IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHULA VISTA CITIZENS FOR JOBS AND FAIR COMPETITION, et al. *Plaintiffs/Appellants,* vs. DONNA NORRIS, et al. *Defendants/Appellees.* STATE OF CALIFORNIA, *Intervenor/Defendant/Appellee.*	No. 12-55726 U.S. District Court No. CV 09-00897-BEN-JMA

BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLEE ATTORNEY GENERAL AND APPELLEES NORRIS ET AL.

On Appeal from the United States District Court
for the Northern District of California

The Honorable Roger T. Benitez

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CIRCUIT RULE 29-2(a) STATEMENT OF CONSENT

All parties to the appeal have consented to the filing of this brief.

RULE 29(C) STATEMENT

No party's counsel authored this brief in whole or in part. No party or its counsel contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The League of California Cities ("League") is an association of 473 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee ("Committee"), which is comprised of 24 city attorneys from all regions of the State.[1] The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

INTRODUCTION

California does not violate the First Amendment by requiring initiative proponents to inform voters of the proponents' identity at the time that identity matters most – when voters are contemplating whether to sign the petition. Nor does California run afoul of the First Amendment by allowing only registered voters, as opposed to corporations and associations, to propose legislation through the initiative process.

[1] The City Attorney for the City of Chula Vista is not a member of the Committee and did not otherwise participate in the League's consideration of whether to file an amicus curiae brief in this matter.

The California Constitution empowers private citizens to act as legislators by placing initiatives on the ballot. Implementing the California Constitution, the State Legislature chose to require initiative proponents to include their names on each initiative petition so that voters contemplating whether to sign the petition know the proponent's identity. This requirement does not violate the First Amendment rights of initiative proponents because of the strong informational interest that it serves.

This Court has described the public's interest in a well-informed electorate as integral to "the full realization of the American ideal of government." *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1007 (9th Cir. 2010). So well-established is this informational interest that nineteen Ninth Circuit judges have acknowledged its importance in rejecting eight separate First Amendment challenges to electoral disclosure laws. The rationale of those cases applies with even greater force in the present context: Just as voters have a compelling interest in knowing who is paying for ballot measure advocacy, they have an even more compelling need to know who actually authored the ballot measure they are being asked to place on the ballot.

The panel opinion treats this informational interest as virtually non-existent by suggesting that if a voter contemplating whether to sign an initiative wants to know the proponent's identity, the voter can proceed to the county registrar's office and ask to see a copy of the proponent's registration affidavit. This analysis ignores the reality that citizens typically are asked to review and sign initiative petitions on the spot, at a street corner or shopping mall, where there is generally no opportunity for further study. That is the moment when information about the petition, including the identities of the people proposing it, is most valuable—

which is precisely why the California Legislature mandates that proponents' names and other objective information be included in the petition itself.

According to the panel opinion, the proponent's interest in concealing his identity from the public outweighs the public's well-established informational interest in the electoral process. The panel opinion reasons that initiative proponents are, for First Amendment purposes, the same as people distributing political leaflets. But even if a proponent had a First Amendment interest here, it would be entirely different from that of an anonymous leaflet distributor because the proponent has chosen to step into the shoes of a legislator and to assume the significant duties and responsibilities associated with that role. For instance, the proponent has a right to author the initiative's official ballot argument and to play a role in any litigation challenging the initiative. By stepping into the shoes of a legislator, the proponent has relinquished any meaningul interest in withholding his identity. Just as a legislator may not conceal his identity when proposing laws in the legislature, a proponent cannot conceal his identity when proposing laws to the public for placement on the ballot.

With regard to the requirement that only registered voters – *i.e.*, electors – can serve as initiative proponents, the League agrees with the panel opinion that serving as an initiative proponent does not implicate the First Amendment. If this Court nonetheless concludes that the First Amendment does apply, however, the elector requirement is fully consonant with the Constitution and does not violate Appellants' rights. For the same reason that there is a compelling interest in prohibiting corporations and associations from voting in elections, running for office, or signing initiative petitions, so too is there a compelling interest in prohibiting corporations and associations from engaging in the fundamentally legislative act of serving as an initiative proponent. As the district court noted,

allowing corporations and associations to participate in the legislative process "overlooks the essence of self-government." Moreover, the elector requirement serves the public's informational interest of knowing the identity of who is proposing a law. Without this requirement, people can hide behind innocuous committee names that provide no useful information to voters.

ARGUMENT

I. Requiring Initiative Proponents To Disclose Their Identities To Voters Contemplating Whether To Sign An Initiative Petition Does Not Violate The First Amendment.

The California Legislature requires initiative proponents to disclose their identities to voters at the time that identity matters most—when the voters are deciding whether to place the proponent's law on the ballot. Even assuming that an initiative proponent has First Amendment rights, this requirement does not violate those rights and in fact, enhances the democratic process. Under the exacting scrutiny standard set forth in *Doe v. Reed*, 561 U.S. 186, 197 (2010), the disclosure requirement passes constitutional muster.

A. Voters Have A Powerful Informational Interest In Knowing The Identity Of An Initiative Proponent At The Time They Are Asked To Sign The Petition.

The strength of the public's informational interest in knowing an initiative proponent's identity is a function of the critical role played by the initiative proponent in California's citizen lawmaking process. The California Constitution empowers citizens to act as legislators by placing initiatives on the ballot. Cal. Const., art. II, §§ 8, 11(a); art. IV, § 1. Citizens can wield this initiative power to amend the California Constitution as well as to pass state and local laws. Cal. Const., art. II, §§ 8(a), 11(a). Since California established the initiative process in 1911, "California has had more initiatives on the ballot than any other State save Oregon." *Doe*, 561 U.S. at 208 (Alito, J., concurring). Citizens have used the

initiative to address an array of significant public policy issues, including criminal justice, education, civil rights, environment and land use, public health, housing, business and labor regulations, and taxes and bonds.

The initiative process begins with the initiative petition. That petition "'is not a handbill or campaign flyer—it is an official election document subject to various restrictions by the Elections Code . . . . It is the constitutionally and legislatively sanctioned method by which an election is obtained on a given initiative proposal.'" *San Francisco Forty-Niners v. Nishioka*, 75 Cal. App. 4th 637, 648 (1999). A voter's decision to sign an initiative petition has significant legal implications. It represents the voter's approval not only to place the initiative on the ballot, but to confer upon the proponent "'both authority and responsibilities that differ from other supporters of the measure.'" *Perry v. Brown*, 265 P.3d 1002, 1017-18 (Cal. 2011).

A long line of Supreme Court precedent teaches that a well-informed electorate is essential to the vitality of our democracy. In upholding a federal law requiring disclosure of campaign contributions and expenditures, the Court in *Buckley v. Valeo* declared "that there are governmental interests sufficiently important to outweigh the possibility of infringement" of First Amendment rights, "particularly when the 'free functioning of our national institutions' is involved." 424 U.S. 1, 62-63 (1976). "The governmental interests sought to be vindicated by the disclosure" of such contributions and expenditures are, in the Court's view, "of this magnitude." *Id.* The *Buckley* Court described the public's informational interest as follows:

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often

> possible . . . [and] also alert[s] the voter to the interests to which a candidate is most likely to be responsive. . . .

Id. at 66-67. The Court further observed: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Id*. at 14-15. According to *Buckley*, disclosure requirements "certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id*. at 68.

While *Buckley* discussed the importance of disclosure in the context of candidate elections, the Court has applied the same reasoning to ballot measure campaigns. For example, the Court affirmed these principles in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978), observing that voters were entitled to consider "the source and credibility" of those who advocated positions in electoral campaigns. The Court went on to explain that disclosure enabled voters "to evaluate the arguments to which they are being subjected. . . . In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of the communication be disclosed." *Id*. at 791 n.32 (citing *Buckley*, 424 U.S. at 67).

Twenty-five years after *Buckley* and *Bellotti*, the Court again emphasized the public's robust informational interest in rejecting a facial challenge to the disclosure provisions in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which required prompt disclosure by certain organizations of the costs of electioneering communications and the identities of the persons who provided significant funding. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194-202 (2003). In *McConnell*, the Court held that the "interests of individual citizens seeking to make informed choices in the political marketplace" overcame any First

Amendment concerns advanced by the organizations. *Id*. at 197. And while *Citizens United* called into question some of *McConnell's* other conclusions, it strongly affirmed the informational interest in disclosure. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 368-70 (2010). There, the Court rejected an as-applied challenge to the same BCRA provisions, holding that "the public has an interest in knowing who is speaking about a candidate shortly before an election," and therefore, "the informational interest alone is sufficient to" uphold the disclosure requirement. *Id*. at 369.

Taken together, these precedents require courts to, "carefully examine governmental limitations on the right of those who wish to remain anonymous while exercising their First Amendment rights. In some circumstances, however, the government's interests in conducting fair and honest elections and in providing prospective voters with the information necessary to make an informed choice may justify a requirement that persons identify themselves when they engage in speech designed to influence the outcome of elections." *Griset v. Fair Political Practices Comm'n*, 884 P.2d 116, 121 (Cal. 1994).

Consistent with this Supreme Court authority, nineteen judges of this Circuit have acknowledged the importance of the public's informational interest in rejecting eight separate First Amendment challenges to campaign finance disclosure laws.[2] In each of these cases, this Court acknowledged the significance

[2] *See Protectmarriage.com-Yes on 8 v. Bowen*, 2014 WL 2085305 (9th Cir. May 20, 2014) (Judge M. Smith (author); Judges Wallace and Ikuta); *Family PAC v. McKenna*, 685 F.3d 800 (9th Cir. 2012) (Judge Fisher (author); Judges Paez and Clifton); *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d at 990 (Judge Wardlaw (author); Judge Gould); *Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009) (Judge Tashima (author); Judges N.R. Smith and Pregerson) *aff'd sub nom. Doe*, 561 U.S. at 186; *Cal. Pro–Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (Judge Rawlinson (author); Judges Noonan and Gould) *abrogation on other grounds recognized in Human Life of Washington*, 624 F.3d at 1013; *Alaska Right To Life Comm. v. Miles*, 441 F.3d 773, 792 (9th Cir. 2006) (Judge W. Fletcher

of the public's informational interest. In *California Pro-Life Council, Inc. v. Getman*, 328 F.3d at 1105-06 (9th Cir. 2003), for example, this Court rejected a First Amendment challenge to a California law requiring disclosure of money spent for the purpose of defeating or passing ballot measures. *Getman* observed:

> Even more than candidate elections, initiative campaigns have become a money game, where average citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threats to their self-interest. Knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.

Id. at 1105-06 (internal citation omitted). The *Getman* court concluded, "By requiring disclosure of the source and amount of funds spent for express ballot-measure advocacy, California—at a minimum—provides its voters with a useful shorthand for evaluating the speaker behind the sound bite," *id*. at 1106 (citing *United States v. Harriss*, 347 U.S. 612, 626 (1954)), and "prevents the wolf from masquerading in sheep's clothing." *Id*. at 1106 n.24.

Similarly, in *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d at 994-95, this Court upheld a Washington law requiring disclosure of donations to and expenditures by political committees and other entities regarding ballot measures. The panel noted that "[p]roviding information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Id*. at 1005. The court also ruled that "[i]n the ballot initiative context, . . . where express and issue advocacy are arguably 'one and the same,' any incidental regulation of issue

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(author); Judges Goodwin and Brunetti); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (Judge Tallman (author); Judges Rymer and Trott).

advocacy imposes more limited burdens that are more likely to be substantially related to the government's interests." *Id*. at 1018.

The cases discussed above involve challenges to campaign finance disclosure laws, where the public's informational interest is in knowing the identity of those who are trying to persuade them how to vote or those who are funding entities trying to persuade them how to vote. The informational interest is even more compelling when applied to the identity of the initiative proponent because the initiative proponent is not simply trying to convince people how to vote on a law, but is actually performing the legislative act of introducing legislation to the public and asking them to place it on the ballot.

Both the California Supreme Court and California Court of Appeal have opined on the importance of the proponent's identity. In *Brown v. Superior Court*, 487 P.2d 1224, 1232-33 (1971), the California Supreme Court stated:

> A ballot measure is devoid of personality and voters who seek to judge the merits of issues by reliance on the personality of those supporting different points of view can do so only if they are made aware, prior to election, of those who are the real advocates for or against the measure. Voters who may well be able to understand and judge candidates may not always be able to comprehend and determine the merits of ballot measures which frequently are cast in language, the precise meaning of which often is confusing and perhaps on occasion intentionally so. A voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption.

Similarly, in *Myers v. Patterson*, 196 Cal.App.3d 130, 139 (1987), the Court of Appeal rejected the argument that voters contemplating whether to sign a petition do not pay attention to the proponent's identity:

> Plaintiffs question the value of the information here by pointing out that the "proponents" who sign the notice might be "'people off the street' who sign on behalf of the persons and interest groups" that actually spearhead the measure. There is no indication that that is what happened here, but in any event, the argument cuts both ways. A voter might decide against signing

> because the proponents do not include anyone he or she recognizes.

This court should not deprive voters of knowing an initiative proponent's identity at the time that identity matters most—when they are contemplating whether to place a law on the ballot.

B. The Disclosure Requirement Imposes a Minimal Burden on Initiative Proponents.

A citizen who chooses to step into the shoes of the Legislature and serve as an initiative proponent has no legitimate expectation that his identity can be concealed from voters when they are contemplating whether to sign the petition. Just as a candidate for public office has no "legitimate interest in expressing the candidate's views anonymously," *Griset*, 884 P.2d at 125, a proponent cannot reasonably expect to become an integral part of the lawmaking process while depriving voters of the proponent's identity.

The panel relies on a series of cases that allow petition circulators and leaflet distributors to remain anonymous. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Buckley v. American Constitutional Law Foundation ("ACLF")*, 525 U.S. 182 (1999). According to the panel opinion, these cases and their progeny establish a nearly categorical First Amendment right to a concealed identity at the point of contact with voters—either because voters may "prejudge her message simply because they do not like its proponent," or because "an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity." *McIntyre*, 514 U.S. at 342.

But the First Amendment interest of an initiative proponent is fundamentally different from that of a leaflet distributor or petition circulator because the initiative proponent is an integral part of the legislative process. Serving as a proponent involves more than expressing a political view; it is playing an operative

role in the adoption of legislation. Whereas the leaflet distributor is seeking to persuade voters how to vote on a measure, the initiative proponent is introducing proposed legislation to the voters and asking them to entrust him with a panoply of legal responsibilities, such as drafting the measure, Cal. Elec. Code § 9202(a), dictating when the initiative process commences, *id*., informing the public that the process has been commenced, *id*. § 9205(a)–(b), exerting some control over the ballot arguments, *id*. § 9287, and, in certain circumstances, playing a role in the litigation if the initiative is challenged in court. *Perry*, 265 P.3d at 1025.

Similarly, a petition circulator is simply engaging in the ministerial act of collecting signatures, often for pay.[3] Whereas a "voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption," *Brown*, 487 P.2d at 1233, no one would reasonably judge a measure based on the identity of the person collecting signatures for its placement on the ballot. *See Washington Initiatives Now v. Rippie ("WIN")*, 213 F.3d 1132, 1139 (9th Cir. 2000) ("[T]here is no logical explanation of how a voter who signs an initiative petition would be educated in any meaningful way by learning the circulator's name or address.") (citing *Buckley*, 424 U.S. at 67).

When an initiative proponent chooses to play an integral role in the citizen lawmaking process, he sacrifices any meaningful interest in concealing his identity from voters.

C. There Is A Substantial Relationship Between The Identity Requirement And The Public's Informational Interest.

To survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 561

[3] *See California's Voter Initiatives: Sign here*, The Economist, February 6, 2010.

U.S. at 196. Here, requiring the proponent to state his or her name on each initiative petition substantially furthers the public's compelling need to know that information when it matters most.

According to the panel opinion, California's disclosure law fails exacting scrutiny because there is no substantial relationship between that disclosure requirement and the state's informational interest due to the existence of two "alternative methods" for the public to learn the proponent's identity. Op. at 29-33 (citing *ACLF*, 525 U.S. at 198–99; *WIN*, 213 F.3d at 1139). The first is for a voter to proceed to the local country registrar and ask to see the notice of intent to circulate that the proponent filed to begin the initiative process. Op. at 33. The second is for the voter to consult the newspaper where the proponents published notice of intent before the signature gathering process began. *Id.* But neither of the "alternative methods" provides a remotely realistic or meaningful way for voters to vindicate their informational interest. It is difficult to imagine a voter even knowing about the existence of the notice of intent or its publication. And even if a voter did have that knowledge, it is unreasonable to place that burden on a voter who is facing a decision to sign a petition on a street corner. The burden that the panel's opinion would impose ignores the reality of how the signature gathering process actually works. As noted above, signature gatherers are typically contractors who are paid per signature, and they often employ high-pressure tactics on prospective voters to maximize profits.[4]

[4] For example, one tactic is called the "clipboard method," in which a signature-gatherer finds a slow-moving queue at a bus stop or cinema, then "works the line", from which people cannot easily escape. *War by Initiative: A Case Study in Unintended Consequences*, The Economist, April 20, 2011. Using such methods, one circulator gathered 700 signatures in one day, an apparent record, by going through a queue for the Tutankhamun exhibition at the Los Angeles County Museum of Art. *Id.* Another tactic is called the "table method," in which a group of circulators put one or more petitions on a folding table in a mall or public plaza then approach prospective voters. *Id.* They try to avoid discussing the subject of

The Court should uphold the requirement that initiative proponents must disclose their names to prospective voters on each petition.[5]

II. The Elector Requirement Does Not Violate The Constitution.

The League agrees with the panel's conclusion that California's requirement that initiative proponents be electors—that is, registered voters—does not implicate the First Amendment. Likewise, the League concurs with the arguments presented by the City of Chula Vista and the Attorney General in their briefs on this issue.

Nonetheless, the League writes to emphasize that even if the First Amendment applies, the State of California does not violate the Constitution under any standard of review by reserving for California registered voters the power to make laws to govern themselves. As the district court noted, Appellant's argument to the contrary "overlooks the essence of self-government." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 875 F. Supp. 2d 1128, 1136 (S.D. Cal. 2012).

Appellants rely mainly on the holding in *Citizens United* that corporations must be able to "expressly advocate [for] the election or defeat of candidates or to broadcast electioneering communications." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337 (2010). But neither the Court in *Citizens United*, nor any other court so far as the League is aware, has ever gone so far as to say that corporations and associations may participate directly in the legislative process.

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the petitions, and instead ushering people to the table, where another circulator pressures them into signing in "conveyor-belt fashion." *Id.*

[5] As articulated in Judge Graber's dissent and the Attorney General's merits brief, the court could also uphold the disclosure requirement based on the government's interest in preserving the integrity of the electoral process, which, by itself, is sufficiently important to sustain the minimal burden on initiative proponents.

Indeed, no case has ever held, nor, to the League's knowledge, has a corporation even argued that it should be allowed to sign an initiative petition, vote in an election, or run for office. If the Constitution did not allow the government to prohibit corporations and associations from serving as initiative proponents, it is hard to see how corporations and associations could also be precluded from participating in other, equally fundamental aspects of the political process.

Moreover, the requirement that only registered voters can serve as initiative proponents also serves the public's informational interest that this court has repeatedly endorsed in the initiative context. *See, e.g.*, *Human Life of Washington*, 624 F.3d at 1008; *Getman*, 328 F.3d at 1105. Just as an understanding of who is financially supporting a measure can be a critical piece of information, so too is the identity of the natural persons who are seeking to place it on the ballot. Allowing corporations or associations to serve as initiative proponents would deprive voters of this information because the names of entities often reveal little if anything about the natural persons behind the measure. *See* Andy Kroll, *California's Biggest "Campaign Money Laundering" Scheme, Revealed-Kinda*, Mother Jones, Nov. 5, 2012 (describing movement of funds between committees named Americans for Responsible Leadership, Center to Protect Patient Rights, and Americans for Job Security); Patrick McGreevy, *Big money from special interests attempts to sway three local elections*, Los Angeles Times, Jul. 11, 2010 (reporting on special interests' participation in umbrella political committees named California Alliance and Put California Back to Work). Indeed, this strategy was employed by one of the Appellants here, "Chula Vista Citizens for Jobs and Fair Competition," an innocuously named committee name that—purposefully or not—provides no useful information to the public.

CONCLUSION

This Court should hold that only natural persons may serve as electors, and that those natural persons must disclose their names on initiative petitions.

Dated: October 28, 2014

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,457 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 28, 2014.

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CERTIFICATE OF SERVICE

I, HOLLY CHIN, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on October 28, 2014.

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLEE ATTORNEY GENERAL AND APPELLEES NORRIS ET AL.

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.

Executed October 28, 2014, at San Francisco, California.

/s/ Holly Chin
HOLLY CHIN