Case. No.15-15307

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Arizona Dream Act Coalition, *et al.*,
Plaintiffs-Appellees
v.
Jan K. Brewer, *et al.*,
Defendants-Appellants

Appeal from Injunction Issued Against Defendant-Appellants by the
United States District Court for the District of Arizona, (Campbell, J.)
Case No. CV12-02546

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS PETITION FOR REHEARING EN BANC

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RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

Amicus Immigration Reform Law Institute, Inc. is a 501(c)(3) not-for-profit corporation with no parent corporation or any publicly held corporation that owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute, Inc. (IRLI) previously filed an *Amicus Curiae* Brief in this case. Docket. No. 16. IRLI's interest remains the same. IRLI files this brief to ensure this Court understands the problems the Panel's Opinion creates for the separation of powers and federalism.[1]

INTRODUCTION

On April 5, 2016, a Panel for the Ninth Circuit held that Arizona's policy of not providing driver's licenses to aliens whose presence in the United States lacks a connection to relief sought or obtained expressly provided pursuant to the Immigration and Nationality Act ("INA")—in particular aliens who have benefited from the Deferred Action for Childhood Arrivals ("DACA") memorandum—was preempted. *See* Panel Opinion ("Op.") at 12. On May 19, 2016, the State of Arizona filed a Petition seeking *en banc* review of this decision.

The issue presented for *en banc* review raises important issues of state sovereignty, federalism, and the separation of powers among the federal branches of government. In finding preemption in this case, the Panel does

[1] Pursuant to Fed. R. App. 29(a), counsel for the parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

not rely on Congressional intent or the admission statutes enacted by Congress. Instead, the Panel relies on a Department of Homeland Security ("DHS") policy memorandum in which DHS independently decided not to deport a certain group of illegal aliens that fit criteria defined entirely by DHS, and on DHS' second independent decision to provide work authorization to that group of aliens despite Congressional intent to the contrary. Op. at 28-29 (discussing DACA as an "immigration classification" comparable to aliens who are seeking relief pursuant to the INA).

The Panel's holding that DHS's current policy—as opposed to Congressional intent evidenced through statutes—can preempt a sovereign state's authority conflicts with Supreme Court precedent and sets a dangerous precedent, giving an executive branch agency open-ended authority to ignore federal law. *En banc* review should be granted to clarify that Congress, not an executive branch agency acting outside of Congressional intent, can preempt state law.

ARGUMENT

I. CONGRESS, NOT AGENCY POLICY, PREEMPTS STATE LAWS.

Only Congress can displace the states through the constitutionally-momentous act of preemption. The Supremacy Clause of Article VI of the

United States Constitution gives preemptive force to only the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States." U.S. Const. art. VI, cl. 2. The executive branch cannot unilaterally preempt the States. Instead, only the "unmistakabl[e]" intent of Congress" has preemptive effect. *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

The Supreme Court has been clear that Congressional intent must be reviewed to determine whether state law is preempted. *Arizona v. United States*, 132 S. Ct. 2492, 2508 (2012) (rejecting federal government argument that a State requiring ICE to verify status of aliens who were likely not to be deported was preempted because *Congress* did not preempt the law); *Chamber of Commerce v. Whiting*, 563 U.S. 582, 596-97 (2010) (looking at Congress's definition of the word "licensing"); *North Dakota v. United States*, 495 U.S. 423, 442 (1990) ("It is Congress – not the [Department of Defense] – that has the power to pre-empt otherwise valid state laws . . . ."); *Alden v. Maine*, 527 U.S. 706, 732 (1999) (The Constitution "delegat[es] to Congress the power to establish the supreme law of the land" and only when "acting within its enumerated powers."); *see also Clearing House Assn., L.L.C. v. Cuomo*, 510 F.3D 105, 131 (2d Cir. 2007) (reversed in part on other grounds, *Cuomo v. Clearing House Assn., L.L.C.*, 129 S. Ct. 2710

(2009)) ("[T]he Supremacy Clause in article VI, clause 2 grants the power to preempt state law to the Congress, not to appointed officials in the Executive branch.").

One reason that the Constitution confers preemption authority to Congress, rather than policy decisions of administrative agencies, involves federalism. "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona*, 132 S. Ct. at 2500 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1990); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring)). Because two sovereigns exist, in some instances those laws will conflict and the Constitution provides a "clear rule that federal law 'shall be the supreme law of the Land . . . .'" *Arizona*, 132 S. Ct. at 2500 (quoting Art. VI, cl. 2). "Under this principle, *Congress* has the power to preempt state law." *Arizona*, 132 S. Ct. at 2500 (citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)).

Congress can exercise its preemptive authority in different ways. "There is no doubt that Congress may withdraw specified powers from the States" through express statutory language. *Arizona*, 132 S. Ct. at 2500-01 (citing *Whiting*, 131 S. Ct. 1968). Congress may also preempt State law

when "acting within its proper authority" to occupy the field of regulation. *Arizona*, 132 S. Ct. at 2501. And finally, conflict preemption can be found when compliance with both federal and state regulations is an impossibility or a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of *Congress*[.]" *Id.* (citations omitted) (emphasis added).

The Panel's Opinion goes to the heart of these foundational principles—whether the Executive Branch can seize authority never granted to it and use that seized power to abrogate a state's authority. The Constitution does not permit such executive action. "As is evident from its text . . . the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts *that accord with the constitutional design*." *Alden*, 527 U.S. at 731. Any such preemptive action is limited to acts "pursuant to [the federal government's] constitutional powers." The Federalist No. 33, at 204 (A. Hamilton).

To be sure, an executive *regulation* can have preemptive effect, but only if that regulation operates "within its congressionally delegated authority." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986); *see also Sikkelee v. Precision Airmotive Corp.*, 2016 U.S. App. 7015 (3d Cir. 2016) (In determining whether preemption occurs, courts look

to the "clear and manifest intent" of Congress and any "regulations . . . issued pursuant to the valid exercise of [an agency's] delegated authority [which] can have the same preemptive effect as federal statutes.").

There is no dispute in this case that DACA was never promulgated through regulation. *See Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (*en banc*) (holding that DACA's subsequent, more expansive program, was unlawful for not being promulgated as a regulation). When an agency refuses to undertake the basic procedural requirements for rulemaking, "[t]he agency's views on state law are inherently suspect[.]" *Wyeth v. Levine*, 555 U.S. 555, 557 (2009). Thus, there should be no dispute that DACA lacks *any* preemptive effect.

Yet, the Panel overlooked this basic point and did not investigate whether *Congress* intended to preempt Arizona's action. Instead, the Panel looked to DHS's policy to not enforce congressional laws against some aliens as its source for preemption, through a category code that DHS created evidencing work authorization for DACA aliens. *See* Op. 27-28.

This finding conflicts with Supreme Court precedent. An executive agency's policy preference about how to enforce (or not enforce) an act of Congress has no preemptive effect. A Court may not "simply . . . accept an argument that the [agency] may . . . take action which it thinks will best

effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374. "To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course would be inconsistent with federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

Indeed, the Supreme Court has already rejected the argument that agency policies should be given the force of law. *Barclays v. Franchise Tax Bd.*, 512 U.S. 298, 329-30 (1994) (expressions of federal policy lacking the force of law cannot render unconstitutional a state law); *see also Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 97 n.9 (2d Cir. 2006) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001)) (in the context of preemption, an agency's view cannot substitute for the need of a clear legislative statement of preemption; "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself."). As Justice Alito rightly stated, finding that a State's action "is pre-empted, not by any federal statute or regulation, but simply by the Executive's current enforcement policy is an astounding assertion of federal executive power that the [Supreme] Court

rightly rejects." *Arizona*, 132 S. Ct. at 2524 (J. Alito concurring in part and dissenting in part). Yet, that is exactly what the Panel has done.

Thus, the Panel erred in ignoring that preemption can only be found through the "unmistakable intent" of Congress and any alleged preemptive action by an agency must be pursuant to validly conferred authority. The Panel ignored these fundamental preemption principles and cast aside Arizona's rightful sovereign authority in overseeing state driver's licenses, instead finding preemption through policy decisions of an Executive agency without identifying any preemptive intent from Congress.

II. THE PANEL'S DEFERRED ACTION AND LAWFUL PRESENCE THEORY IGNORES THE IMMIGRATION CLASSIFICATIONS THAT CONGRESS CREATED.

In explaining its holding that a State was preempted from following the INA by a DHS non-enforcement policy, the Panel misunderstands the difference between immigration classifications created by Congress and the non-enforcement policy created by DHS. Its finding is also contrary to Congress' statutory doctrine of admission and Congress' decision to deny employment to illegal aliens.

1. DACA is Contrary to the Admission Doctrine.

As the Fifth Circuit in *Texas v. United States* found, programs like DACA are "manifestly contrary" to the statutory scheme of the immigration

laws. *Texas*, 809 F.3d at 181. When challenged, DHS has been unable to identify the source of its asserted "broad authority." In its Merits Brief pending before the Supreme Court, DHS claims that "[d]eferred action and similar discretionary practices that DHS and the INS before it have repeatedly followed *do not have their source in pinpoint grants of authority by Congress*" and instead are found in the penumbras of "the general vesting power that Congress bestowed in Section 1103." *Texas v. United States*, No15-674, Br. of Pet. United States at 61 (emphasis added). The Panel principally relies on that section to find that "it is well settled that the Secretary can exercise deferred action [to] decline[] to pursue the removal of a person unlawfully present in the United States. Op. at 13.

The Panel does not cite this "well settled" authority. *See id.* INA § 103 could not provide the unlimited reach that the Panel believes. Agency action cannot be violative of the statutory scheme an agency purports to implement. Indeed, Congress has foreclosed the categorical grant of deferred action that the Panel relied upon to find preemption in this case through the admission doctrine.

The INA is a comprehensive federal statutory scheme for regulation of immigration and contains the terms and conditions of admission to the country. *Whiting*, 131 S.Ct. at 1973. The Panel ignores the comprehensive

reforms to the framework of immigration laws enacted by Congress between 1980 and 2005; in particular the Illegal Immigration Reform and Immigrant Relief Act of 1996, Pub. L. No. 104-208 ("IIRIRA. These acts progressively restricted agency authority to grant deferred action relief on a categorical basis making virtually all DACA beneficiaries an unadmitted "applicant for admission." 8 U.S.C. §1225(a)(1). The congressional scheme leaves no interstitial gap wherein such discretion may operate.

IIRIRA imposed on both DHS and all aliens a nondiscretionary duty to appear in person before an immigration officer, who must conduct an inspection. *Clark v. Suarez Martinez*, 543 U.S. 371, 373 (2005); 8 U.S.C. § 1225(a)(3). DHS lacks authority to waive or decline to comply with this congressional mandate. *Clark*, 543 U.S. at 373 ("must be inspected"). Every applicant for admission bears the burden of proving he "is not inadmissible" under the statutory presumption of being present in violation of law if the burden is not sustained. 8 U.S.C. § 1361.

The INA imposes a presumption of an intent to immigrate on every alien unless the alien establishes "at the time of application for admission that he is entitled to a nonimmigrant visa under section 101(a)(15)." 8 U.S.C. § 1184(b). That presumption, which applies to DACA aliens because they are applicants for admission, triggers another statute restraining agency

discretion: "Except as provided . . . no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa . . . and, (2) present a valid unexpired passport or other suitable travel document . . . ." 8 U.S.C. § 1181(a).

Aliens eligible for DACA are thus with few exceptions statutorily *barred* from admission into the United States and consequently inadmissible under the Excludable Aliens statute, 8 U.S.C. § 1182(a)(7)(A). The Panel erred by holding that aliens who are expressly prohibited from being admitted into the United States are an immigrant "classification" and uses a DHS-created employment classification code for those aliens to preempt Arizona's policy. But it cannot follow that Arizona can be preempted from denying driver's licenses to aliens whom *Congress* itself chose to exclude.

DHS has the "duty" as well as the "power" to "control and guard against… the illegal entry of aliens." 8 U.S.C. §1103(a)(5). Even if DHS could redeploy the enforcement authority found in Section 103 as a means to arbitrarily reclassify millions of aliens into a status that Congress did not authorize (truly an aggressive assertion of power), *nothing* in that statute demonstrates the required "clear and manifest purpose of Congress" to preempt Arizona's law related to driver's licenses. *Arizona*, 132 S. Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

2. DACA is Contrary to Congress' Policy to Deny Employment to Illegal Aliens.

DHS' provision of class-wide work authorization under the guise of DACA, and the underlying employment authorization document ("EAD") category code at issue in this case, further shows that DHS' actions are inconsistent with congressional intent and should be given no preemptive effect. "[T]he general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants towards the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (2002) (J. Breyer, dissenting). The immigration laws related to employment are designed to "prevent [illegal aliens] from taking jobs that would otherwise go to citizens." *Incalza v. Fendi N. Am, Inc.*, 479 F.3d 1005, 1011 (9th Cir. 2007) (citing P.L. 99-603, Immigration Reform and Control Act of 1986 H.R. Rep. 99-682(I), at 46). "If an alien is not working and is not being paid, IRCA's purposes are not contravened." *Id*.

The Panel erred in finding preemptive effect in an agency decision which conflicts with and undermines this congressional objective. According to the Panel, work authorization for over one million aliens who would be entirely precluded from working in the United States absent DACA can have preemptive effect over an Arizona driver's license policy

which restricts licenses to those individuals. Given how contrary DACA is to the admission doctrine and IRCA's goal of combating illegal immigration through denial of work authorization, no INA provision demonstrates preemptive intent by Congress in DHS' purely administrative action.

3. Congress has Rejected the Classification that DHS Created.

The Panel also erred in brushing aside repeated *rejections* by Congress of an almost identical statutory process that DHS created extra-statutorily. Panel Op. 34, n.10 (discussing the "DREAM Act"). While it is true that courts should not give great credence to un-enacted laws, *id.*, the Panel overlooked the holding that when Congress has rejected the same interpretation of authority that is being asserted, those rejections "reinforce" that Congress did not intend to adopt that reading. *See Barclays*, 512 U.S. at 326-327 (looking to repeated rejections by Congress of the interpretation made by a party as well as looking to a Senate rejection of a treaty provision as "reinforc[ement]" of non-preemption).

Congress has repeatedly considered granting similar relief as that given under DACA and consistently rejected it. *See* Pet. Br. at 14-15. Had *Congress* created that classification through statute, this would be an entirely different case. But Congress did not, and pre-emptive intent cannot follow

from Congress' refusal to create a classification that DHS is applying by memorandum.

4. The Provisions for Authority Relied Upon by the Panel Evidence No Preemptive Intent and are Narrower than the Panel Claims.

Lacking evidence of congressional intent to preempt, the Panel relies on the claim that, "[t]he INA expressly provides for deferred action as a form of relief that can be granted at the Executive's discretion." Op. at 14. While two of the sections that the Panel cites do use the term "deferred action," those sections do not support the existence of the broad preemptive power the Panel assigns to DHS, and are more limited than claimed.

For instance, 8 U.S.C. § 1227(d)(2) relates to aliens seeking nonimmigrant visas for victims of human trafficking or abuse who are denied administrative stays of a final order of removal. In such a case, this statute clarifies that denial of a stay does not preclude application for deferred action or other temporary relief "under any other provision of the immigration laws of the United States." Section 1154(D)(i)(II) relates to aliens who aged out while awaiting approval of a petition under the Violence Against Women Act.[2] Contrary to showing a broad, unrestricted

[2] The third provision that the Panel cites does not use the term "deferred action" at all, but instead permits relief to aliens who can demonstrate "exceptional circumstances." Panel Op. 14 (citing 8 U.S.C. § 1229(a). To

congressional grant of discretion for "deferred action" on DHS, these statutes narrowly provide for individualized instances of deferred action, evoking the statutory canon of construction *expression unius est exclusio alterius*—that one excludes the other. *Nken v. Holder*, 556 U.S. 418, 430 (2009) (citing *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987)) ("[W]here Congress includes particular language in one section of a statute [in the INA] but omits it in another section of the [INA], it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.").

In other words, the citations provided by the Panel express a congressional intent opposite to the one found by the Panel—where Congress has expressly permitted deferred action by statute, it has been exceedingly limited in its permissible use. *See Louisiana*, 476 U.S. at 374 (stating an agency cannot confer authority upon itself). To reach the conclusion that Congress intended DHS to have unrestrained authority under "deferred action," the Panel had to ignore the admission doctrine, the layers of statute designed to discourage illegal immigration, and Congress' refusal

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demonstrate "exceptional circumstances" in that statute, an alien must show "battery or extreme cruelty to the alien . . . *but not including less compelling circumstances* . . . beyond the control of the alien." 8 U.S.C. § 1229a(e)(1) (emphasis added). Again, this is the antithesis of carte blanche "deferred action" authority.

to create the program that DHS has now implemented on its own. And even then, nothing in the immigration statutes cited by the Panel evidence any unmistakable congressional intent to preempt Arizona's policy.

III. THE PANEL'S PREEMPTION THEORIES HAVE ALREADY BEEN REJECTED.

Not only has the Panel created a problem by ignoring congressional intent and instead relying on agency policies to find preemptive effect, a previous Ninth Circuit panel took the same course and was reversed by the Supreme Court.

In *Arizona v. United States*, 641 F.3d 339 (9th Cir. 2011), the Ninth Circuit held that Section 2(B) was preempted in part because it "interfere[d] with the federal government's authority to implement its priorities and strategies in law enforcement." *Id.* at 351. In a holding remarkably similar to the one adopted by the Panel in this case, the *Arizona* Panel stated, that "DHS exercises a large degree of discretion in determining how best to carry out its enforcement responsibilities which necessitates prioritization to ensure ICE expends resources most efficiently to advance the goals of protecting national security, protecting public safety, and securing the border." *Id.* at 352 (quoting ICE Executive Associate Director for Management and Administration) (internal quotations omitted). Thus, the

Arizona Ninth Circuit Panel held that, "[b]y imposing mandatory obligations on state and local officers, Arizona interferes with the federal government's *authority to implement its priorities and strategies . . . .*" *Arizona*, 641 F.3d at 352 (emphasis added).

Judge Bea, in dissent, explained succinctly why the Panel majority was incorrect:

> [A]n agency such as ICE can preempt state law only when such power has been delegated to it by Congress . . . . Otherwise, evolving changes in federal "priorities and strategies" from year to year and from administration to administration would have the power to pre-empt state law, despite there being no new Congressional action. Courts would be required to analyze statutes anew to determine whether they conflict with the newest Executive policy.

Arizona, 641 F.3d at 380. The Supreme Court agreed with Judge Bea on this point.

In *Arizona v. United States*, the Supreme Court rejected the argument adopted by the Ninth Circuit *Arizona* Panel and urged by the United States, that "making status verification mandatory interferes with the federal scheme" because Arizona "officers must make an inquiry even in cases where it seems unlikely that the Attorney General would have the alien removed." *Arizona*, 132 S. Ct. at 2508. The Supreme Court rightly noted that, "Congress ha[d] done nothing to suggest it [was] inappropriate to communicate with ICE in th[o]se situations." *Id.* In other words, *Arizona*

flatly rejected the idea that an agency's policy preferences could preempt state law beyond what Congress intended.

Concurring in this finding, Justice Alito elaborated:

> The United States' attack on § 2(B) is quite remarkable. The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force . . .If § 2(B) were pre-empted at the present time because it is out of sync with the Federal Government's current priorities, would it be un-preempted at some time in the future if the agency's priorities changed?

Id. at 2527 (J. Alito concurring in part, dissenting in part). As noted earlier, the Panel in this case adopted the same "remarkable" position rejected by the Supreme Court in *Arizona*. But as was the case with *Arizona*, Congress "has done nothing" to demonstrate that Arizona is preempted in its use of federal statutes. *Id.* at 2508. Not only does the Panel's decision conflict with the Constitution's requirement that congressional intent, not agency policy, preempts state law, the Panel's view has already been rejected by the Supreme Court in the context of immigration enforcement itself.

Indeed, taken to its conclusion, the Panel has provided no direction as to what happens under a new administration or if the DACA non-enforcement program ends. As Justice Alito pointed out in *Arizona*, holding that a state action can be pre-empted based on shifts in internal agency

policy would be "quite remarkable." *Arizona*, 132 S. Ct. at 2527 (J. Alito, concurring in part and dissenting in part). "[P]riorites . . . are not law. They are nothing more than agency policy" and "no decision of [the Supreme] Court recogniz[es] that mere policy can have pre-emptive force. *Id.* (citing *Barclays*, 512 U.S. at 330). Based on the Panel's holding, if Arizona's driver's license policy is pre-empted now because it is not consistent with DHS's priorities, "would it be unpre-empted at some time in the future if the agency's priorities change?" *Arizona*, 132 S. Ct. at 2257. One has to believe that to be the case.

The Panel's decision that DHS's current enforcement decision related to DACA aliens can preempt Arizona state law violates basic preemption principles and rehearing should be granted to correct this decision.

CONCLUSION

For the reasons stated above and for the reasons stated in Arizona's Petition, the Court should grant *en banc* review.

May 31, 2016

Respectfully Submitted,

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/s/ MICHAEL HETHMON
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May 31, 2016

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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 May 31, 2016.

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