

# No. 06-35669

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## United States Court of Appeals for the Ninth Circuit

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MUHAMMAD SHABAZZ FARRAKHAN, A/K/A ERNEST S. WALKER-BEY;  
AL-KAREEM SHADEED; MARCUS PRICE; RAMON BARRIENTES;  
TIMOTHY SCHAAF; AND CLIFTON BRICENO,

*Plaintiffs-Appellants,*

— v. —

CHRISTINE O. GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON;  
SAM REED, SECRETARY OF STATE FOR THE STATE OF WASHINGTON;  
HAROLD W. CLARKE, DIRECTOR OF THE WASHINGTON DEPARTMENT OF  
CORRECTIONS; AND THE STATE OF WASHINGTON,

*Defendants-Appellees.*

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APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON, NO. CV-96-076-RHW  
THE HONORABLE JUDGE ROBERT H. WHALEY PRESIDING

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### SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellants, NAACP Legal Defense and Educational Fund, Inc. and the University Legal Assistance at Gonzaga Law School, by and through undersigned counsel, hereby certify that Counsel for Plaintiffs-Appellants are neither subsidiaries nor affiliates of a publicly owned corporation.

Dated this 29th day of May, 2009.

Respectfully Submitted,

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Plaintiffs Muhammad Shabazz Farrakhan, Al-Kareem Shadeed, Marcus Price, Ramon Barrientes, Timothy Schaaf, and Clifton Briceno (collectively, “Plaintiffs”) submit this supplemental brief pursuant to the Court’s order dated May 14, 2009, directing the parties to address how, if at all, the enactment of Washington Laws of 2009, chapter 325, HB 1517 (“HB 1517”) affects this appeal, including whether, as of its effective date, July 26, 2009, it will render this appeal and the action moot. The Court also directed the parties to address whether, if this appeal is not moot, this case should be remanded to the district court for that court to examine, in the first instance, the effect of HB 1517 on this action.

### **SUMMARY OF ARGUMENT**

Notwithstanding its finding of “compelling evidence of racial discrimination and bias in Washington’s criminal justice system” that “clearly hinder[s] the ability of racial minorities to participate effectively in the political process,” the district court in this action nevertheless concluded that Washington’s felon disfranchisement scheme does not violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (“VRA”). *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273, at \*6 (E.D. Wash. July 7, 2006) (*quoting Farrakhan v. Washington*, 338 F.3d 1009, 1220 (9th Cir. 2003) (“*Farrakhan I*”). As the district court found, Plaintiffs have shown that existing disparities at every stage of Washington State’s criminal justice system—from arrest to charging to incarceration—are neither

reflective of nor warranted by the extent to which racial minorities actually participate in criminal activity. As a result of the interaction of racial discrimination in the criminal justice system with Washington State's felon disenfranchisement scheme, Blacks, Latinos and Native Americans are disproportionately denied access to the one fundamental right that is preservative of all others. Plaintiffs' evidence demonstrates that the disproportionate denial of the right to vote to racial minorities is *caused by that interaction*, resulting in the disenfranchisement of nearly one-quarter—an incredible 24%—of all Black men in Washington, and nearly 15% of the entire Black population in the State. Plaintiffs' claim is that this disparate result is precisely what Section 2 was enacted to proscribe.

That claim is not mooted by the enactment of HB 1517, which, as of July 26, 2009, will permit the “provisional” restoration of voting rights to some persons convicted of felonies *upon release from physical custody of the State*. All of the Plaintiffs here, with the exception of Mr. Muhammad Shabazz Farrakhan, are serving lengthy prison sentences in the Washington Department of Corrections. Thus, notwithstanding the enactment of HB 1517—which is a positive development for the State of Washington—Article VI, Section 3 of the Washington State Constitution will continue to exclude Plaintiffs, with the exception of Mr. Farrakhan, from the “elective franchise” as a result of the

interaction of their race and their “convict[ion] of an infamous crime.”<sup>1</sup> Wash. Const. art. VI, § 3.

Under the current section 9.94A.637 of the Revised Code of Washington (“RCW”), persons with a felony conviction may attempt to regain the right to vote by completing all of the requirements of their sentences and obtaining a certificate of discharge. RCW 9.94A.637 § (1)(a). HB 1517 will modify this framework by providing that “the right to vote is provisionally restored” to persons convicted of felonies upon release from physical custody and from supervision by the State Department of Corrections. HB 1517 § 1. This provisional restoration is limited, however, as HB 1517 permits a sentencing court to “revoke the provisional restoration of voting rights” if it determines that the person “has willfully failed to comply with the terms of his or her order to pay legal financial obligations” (*id.* § (2)(a)), and empowers a prosecutor to seek such revocation “[i]f the person has failed to make three payments in a twelve-month period” (*id.* § 2(b)).

These amendments continue to leave Plaintiffs—with the exception of Mr. Farrakhan, as discussed below—ineligible to vote, and permit Washington’s discriminatory felon disfranchisement scheme to remain fundamentally intact. The enactment of HB 1517, therefore, does not moot Plaintiffs’ claims, nor does it

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<sup>1</sup> Under Washington law, an “infamous crime” is defined as “a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility.” RCW § 29A.04.079.

affect the VRA's totality of the circumstances analysis. Thus, this case should not be remanded to the district court for that court to examine the effect of HB 1517 on this action.

## ARGUMENT

### **I. PLAINTIFFS' CLAIMS, WITH ONE EXCEPTION, ARE NOT MOOTED BY THE ENACTMENT OF HB 1517**

As an initial matter, “[i]n cases involving the amendment or repeal of a statute or ordinance, mootness is ‘a matter relating to the exercise rather than the existence of judicial power.’” *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1181 (9th Cir. 2006) (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 927 (9th Cir. 1991) (internal citations omitted)). Although ordinarily a jurisdictional issue, mootness is *not* jurisdictional where, as here, the suggestion of mootness *arises from the repeal or amendment of a statute*. In such cases, “[a] court may continue to exercise jurisdiction...where the balance of interests favor such continued authority.” *Quest Corp.*, 434 F.3d at 1181. Thus, “[t]he party moving for dismissal on mootness grounds bears a heavy burden.” *Coral Constr.*, 941 F.2d at 927-28 (citing *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982)). “[D]ismissal of a case ‘on grounds of mootness would be justified *only* if it were *absolutely clear* that the litigant no longer had any need of the judicial protection that it sought.” *Jacobus v. Alaska*, 338 F.3d 1095, 1102 (9th Cir. 2003) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (emphasis added)).

Moreover, courts should not apply the doctrine of mootness too stringently in a way that deprives a plaintiff of standing at the appellate stage, where “by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191-92 (2000).

**A. HB 1517 Disadvantages Plaintiffs in the Same Fundamental Way as Existing Washington Law**

Although the amendment or repeal of a statute may, in some circumstances, render a plaintiff’s claims challenging a statute moot, *see, e.g., Jacobus*, 338 F.3d at 1103, this is not the case where, as here, the revised statute “disadvantage[s the plaintiffs] in the same fundamental way” as the original statute. *Ne. Fl. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

Here, although the voting rights of Plaintiff Muhammad Shabazz Farrakhan, who is no longer incarcerated or under the supervision of the State Department of Corrections, will be provisionally restored upon the effective date of HB 1517, thereby rendering his claim moot, the claims of all of the other plaintiffs continue

to present a live controversy.<sup>2</sup> Al-Kareem Shadeed, Marcus Price, Ramon Barrientes, Timothy Schaaf, and Clifton Briceno (collectively, the “Remaining Ineligible Plaintiffs”), remain incarcerated under lengthy sentences.<sup>3</sup> HB 1517 will have no effect on the voting rights of the Remaining Ineligible Plaintiffs, who will continue to be unable to vote by operation of Washington’s discriminatory disfranchisement scheme.

In this Circuit, the mere replacement of one statutory provision or program with another does not moot a claim where the plaintiffs will be subjected to the same basic treatment under the new statutory framework. *See, e.g., Lauran v. U.S. Forest Serv.*, 141 F. App’x 515, 518 n.1 (9th Cir. 2005) (challenge to the validity of fees collected under the federal Recreational Fee Demonstration Program (RFDP) was not mooted by repeal of RFDP, where new legislation reauthorized the collection of substantially similar recreation fees).<sup>4</sup>

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<sup>2</sup> That Mr. Farrakhan’s voting rights will be provisionally restored by operation of HB 1517 has no bearing on the claims of the Remaining Ineligible Plaintiffs, who remain incarcerated and disfranchised. *See Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2001) (dismissing complaint for lack of injury, but observing that, although the claims of several plaintiffs had been mooted, the claims of several other plaintiffs were not moot because those plaintiffs theoretically remained subject to challenged policy).

<sup>3</sup> Plaintiffs Price and Shadeed, for example, were sentenced to life imprisonment without the possibility of parole. Plaintiffs Barrientes, Briceno and Schaaf were each sentenced to at least 30 years in prison in the 1990s. *See Declaration of Leora McDonald, Defendants’ Supplemental Excerpts of Record*, 331-332.

<sup>4</sup> Numerous other Courts of Appeals have similarly held that, where an amended statute affects plaintiffs in the same fundamental way as the originally challenged

Moreover, even if the new law “may disadvantage [the plaintiffs] to a lesser degree than the old one,” the plaintiffs’ claims are not moot so long as the gravamen of their complaint remains unchanged. *Ne. Fl. Chapter*, 508 U.S. at 662.<sup>5</sup> Here, simply providing plaintiffs with a mere *possibility* that their voting

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statute, the plaintiffs’ claims are not moot. *See, e.g., Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002) (challenge to a town ordinance that prohibited a cellular tower at a viable location was not mooted by an amendment to the ordinance, on the grounds that “an amendment does not moot the claim if the updated statute differs only insignificantly from the original”); *Cooper v. McBeath*, 11 F.3d 547, 551 (5th Cir. 1994) (challenge to Texas statute requiring three years residency to obtain a “mixed beverage permit” was not mooted by amendment reducing residency requirement to one year); *Cam I, Inc. v. Louisville/Jefferson County Metro Gov’t*, 460 F.3d 717, 719-20 (6th Cir. 2006) (plaintiff’s challenge to adult entertainment establishment ordinance on the grounds that it failed to provide an adequate mechanism for expedited judicial review of license denials was not mooted by the enactment of a new law which provided for only non-expedited review); *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1064 (8th Cir. 2004) (amendment to broaden class of pork and beef processors prohibited from owning, controlling, or operating a feedlot in Iowa did not moot dormant commerce clause challenge to the law); *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1313-14 (11th Cir. 2000) (rejecting suggestion of mootness where amended city ordinance, while “narrow[ing] the scope of events which will be governed” by the ordinance, “d[id] not substantially alter” plaintiff’s claim that ordinance was an impermissible content-based regulation).

<sup>5</sup> Other Courts of Appeals, including the Fifth, Sixth, and Eleventh Circuits, have similarly held that where an amendment to a statute narrows or lessens the scope of a plaintiff’s injury, but does not eliminate it altogether, the plaintiff’s claim is not moot. *See, e.g., Cooper*, 11 F.3d at 551 (amendment reducing Texas’ residency requirement for obtaining a certain permit from three years to one year, while “lessen[ing] the burden placed on the Plaintiffs,” did not moot plaintiffs claim; *Cam I*, 460 F.3d at 719-20 (amendment to statute providing for judicial review of denials of certain municipal licenses did not moot plaintiff’s claim because it “did not completely remove the alleged harm,” which was based on the absence of *expedited* judicial review); *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1313-14 (amended city ordinance, which “narrow[ed] the scope of events

rights might be “provisionally” restored at an earlier date than had been possible at the onset of this litigation does not moot their claim that the discriminatory operation of Washington’s felon disfranchisement scheme itself violates Section 2 of the VRA. *See Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1206 (9th Cir. 1994) (merely replacing one regulation with another that allegedly violates federal law in the same manner does not render plaintiff’s claim moot); *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000) (action should not be dismissed as moot where amendment to law resolved some but not all of plaintiff’s claims).<sup>6</sup>

Accordingly, Defendants cannot satisfy their burden of demonstrating that it is “absolutely clear” that the Remaining Ineligible Plaintiffs “no longer ha[ve] any need of the judicial protection” that they seek. *Jacobus*, 338 F.3d at 1102. The

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which will be governed” under its laws concerning “outdoor festival[s],” “d[id] not substantially alter” plaintiff’s claim).

<sup>6</sup> Indeed, that HB 1517 does not permanently restore the franchise even upon a person’s release from physical custody of the State, but does so only “provisionally” makes plain that the Remaining Ineligible Plaintiffs’ claims are not impacted by it. HB 1517 permits a sentencing court to “revoke the provisional restoration of voting rights” if it determines that the person “has willfully failed to comply with the terms of his or her order to pay legal financial obligations” (HB 1517 § (2)(a)), and empowers a prosecutor to seek such revocation “[i]f the person has failed to make three payments in a twelve-month period” (*id.* § 2(b)). Nothing about HB 1517 bears on the Remaining Ineligible Plaintiffs’ claims that felon disfranchisement in Washington “results in a denial or abridgement of the[ir] right . . . to vote on account of race or color,” in violation of Section 2 of the VRA. 42 U.S.C. § 1973(a).

Remaining Ineligible Plaintiffs continue to be disadvantaged in the same fundamental way, as they will still be disfranchised after the effective date of HB 1517. This Court may properly make that determination on appeal, without remanding this case to the district court, as the cases cited above demonstrate that appellate courts have frequently determined in the first instance that a plaintiff's claim is not moot as a result of statutory amendment. *See, e.g., Lauran*, 141 F. App'x at 518 n.1 (ruling in the first instance that amendments passed three days before appeal did not moot plaintiff's claims); *Jacobus*, 338 F.3d at 1102-04 (ruling in the first instance that amendment enacted after appellate briefing did not moot case); *Pub. Serv. Co. of Colo.*, 30 F.3d at 1206 (deciding in the first instance that amendment enacted while appeal was pending did not render plaintiffs' claims moot); *Coral Constr.*, 941 F.2d at 927-28 (ruling in the first instance that amendment enacted two months prior to submission of appeal did not render case moot).

**B. Defendants' Voluntary Cessation of Unlawful Conduct Does Not Moot the Remaining Ineligible Plaintiffs' Claims**

Even if all of the Plaintiffs would be affected by HB 1517, HB 1517 would at best amount to a voluntary cessation of unlawful conduct, which clearly would not moot Plaintiffs' claims. *See, e.g., Coral Const.*, 941 F.2d at 928 (“[V]oluntary cessation of allegedly illegal conduct, standing alone, does not necessarily render a

case moot”) (*citing, inter alia, City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)); *Jacobus*, 338 F.3d at 1103 (“repeal of the objectionable language [does] not deprive the federal courts of jurisdiction . . . because of the well-settled principle that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice”) (*quoting Carreras v. City of Anaheim*, 768 F.2d 1039, 1047 (9th Cir. 1985)).

Although courts in this Circuit do not usually characterize the amendment of a state statute as a form of “voluntary cessation,” *see Chem. Producers & Distribs. Ass’n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006), two factors favor the application of the voluntary cessation exception here. First, the district court granted summary judgment to defendants, thus holding that Washington’s then-existing felon disfranchisement scheme is lawful under Section 2 of the VRA. Under these circumstances, a decision by this Court to decline to exercise jurisdiction would enable Washington not only to “reenact its earlier statute, but [to] do so without the spectre of a prior finding of [illegality]. This factor weighs against mootness.” *Coral Const.*, 941 F.2d at 928. Second, the enactment of HB 1517 only occurred after more than a decade of litigation, which weighs heavily against a finding of mootness. *See Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1194 (9th Cir. 2000) (finding case moot where defendant “did not wait for litigation” before changing its policies, and indicating that a finding of mootness is

less appropriate when repeal occurred due to the “prodding effect” of litigation). Under these circumstances, this Court should not find that Washington’s voluntary decision to cease unlawful conduct renders the Remaining Ineligible Plaintiffs’ claims moot.

**C. Even if the Remaining Ineligible Plaintiffs’ Claims Were Moot, Which They Are Not, This Court Can and Should Reach the Merits of the Questions Presented on Appeal**

Even if the Remaining Ineligible Plaintiffs claims were moot this is not a case where this Court should decline to exercise jurisdiction on mootness grounds. Where the suggestion of mootness arises from statutory amendment or repeal, the issue of mootness relates “to the exercise rather than the existence of judicial power.” *Qwest Corp.*, 434 F.3d at 1181. Here the “balance of interests” clearly favors continued jurisdiction over this matter. *Id.* Purely as a matter of judicial economy, retention of jurisdiction is proper. This action was first filed in 1996. After thirteen years of litigation and two appeals, dismissing this case now on mootness grounds would squander, rather than conserve, judicial resources. *See Friends of the Earth*, 528 U.S. at 191-92.

More importantly, Plaintiffs’ interest in this matter is of the highest order: a vindication of their rights under Section 2 of the VRA, a milestone in “the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote.” *Bartlett v. Strickland*, 121

S.Ct. 1231, 1240 (2009). No statute in our nation’s history embodies America’s commitment to democracy more clearly than the Voting Rights Act. While there has certainly been progress, as the Supreme Court recently recognized, “[s]till, racial discrimination . . . [is] not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions. . . .” *Id.* at 1249. This is particularly true with respect to the discriminatory operation of Washington State’s felon disfranchisement scheme. Given the gravity of Plaintiffs’ allegations, and the apparent absence of countervailing concerns, a proper balancing of interests clearly favors retention of jurisdiction.

**II. THE ENACTMENT OF HB 1517 HAS NO EFFECT ON THE PLAINTIFFS’ SHOWING THAT, UNDER THE TOTALITY OF THE CIRCUMSTANCES, WASHINGTON STATE’S FELON DISFRANCHISEMENT SCHEME VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT**

The enactment of HB 1517 in no way undermines Plaintiffs’ appeal before this Court. As the district court recognized, Plaintiffs presented unrefuted and “compelling evidence of racial discrimination and bias in Washington’s criminal justice system” that “clearly hinder[s] the ability of racial minorities to participate effectively in the political process,” *Farrakhan*, 2006 WL 1889273, at \*6 (*citing Farrakhan I*, 338 F.3d at 1220). Notwithstanding this critical finding, the district

court concluded that Washington's felon disfranchisement scheme does not violate Section 2.

In so ruling, the district court performed a contorted application of the totality of the circumstances inquiry that is unsupported by Section 2's text, legislative history and decades of case law (including this Court's decision in *Farrakhan I* interpreting that provision). In reaching its conclusion, the district court found that other Senate Factors—principally, the absence in Washington of an official *history* of discrimination against racial minorities in the area of voting—trumped Plaintiffs' compelling evidence of *present day* official racial discrimination in the criminal justice system (and other areas). Not only did the district court misconstrue the relevance of these factors to a claim of vote denial (as opposed to vote dilution), it also failed to recognize that this Court's earlier remand would have been entirely unnecessary if such factors could overcome a finding that racial bias in the criminal justice system “clearly hinder[s] the ability of racial minorities” in Washington to vote. *Farrakhan I*, 338 F.3d at 1020. *See* Pls.' Opening Br. at 22-47.

In short, the enactment of HB 1517 simply does not affect the Remaining Ineligible Plaintiffs' claim that, under the totality of the circumstances, Washington State's felon disfranchisement scheme violates Section 2. *See* Pls.' Opening Br. at 22-57; Pls.' Reply Br. at 10-19. This Court need not remand this

case to the district court for that court to examine the effect of HB 1517 on this action.

### **CONCLUSION**

For the foregoing reasons, and for the reasons stated in Plaintiffs' previous submissions to this Court, the judgment of the district court should be reversed and judgment should be entered in favor of Plaintiffs, that Washington State's felon disfranchisement scheme violates Section 2 of the VRA.

Dated this 29th day of May, 2009.

Respectfully Submitted,

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**(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief***

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' Proportionately spaced, has a typeface of 14 points or more and contains \_\_\_\_\_ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

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' Monospaced, has 10.5 or fewer characters per inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

4. *Amicus Briefs*

' Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

**or is**

' Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

**or is**

' **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

May 29, 2009

Date

/s/ RYAN P. HAYGOOD

Signature of Attorney or  
Unrepresented Litigant

**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 May 29, 2009.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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