Nos. 11-15631, 11-15633, 11-15639, 11-15641, and 11-15642

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE GILA RIVER INDIAN COMMUNITY et al.,
Plaintiffs-Appellants,

and

THE STATE OF ARIZONA et al.,
Intervenors-Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA et al.,
Defendants-Appellees,

and

THE TOHONO O'ODHAM NATION,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona, Nos. 2:10-cv-1993-DGC et al.
Before the Honorable David G. Campbell

RESPONSE OF THE TOHONO O'ODHAM NATION TO PLAINTIFF-APPELLANTS' PETITIONS FOR PANEL REHEARING AND REHEARING EN BANC

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This appeal arose from the Secretary of the Interior's decision to accept trust title on behalf of the Tohono O'odham Nation to a parcel of land in unincorporated Maricopa County, Arizona, pursuant to a federal statute enacted to replace reservation land destroyed by the federal government. Plaintiffs paint that determination—and the decisions by the district court and this Court to leave it undisturbed—as an unprecedented intrusion on state's rights and an affront of constitutional dimensions. In truth, however, no such intrusion or affront has occurred and Plaintiffs' petitions for rehearing rest on misguided fact-bound claims of error that present no conflict with any decision of the Supreme Court or this Court, and raise no issue of exceptional importance, *see* Fed. R. App. P. 35(b). The petitions for rehearing should be denied.

BACKGROUND

1. Thirty years ago, a dam built by the United States repeatedly flooded the Nation's 10,000-acre Gila Bend Indian Reservation. The floods rendered the reservation as a whole uninhabitable and unable to support any economic activity that could sustain the Nation's people. In 1986, to remedy that serious injury, Congress enacted the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) ("Lands Replacement Act" or "Act"). The Act provided that if the Nation surrendered 9,880 acres of the destroyed reservation and waived its legal claims against the United States—as it

subsequently did—the Nation would receive $30 million and the right to place 9,880 replacement acres into trust. If land purchased by the Nation satisfies a few simple requirements, including being outside "the corporate limits of any city or town," the Act requires the Secretary, at the Nation's request, to hold that land in trust as "a Federal Indian Reservation for all purposes." *Id.* §6(d).

2. The property at issue here ("Parcel 2") is part of a 135-acre tract of land located near 91st and Northern Avenues in Maricopa County, Arizona. ER3; NER264-267.[1] Parcel 2 is part of a "county island"—a parcel of land that is unincorporated and under the jurisdiction of the county, but is surrounded by land (much of which is a strip no wider than two highway lanes) previously annexed by the City of Glendale. Parcel 2 is not part of Glendale, receives no city services, and is not subject to the city's police powers.

3. In January 2009, the Nation requested that DOI take Parcel 2 into trust under the Lands Replacement Act. NER235-238. The Nation's trust application was first reviewed by the Bureau of Indian Affairs' Western Regional Office. The Field Solicitor for that office concluded that the property satisfied all the Act's requirements. NER247-263. Specifically, he determined that Parcel 2, as unincorporated county land, was not within the "corporate limits of any city or

[1] Plaintiffs' Excerpts of Record are cited as "ER__." The Nation's Supplemental Excerpts of Record are cited as "NER__."

town," *see* NER257-262, and that, after Parcel 2 is taken into trust, the total amount of land held in trust for the Nation would remain "well below" the Act's "acreage ceiling" of 9,880 acres, NER254. The Field Solicitor's analysis of the corporate limits issue was particularly thorough and, over the course of five single-spaced pages, considered Arizona state law and judicial precedents as well as legal arguments submitted by the Nation and the Plaintiffs. *See* NER257-262. Because "unequal but … competing" arguments could be made, the Field Solicitor reasoned that the term "corporate limits" was "ambiguous." NER262. Nonetheless, he explained that both "reason and [relevant state law]" supported the conclusion that Parcel 2 was "not within the … 'corporate limits'" of Glendale as the term is used in the law. *Id*. In light of the term's established legal usage, as well as the Indian canon of construction, the Field Solicitor concluded that Parcel 2, "though within the exterior boundaries of the City of Glendale, [is] not within that City's 'corporate limits.'" *Id*. The Director of the Western Regional Office subsequently recommended that the Nation's application be approved. NER239-246.

4. Review of the Nation's application then shifted to DOI headquarters. Plaintiffs Glendale and the Gila River Indian Community (GRIC) continued their vigorous opposition to the application, submitting lengthy memoranda raising a host of objections. *See* NER198-201; NER221-227; ER220-223; NER6-31; NER70-88; NER103-104; NER118-165. On July 23, 2010, eighteen months after

the application was filed, DOI announced its final decision to accept trust title to Parcel 2. ER25-32. DOI noted that only one 3,200-acre parcel had so far been taken into trust for the Nation, so that the 9,880-acre limit on replacement reservation land was not at issue. ER31. It also considered "the numerous submissions and legal arguments presented by the Nation … and [Plaintiffs]" on the "corporate limits" issue. ER30. DOI concluded that it was "clear" from the statute's text that only a city's *incorporated* territory is within its "corporate limits," ER30, but went on to explain that "[e]ven if Congress's intent was less than clear, … we interpret ['corporate limits'] … to support a conclusion that Parcel 2 is []eligible under the Act," *id*. n.6 (referencing the Field Solicitor's opinion).

5. Plaintiffs filed suit in the district court challenging DOI's decision and contending that the Lands Replacement Act exceeds Congress's power under the Indian Commerce Clause and violates the Tenth Amendment. In addition to reprising their argument that the property was within Glendale's "corporate limits," Plaintiffs raised a new argument not made to the agency—that §6(c) of the Act created a 9,880-acre limit on acres the Nation could *purchase* and that the Nation was barred from placing Parcel 2 into trust because it had already purchased more than 9,880 acres.

The district court held that Plaintiffs' constitutional arguments were foreclosed by Supreme Court precedent, ER21-23, and upheld DOI's decision in all respects. The court declined to reach Plaintiffs' §6(c) argument, finding it waived because no party raised it during the administrative process. ER9-10.

6. On September 11, 2012, a divided panel of this Court affirmed. With respect to the "corporate limits" issue, the panel found the statute ambiguous and deferred to the Secretary's decision, noting that the Secretary had not relied solely on the statute's plain text, but had also "exercise[d] his judgment and discretion" to interpret the statute "on an alternate basis, construing the statute as ambiguous." Op.10970. The panel affirmed "[t]he Secretary's construction of §6(d)" as "reasonable," because it was "consistent with congressional intent and the structure of the statute … and … supported by the City of Glendale's laws and conduct, and Arizona state law." *Id.*[2] Assuming, without deciding, that Plaintiffs' §6(c) argument was not waived, the panel reached the merits of the argument and rejected it. The panel "h[e]ld that the statute read as a whole is unambiguous and that §6(c) creates a cap only on land held in trust for the Nation, not on total land [the Nation may purchase]." Op.10964-65. The panel also rejected Plaintiffs' "fail[ed]" constitutional arguments. *See* Op.10975-77.

[2] The majority also noted that even if they were to agree with the dissent that "§6(d) is not ambiguous … we would agree with the Secretary … [that] 'corporate limits' … means property … 'on the unincorporated side of the city's boundary line.'" Op.10970 n.11.

Judge N.R. Smith dissented on the ground that "[t]he statutory text … clearly prohibits the Secretary's ability to take land … into trust when the city's limits wholly surround that land." Op.10977. He also reasoned that "even if" the text was "'ambiguous,'" deference to the Secretary's determination was unwarranted because "'a clear statement from Congress'" was required before a statute could be read to work a "'federal encroachment upon a traditional state power.'" Op.10977-78 (quoting *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-174 (2001) (*SWANCC*)).

REASONS REHEARING SHOULD BE DENIED

Plaintiffs seek rehearing of every aspect of the panel's interpretation of the Lands Replacement Act. As to the "corporate limits" issue, Plaintiffs contend (1) that the panel erred by failing to require a "clear statement" of Congress's intent to infringe on state power and (2) that the panel should have remanded to the agency because the agency's statutory interpretation was based solely on its view that the text was plain, while the panel found the text ambiguous. Both arguments assert nothing more than fact-bound errors in the application of settled law to a statute of extremely limited applicability. Furthermore, neither question is actually presented by this case. The Lands Replacement Act does contain a "clear statement" of Congress's intent to permit land to go into trust as replacement reservation land. And DOI carefully explained, referencing the Field Solicitor's lengthy analysis,

that it would have reached the same conclusion even if it found the text of the Act ambiguous.

As to the acreage limitation issue, Plaintiffs contend that the panel erred by deferring to an "implicit" decision by DOI that the 9,880-acre limit applied only to the amount of land taken into trust. But the panel did not defer to the agency at all; it construed the Act and determined that Congress's intent on this point was clear. Once again, Plaintiffs' claim is one of fact-bound error—and one that is not actually presented.

I. THE PANEL CORRECTLY DETERMINED THAT PARCEL 2 IS NOT "WITHIN THE CORPORATE LIMITS" OF GLENDALE

Plaintiffs contend that even though Parcel 2 is *unincorporated* Maricopa County land, Parcel 2 is not eligible to be taken into trust because it is "within the corporate limits" of Glendale. That view has been rejected by every administrative and judicial body to have considered it, and the panel correctly deemed DOI's interpretation "reasonable" and thus controlling under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). *See* Op.10969. Plaintiffs' arguments to the contrary provide no cause for rehearing en banc.

A. The "Clear Statement" Rule Is Inapplicable

Plaintiffs contend that "the panel should have applied *Gregory* [*v. Ashcroft*, 501 U.S. 452 (1991)] and held that the requisite clear statement needed to apply the [Lands Replacement] Act within cities is missing." State Pet. 6. Plaintiffs

argue that this "conflict" with *Gregory* and similar decisions warrants en banc review. But no such conflict exists, first because *Gregory*'s clear statement rule is not implicated by the Act, and second because even if a clear statement of intent were required in this context, the Act clearly provides one.

1. *Gregory* construed the Age Discrimination in Employment Act not to reach state judges, required to retire at 70 in Missouri, because "[c]ongressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers." 501 U.S. at 460. Noting that the power to determine the qualifications of their government officials is at the core of the prerogatives reserved to the States by the Tenth Amendment, the Court found that "[a]pplication of the plain statement rule thus may avoid a potential constitutional problem." *Id.* at 464. Similarly, in *SWANCC*, the Court construed the Clean Water Act not to extend to isolated, *intra*state ponds because doing so would "invoke[] the outer limits of Congress' power" under the Commerce Clause. 531 U.S. at 172.[3]

[3] *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), arose in a different context. The question there was the meaning of "reasonably equivalent value" in the fraudulent-transfer provisions of the Bankruptcy Code, and the Court's answer was informed by the fact that the Code is built on the foundation of state-law property rights, and thus, absent a manifest contrary purpose, "will be construed to adopt, rather than displace, pre-existing state law." *Id.* at 545. That is not true of the Lands Replacement Act.

This case bears no resemblance to *Gregory* or *SWANCC* because neither reading of the Lands Replacement Act gives rise to a "'serious constitutional problem[].'" *SWANCC*, 531 U.S. at 173. It is settled that under the Indian Commerce Clause, U.S. Const. art. I, §8, cl.3, Congress enjoys "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). And the Supreme Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under [Article I] in a manner that displaces the States' exercise of their police powers." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981). Where Congress acts within its authority—*e.g.*, under the Indian Commerce Clause—and does not "attempt[] to directly regulate the States as States," *id*. at 286, the Tenth Amendment's reservation of non-enumerated powers to the States is not implicated. *See* Op.10976-77.

That is the case here. The Lands Replacement Act does not remotely "regulate the State[] as State[]," as the interpretation of the ADEA rejected in *Gregory* arguably would have done. Indeed, it does not regulate the State at all.[4]

[4] Plaintiffs allege interference with "Arizona's power to organize its municipalities," State Pet. 9, but the Secretary's interpretation of "within the corporate limits" in no way "'interpos[es] federal authority'" between a State and its political subdivisions, *id*. (quoting *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004)).

Nor does the Act tread on the limits of Congress's Commerce Clause powers, as would have occurred in *SWANCC*. Moreover, "[a]lthough States have important interests in regulating … natural resources within their borders, this authority is shared with the Federal Government when [it] exercises one of its enumerated constitutional powers," as here. *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 204 (1999); *see also* Op.10974 (citing *Nevada v. Hicks*, 533 U.S. 353, 361 (2001)). The federal decision to take unincorporated county land into trust thus does not "significantly change[] the federal-state balance," *United States v. Bass*, 404 U.S. 336, 349 (1971), nor does it "encroach[] upon a traditional state power," *SWANCC*, 531 U.S. at 173, however the Lands Replacement Act is interpreted.

Second, even if a "clear statement" of Congress's intent were required in this case, the Lands Replacement Act contains such a statement. The Act plainly provides that the federal government is *required* to take certain land in unincorporated Maricopa, Pima, or Pinal Counties into trust for the Nation and to treat that land as a federal Indian reservation "for all purposes." Pub. L. No. 99-503, §6(d). To the extent that turning privately-owned land within a State into an Indian reservation infringes on State prerogatives, as Plaintiffs claim, Congress's intent to replace the Nation's destroyed trust lands by creating 9,880 acres of new reservation land within the State, *id*. §§2(4), 6(d), is "absolutely certain," *Gregory*, 501 U.S. at 464.

Plaintiffs' counter-argument—that the "clear statement" rule requires that *any* ambiguity in a statute affecting State interests must be construed in favor of the State, and thus that the Act must clearly state that it applies to county islands—is meritless. *First*, the Act *does* contain that clear statement, as DOI found. ER30. *Second*, even if the statute were less clear, Plaintiffs offer no authority whatsoever for their argument that, when reading any ambiguous statute, Congress should be presumed to intend the result favored by the State—let alone their contention that the State's litigating position should trump the expert agency's interpretation.[5]

Even if Plaintiffs' grossly distorted version of the "clear statement" rule were more plausible, this would be a particularly poor case for its application. The question here is not whether Congress intended to establish reservation lands within the State, or even whether it intended to establish reservation lands in cities. The question is merely *where* on unincorporated county land such reservations can be placed. Any intrusion on State interests occasioned by the Act will occur whether or not the land is a county island. Plaintiffs assert that "stripping away state control of land" on a county island "imposes a different and greater burden [on the State] than doing so elsewhere," State Pet. 11, but fail to explain why. And

[5] *Gregory*, *SWANCC*, and *BFP* do not remotely support Plaintiffs' position. As discussed above, in *Gregory* and *SWANCC* the choice was between an interpretation that raised serious constitutional questions and one that did not, and in *BFP* the choice was between an interpretation that could have interfered with State interests and one that did not. The panel here did not confront such a choice.

for good reason: The State exercises no greater control over county islands than over other unincorporated land.

In sum, nothing in Plaintiffs' submission suggests that, in deferring to DOI's reasonable interpretation of the Lands Replacement Act, the panel erred at all, let alone in a way that requires rehearing en banc.

B. The Panel Properly Applied *Chevron*

Plaintiffs next assert—relying on a line of D.C. Circuit precedent and a footnote in this Court's decision in *Delgado v. Holder*, 648 F.3d 1095, 1103 n.12 (9th Cir. 2011)—that because the Secretary determined that the meaning of "within the corporate limits" was plain but the panel found it ambiguous, the court was required to remand to the agency. State Pet. 12; GRIC Pet. 7-8. Plaintiffs allege that "[t]he majority's prediction of how it expects the agency to exercise its discretion" misapplies *Chevron* because it "supplants, rather than defers to, the agency's role." GRIC Pet. 9.

The short—and dispositive—answer is that the panel made no such "prediction." DOI concluded that the plain meaning of "corporate limits" was clear. ER30. But it also went out of its way to note that "[e]ven if Congress's intent was less clear," it would "interpret the term ['corporate limits'] not to support a conclusion that Parcel 2 is ineligible under the Act," citing the detailed analysis by the Field Solicitor on this question. ER30 n.6. While a remand may

well be required in cases where "[t]he agency [sa]id it ha[s] no discretion to exercise" but a court rules that it does, GRIC Pet. 8, this is not such a case.[6] Here, the agency has exercised its discretion, explaining that if the statute were ambiguous it would reach the same result. There is simply no "real and genuine doubt concerning what interpretation the agency would choose if given the opportunity to apply 'any permissible construction.'" *PDK Labs. v. DEA*, 362 F.3d 786, 808 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment). The law does not require such a futile remand.

Plaintiffs nevertheless persist, arguing that DOI failed adequately to *explain* its statement that it would adopt the same interpretation even if the statute were ambiguous. State Pet. 14. An administrative agency must, of course, "articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). But this is a "'narrow' standard of review," and a court must uphold even "'a decision of less than ideal clarity'" so long as "'the agency's path may reasonably be discerned.'" *FCC v. Fox Television Stations*, 556 U.S. 502, 513-514 (2009). DOI's decision easily passes this test. The Secretary discussed the statutory text, the state-law usage of the term "corporate limits," and the Indian canon of construction. ER29-30 & nn.3-6. DOI

[6] This case is nothing like *Negusie v. Holder*, 555 U.S. 511, 516 (2009), for example, where the agency failed to construe the statute at all because it mistakenly believed that Supreme Court precedent prevented it from exercising any discretion.

also referenced the Field Solicitor's separate opinion, which included further analysis of these factors. *See* ER30 n.6; *accord* ER16-17. In short, the panel decision is a garden-variety application of *Chevron* that raises no question worthy of the en banc Court's attention—and it is entirely correct.

II. THE PANEL CORRECTLY DETERMINED THAT THE ACREAGE LIMIT IN SECTION 6(c) IS UNAMBIGUOUS

Plaintiffs also contend that the panel erred by "affirm[ing] an 'implicit' decision that Interior never actually made" regarding the interpretation of §6(c)'s acreage limit, "instead of remanding the case for the agency to undertake the interpretive work in the first instance." GRIC Pet. 3. This argument misrepresents both DOI's and the panel's decision.

First, DOI *did* determine whether the Nation was in compliance with §6(c): It interpreted §6(c) as placing a limit on the amount of land the Nation may have placed into trust. ER31; *see also* Op.10964. The Nation's application advocated this interpretation, NER236; NER275; NER280-281, and DOI's Field Solicitor and its Western Regional Office adopted the same reading, NER244; NER251-254 & n.2. The Secretary's decision further explained that the only prior trust acquisition by the Nation involved a single parcel of 3,200 acres, ER31—confirmation that the Secretary interpreted §6(c) as a limit on the number of acres the Nation can have *placed into trust*. And where the agency articulates its determination during the administrative process—or, at a minimum, that determination is a "necessary

presupposition" of the agency action—that determination is entitled to *Chevron* deference. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992); *see also* Op.10967.[7]

Second, and perhaps more importantly, Plaintiffs' objection to the "implicit" character of the agency's decision is entirely irrelevant because the panel's holding did not rest on deference to the agency. To the contrary, the panel clearly explained that the dispute over the meaning of §6(c) was a "question … of statutory construction" that could be decided at *Chevron* step 1. Op.10964. "[R]ead as a whole," the panel concluded, the Act "is unambiguous and … §6(c) creates a cap only on land held in trust for the Nation, not on total land acquisition by the tribe under the Act." Op.10964-65. The panel was correct on both points.

a. It is settled that "a pure question of statutory construction" is "for the courts to decide." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). "The judiciary is the final authority on issues of statutory construction[.]" *Chevron*, 467 U.S. at 843 n.9. Plaintiffs point to no contrary authority. In *Department of*

[7] In *National Railroad*, the Court "defer[red] to an interpretation which was a necessary presupposition of the [agency's] decision" because "the only plausible explanation of the issues that the [agency] addressed … is that [its] decision was based on the proffered interpretation." 503 U.S. at 420. Plaintiffs attempt to sidestep that precedent by alleging that "the most plausible … explanation for Interior's decision is that the Nation[] … concealed its excess land purchases." GRIC Pet. 16. The Nation has already demonstrated that this allegation is false. Nation Br. 6-7. In any event, if the Secretary had interpreted the Act to require a determination of how many acres the Nation had *purchased*, the Secretary would presumably have asked the Nation for that information.

Treasury v. FLRA, the Court remanded for the agency "to give reasonable content to the statute's textual *ambiguities*." 494 U.S. 922, 933 (1990) (emphasis added). In *Negusie v. Holder*, the Court similarly stated that "'*ambiguities* in statutes … are delegations of authority to the agency to fill the statutory gap in reasonable fashion.'" 555 U.S. 511, 523 (2009) (emphasis added).[8] Those decisions say nothing about a court's authority to interpret a statute where, as here, "the intent of Congress is clear." *Chevron*, 467 U.S. at 842.[9]

b. The panel correctly determined that "§6(c) [unambiguously] creates a cap only on land held in trust for the Nation." Op.10965. While plaintiffs allege that the panel decision is impermissibly infused with "policy justifications asserted by government lawyers," GRIC Pet. 16, in reality it is nothing more than a straightforward construction of the statutory text. The panel properly interpreted §6(c) as part of a "'symmetrical and coherent regulatory scheme,'" Op. 10965, in which "[s]ubsection 6(c) and 6(d) are internally cross-referenced and must be read

[8] Plaintiffs also rely on *Gonzales* and *Ventura*, but those cases involved remands for the application of law to fact that is undisputedly within the agency's purview. *See Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (BIA had not considered an issue that "require[d] determining the facts and deciding whether the facts as found f[e]ll within a statutory term"); *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (remand required because the court had not respected "'the BIA's role as fact-finder'"). The interpretation of §6(c), by contrast, is a purely legal question.

[9] Indeed, at oral argument counsel for GRIC twice correctly acknowledged that "the plain meaning of the statute does not get remanded [to the agency]." Oral Argument at 3:08 (Apr. 16, 2012); *see id*. at 12:36.

together," and concluded that "treating §6(c) as a limit on land" purchases is incorrect in light of the text of the remainder of §6, Op.10966.

Moreover, while Plaintiffs claim that theirs is the "better reading" of the Lands Replacement Act, GRIC Pet. 18, their interpretation would thwart the Act's central purpose—to provide replacement reservation land for the Nation. If the Nation purchased a 9,880-acre parcel of land but was unable to place it into trust for whatever reason, on Plaintiffs' view the Nation would never be entitled to have *any* replacement reservation lands because it would have purchased all the land to which it was entitled. There is no reason to think Congress designed such a self-defeating scheme. And there is nothing in Plaintiffs' improbable reading of §6(c) that comes close to justifying rehearing by this Court.

CONCLUSION

Plaintiffs' petitions for rehearing should be denied.

Respectfully submitted.

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December 20, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 35-4 and 40-1, the undersigned hereby certifies that the attached response to the petitions for panel rehearing and rehearing en banc is proportionally spaced, has a typeface of 14 points or more, and contains 4,200 words.

As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Seth P. Waxman
SETH P. WAXMAN

December 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 20, 2012. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman
SETH P. WAXMAN