WUTC to study the existing state of commercial ferry regulation on Lake Chelan. The Ferry Report details the WUTC's findings in accordance with the legislative mandate. The report is available at http://www.wutc.wa.gov/webdocs.nsf/d94adfab95672fd98825650200787e67/b18a8709b0fbaba2882576b100799b46/$FILE/Appropriateness%20of%20Rate%20&%20Service%20Regulation%20of%20Commercial%20Ferries%20Operating%20on%20Lake%20Chelan_2010.pdf (ER 9).

As a current PCN certificate holder operating between fixed termini or over regular routes in Puget Sound, Arrow Launch has a direct interest in how the Courtneys' various challenges to the PCN commercial ferry certificate requirement is decided by this Court. Arrow Launch believes that the district court's ruling on the Courtneys' second claim was appropriate and should be affirmed on the bases of standing, ripeness, and abstention.[2]

1. The Courtneys Have Failed to Show an Injury in Fact and Therefore Lack Standing Where There is Lingering Uncertainty about How Wash. Rev. Code § 81.84.010 Would Be Applied to Their Proposed Ferry Services.

The Courtneys assert that they have standing under Article III of the United States Constitution, based on their claim that they are undoubtedly required to obtain a PCN certificate for their proposed private ferry services. They base this

[2] While Arrow Launch supports affirmance of the district court's ruling on the bases of standing, ripeness, and abstention, Arrow Launch additionally notes that the Courtneys incorrectly rely on the decisions in *City of Sault Ste. Marie v. International Transit Company*, 234 U.S. 333, 34 S. Ct. 826, 58 L. Ed. 1337 (1914) and *Mayor of Vidalia v. McNeely*, 274 U.S. 676, 47 S. Ct. 758, 71 L. Ed. 1292 (1927) for their assertion that state law interferes with their constitutional right to provide transportation services on Lake Chelan. Those cases stand simply for the proposition that one state or local government may not regulate interstate commerce in a fashion which excludes entry into a business by a citizen in another state, and analogously, from one foreign country to another in international commerce. They do not stand for the proposition that a state cannot regulate or otherwise limit entry to perform commercial ferry services wholly in intrastate commerce. Thus, the Courtneys' reliance on *City of Sault Ste. Marie* and *Vidalia* to suggest that the State of Washington lacks the right to regulate commerce between fixed termini and/or over a regular route on a body of water lying solely within state boundaries is misplaced.

conclusion upon WUTC staff communications, the Ferry Report, and the Washington Supreme Court's decisions in *Kitsap Cnty. Transportation Company v. Manitou Beach-Agate Pass Ferry Ass'n*, 30 P.2d 233 (Wash. 1934) and *McDonald v. Irby*, 445 P.2d 192 (Wash. 1968). *See* Brief of Plaintiffs-Appellants at 43. The district court, however, held instead that the Courtneys lacked standing because of "lingering uncertainty" about how Wash. Rev. Code § 81.84.010 would be applied to their proposed services.

To establish standing, a plaintiff must demonstrate that he or she has suffered an "injury in fact" *i.e.*, an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations omitted). Although the Courtneys argue that they need only allege that there is a "credible threat" of prosecution under *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983), the *Stoianoff* court held that a "credible threat" requires a plaintiff to "demonstrate a genuine threat that the allegedly unconstitutional law *is about to be enforced against him*." (citations omitted) (emphasis added).

Indeed, in *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996), to which the Courtneys cite, the court held that the plaintiffs failed to establish that they faced a genuine threat of prosecution under

the Crime Control Act because they had not "articulated concrete plans to violate" the Act. Rather, the plaintiffs had merely asserted that they wished and intended to engage in activities prohibited by the Act, but did not "specify any particular time or date on which plaintiffs intend[ed] to violate" the statute. The court held "such 'some day' intentions - without any description of concrete plans, or indeed even any specification of when the some day will be - do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* (quoting *Lujan*, 504 U.S. at 564).

Additionally, the Courtneys have not demonstrated any imminent threat that Wash. Rev. Code § 81.84.010 is about to be enforced against them. In the Ferry Report, the WUTC, acknowledging the Washington Supreme Court's holding in *Kitsap*, found that it could take an "expansive interpretation of the private carrier exemption," thereby eliminating the Courtneys' need to obtain a PCN certificate. Ferry Report at 15. The report identified multiple factors that the WUTC would consider when determining whether the Courtneys' proposals were exempt and the WUTC has never dispositively found that, despite such factors, the Courtneys' proposals would undoubtedly fall outside of the private carrier exemption criteria.

The WUTC also explained that a would-be ferry operator could apply for a competing certificate if it believed that a certificated commercial carrier was not providing sufficient and satisfactory services. Ferry Report at 15-16. Although the

WUTC noted that Lake Chelan "may offer little practical opportunity for different types of ferry service," it did not conclude that no other competing ferry service could or would be permitted. *Id.* at 14.

Furthermore, simply because a certificated commercial ferry operator could oppose the Courtneys' application under Wash. Rev. Code § 81.84.010 does not mean that the application will necessarily be denied. Indeed, after Arrow Launch began its service following the WUTC approved transfer of its predecessor's certificate, Mr. Harmon and his partner quickly learned that Arrow Launch would not be able to serve an important termini point requested by its customers, Vendovi Island, Washington, since Vendovi Island was not named in the certificate issued to Arrow Launch. Arrow Launch and a competitor commercial ferry company, Belairco, Inc., each then applied to the WUTC to operate a ferry service to Vendovi Island. Although Arrow Launch argued that the route could sustain only one provider, the WUTC weighed the evidence presented and granted both applicants certificates to service the same route. *See In re Application B-308 of Jack Rood and Jack L. Harmon, Jr. d/b/a Arrow Launch Service*, Order S.B.C. No. 467 (May 14, 1990), at 7, attached as Appendix ("App.") A.

Again, because the Courtneys have not attempted to obtain a certificate since James Courtney's initial application in 1997, and did not apply for a certificate for their 2006 and 2008 Lake Chelan service proposals, it is not known whether any

such application would be denied. There is certainly no sound basis to assume that their application will be denied simply because an existing certificate holder might oppose their request.

At this stage, the Courtneys have presented only the possibility that they will be required to obtain certification, that their request would be denied, and that they would be prosecuted for violation of the statute if they operated the services without a certificate. Without evidence that their alleged injury is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," the Courtneys have failed to establish standing under Article III. *E.g., Lujan*, 504 U.S. at 559.

2. The Courtneys Have Failed to Show that their Second Claim is Ripe for Adjudication Because Their Threatened Injury Is Not Sufficiently Real and Immediate and the Constitutional Issue Would be Illuminated by the Development of a Better Factual Record.

For an issue to be ripe for judicial review, a plaintiff must demonstrate a threatened injury that is both real and immediate. *Portland Police Association v. City of Portland*, 658 F.2d 1272, 1273 (9th Cir. 1981). "[I]if the issue would be illuminated by the development of a better factual record, the challenged statute or regulation is generally not considered fit for adjudication until it has actually been applied." *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 915 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983) (citation omitted).

In *Pacific Legal*, the court evaluated the constitutionality of the certification scheme for electric power plants under the Warren-Alquist Act. In deciding whether to certify a proposed plant, the Energy Commission was required to gather information on a wide variety of issues and then grant or deny certification. *Id.* at 915. The court held that the challenges to the Act were not ripe for adjudication because the court had no way of knowing what types of information the Energy Commission might require of the utilities, or to what purposes the information might be put, and could not tell whether the Commission would grant or deny certification. Rather, the issue presented "require[d] factual development, and should not be decided in the abstract." *Id.* at 916.

Similarly, in *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 804, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003), the Supreme Court addressed whether the Contract Disputes Act of 1978 applied to certain concession contracts. The court's decision hinged on whether the case was ripe for judicial action because the petitioner brought a facial challenge to the regulation and did not litigate any particular dispute. *Id.* at 807. The court there explained that agency action is not ordinarily considered ripe for review "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.* at 808 (quoting *Lujan v. National*

Wildlife Federation, 497 U.S. 871, 891, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)). Because the plaintiff did not present a "concrete dispute" about a particular concession contract and "further factual development would 'significantly advance [the court's] ability to deal with the legal issues presented,'" the court held that the case was not ripe for review. *Id.* at 812 (citations omitted). *See also Connecticut v. Duncan*, 612 F.3d 107, 113 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1471 (2011) (claim was not ripe because consideration of underlying legal issues would necessarily be facilitated if they were raised in context of specific attempt to apply and/or enforce the regulation and case would be "better decided later"); *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 190 (N.Y. 1986), *cert. denied*, 479 U.S. 985 (1986) (case not ripe for judicial review where plaintiff's basis for claim was incomplete and undetermined because it had not sought review and the agency had not either granted or denied certification requirement).

Here, further development of the administrative record, namely whether the Courtneys' proposals even require certification, would significantly improve the Court's ability to deal with the constitutional issues presented. Again, the Courtneys have not sought certification of either their 2006 and 2008 proposed updated service alternatives or scenarios, nor have they requested a declaratory order from the WUTC under Wash. Rev. Code § 34.05.240 or judicial review

under Wash. Rev. Code § 34.05.570. Given the "lingering uncertainty" surrounding the certification requirement as it applies to the Courtneys' proposals, a contemporaneous administrative record upon which a reviewing court could base its review would undoubtedly be helpful.

The Courtneys contend, however, that requiring them to go through the WUTC's adjudicative process would be futile because an adjudicative hearing would require the current certificate holder to participate in the hearing and the WUTC is unlikely to permit a competing service on Lake Chelan. The Courtneys lack a factual basis for this assertion. As discussed previously, the WUTC has in the past issued competing commercial ferry certificates for the same service area. App. A at 7. Similarly, in *State ex rel. Puget Sound Nav. Co. v. Dep't of Public Works*, 6 P.2d 55 (Wash. 1931), a ferry company applied for a PCN certificate to run a ferry between Seattle and Port Ludlow. A competing ferry company objected to the application on the grounds that they already sufficiently served the same "district" or "territory." *See* Wash. Rev. Code § 81.84.020(1). On an earlier appeal of a denial of the certificate, the court remanded the case for the agency to determine if the proposed route was in fact already being served. 6 P.2d at 56. After a new hearing, the agency determined that the area was not sufficiently served and issued the certificate. *Id.* at 57. The court explained:

> [t]he question, what is territory already served, is a question of fact. Before that fact can be determined, it requires consideration of economic conditions, ofttimes involving expert testimony; a consideration of the kinds, means and methods of travel; the question of population warranting additional facilities for transportation, or the possibilities of the additional means of transportation increasing the population…

Id. (citation omitted). Thus, the mere possibility that the Courtneys' certificate application might be denied after hearing does not mean that applying for a certificate or participating in an adjudicative hearing would be futile.

Furthermore, to permit the Courtneys to bypass the adjudicative process based on speculation and conjecture would allow them to circumvent the important threshold evaluation process that the statute is designed to foster. Operating a commercial ferry business requires extensive experience, properly certified and insured equipment, and substantial safety precautions, including safety training and substance abuse testing. The threshold certification regulatory requirements address various operational fitness, safety and insurance concerns in evaluating and vetting proposed service providers. *See*, *e.g.*, Wash. Admin. Code § 480-51-030(1)(a)-(f) (threshold certificate application fitness requirement); Wash. Admin. Code § 480-51-070 (insurance); Wash. Admin. Code § 480-51-075 (safety inspections). Without an evaluation process, those who desire to travel on navigable waters in this state may ultimately face risks or a lack of service. The

WUTC's prospective analysis of the Courtneys' service proposals is a reasonable course of governmental action, not an exercise in futility.

3. The District Court Did Not Abuse Its Discretion in Dismissing the Courtneys' Action Under the *Pullman* Abstention Doctrine Because This Case Involves a Sensitive Area of Social Policy, Resolution By the State Could Obviate the Need for the Court's Adjudication, and Proper Resolution of the State Law Issue Is Uncertain.

The district court properly abstained, under the *Pullman* Abstention Doctrine, from deciding the constitutional issues the Courtneys have raised. A district court may abstain from deciding a constitutional issue if three factors are present: (1) the complaint involves a "sensitive area of social policy" that should be addressed by the state; (2) "a definitive ruling on the state issues by a state court could obviate the need" for a federal court's adjudication; and (3) "proper resolution of the potentially determinative state law issue is uncertain." *Cedar Shake and Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622 (9th Cir. 1993) (quoting *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984)).

Regulation of ferry services on navigable waters is particularly important in Washington state. In *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.*, 206 P.2d 456, 460 (Wash. 1949), the court quoted an agency order that uniquely describes the transportation issues that face Washington's navigable waters (in that case, Puget Sound):

> The transportation problems of the Puget Sound Area generally, are not the problems of any particular locality or of any particular route. Our habit of moving about freely and frequently and the enlargement of the situs of our business and social activities make the resident of Bellingham neighbor to the citizen of Bremerton, and the dairyman at Sequim. All of us need adequate service in all parts of the Sound country. One may travel the Vashon route today, use the Bremerton service tomorrow, the Ballard-Ludlow route another time, and journey to Orcas Island for the week-end. The Vashon Island resident who works in Seattle, or sells his produce in its markets is vitally interested in the development of all the territory which both supports and is dependent upon the metropolis. Whether he realizes it or not he is deeply concerned with the problem of promoting and maintaining adequate transportation facilities in all parts of the Sound country. No one community or area lives in, of, and by itself.

Indeed, Wash. Rev. Code § 81.84.010 is one of the various ways the state monitors and supervises Washington's navigable waters. The statute creates a mechanism by which the WUTC can evaluate the operational fitness and financial viability of a proposed service provider. Given the unique importance and use of navigable waters in Washington, particularly through both commercial and state-operated ferry services, this is a vital and sensitive area of transportation and economic policy that initially should be evaluated by the state.

As described previously, because there presently is uncertainty about how the certification requirement would be applied to the Courtneys, and indeed, what the outcome of that process would be, a definitive ruling by the WUTC or a state court could well obviate the need for a federal court's adjudication. It is simply unknown today whether, if the Courtneys were to participate in the adjudicative

process and if the current certificate holder were to oppose the Courtneys' application, their application would be granted, limited or denied. The WUTC could well weigh the evidence presented and ultimately grant another certificate to service the same route, or a portion thereof, partially or wholly duplicating the incumbent provider's commercial ferry certificate, as happened with respect to ferry service on Vendovi Island, and in *Puget Sound Nav. Co. v. Dep't of Public Works*, *supra*.

Because all three of the *Pullman* abstention factors are present, the district court did not abuse its discretion in dismissing the Courtneys' action to enable further state proceedings on the issue.

CONCLUSION

The district court correctly held that the Courtneys lack standing to pursue their second claim because they have failed to show an injury in fact. The district court did not abuse its discretion in dismissing the Courtneys' second claim on the basis of ripeness and abstention where the Courtneys face no sufficiently certain and immediate threat of injury, where any consideration of their constitutional issues would be illuminated by the development of a better factual record, and where all three *Pullman* factors are present. For these reasons, and those presented in the Brief of Defendants-Appellees, the district court's ruling be affirmed.

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RESPECTFULLY SUBMITTED this 15th day of October, 2012.

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STATEMENT OF RELATED CASES
REQUIRED BY NINTH CIRCUIT COURT OF APPEALS
RULE 28-2.6

Pursuant to Circuit Rule 28-2.6, Appellees are not aware of any related cases pending in this Court.

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULES 28-4,29-2(C)(2) AND (3), 32-2 OR 32-4[3] FOR CASE NUMBER 12-35392

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Dated: October 15, 2012

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CERTIFICATE OF SERVICE AND FILING

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 October 15, 2012.

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.

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