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Case Nos. 08-1387/1389/1534/09-1111

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, et al.,

Plaintiffs-Appellants,

- and -

CHASE CANTRELL, et al.

Plaintiffs-Appellees

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,

Defendant-Appellee,

- and -

MICHAEL COX, MICHIGAN ATTORNEY GENERAL,

Intervenor-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
Honorable David M. Lawson, District Judge

BRIEF OF PROPOSED AMICI CURIAE CITY AND COUNTY OF SAN FRANCISCO, CITY OF OAKLAND, AND COUNTY OF ALAMEDA IN SUPPORT OF APPELLANT AND REVERSAL

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IDENTITY AND INTEREST OF AMICI CURIAE

The City and County of San Francisco, City of Oakland, and County of Alameda (collectively "the Amici") are local government entities in California that have been subject to Proposition 209 – a close analogue of Michigan's Proposal 2 – since California voters enacted it in 1996. Like Proposal 2, Proposition 209 forbids preferential treatment on the basis of race or sex in public education, government contracting, and public employment. It has had a substantial impact on the Amici, and in particular on the school children in the Amici's communities. Many of those children are African American or Latino, attend public schools, and hope to attend California's public universities.

The Amici's interest in this litigation is to explain why the Ninth Circuit's opinion, refusing to apply the *Hunter-Seattle* doctrine to invalidate Proposition 209 and the only potentially persuasive authority from a sister circuit, is incorrect and should not be followed. Because the Amici have now lived under Proposition 209 for thirteen years, they have experienced first-hand the toll that prohibiting race as a consideration in public school assignment and admissions to the University of California has taken on public education for the youth in the Amici's communities.

SUMMARY OF ARGUMENT

The Ninth Circuit misapplied binding precedent in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) ("*Wilson*"), when it held that Proposition 209, California's 1996 constitutional initiative[1] prohibiting race- or sex-based affirmative action in public education, employment and contracting, does not violate the federal Equal Protection Clause. As the United States Supreme Court has made clear, the Equal Protection Clause forbids selectively placing special political burdens on racial minorities or women to achieve beneficial legislation. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).

Yet that is exactly what Proposition 209 does. Before it was enacted, minorities and women could seek remedies from local school boards and the University of California Regents to counteract public school segregation and a disproportionately low matriculation rate in the University of California system. After Proposition 209's passage, women and minorities could only seek those remedies by amending California's Constitution. No fair application of United States Supreme Court precedent can square that with the Equal Protection Clause.

Nonetheless, the Ninth Circuit refused to apply *Hunter* and *Seattle* to invalidate Proposition 209 because, in its view, race- and sex-conscious policies to desegregate public schools and increase minority admissions constitute *preferential treatment*, whereas *Hunter*

[1] Proposition 209 is now article 1, section 31 of the California Constitution.

and *Seattle* protect only against statutes denying minorities the right to seek protection from *direct discrimination*.

Not only does the Ninth Circuit's preference/discrimination distinction find no support in *Hunter* or *Seattle*, it also plainly contradicts the Supreme Court's express rationale for the doctrine: that burdens placed in the way of racial minorities or women who seek "beneficial" legislation violate the Equal Protection Clause. *Seattle*, 458 U.S. at 467; *Hunter*, 393 U.S. at 390-391. Indeed, in *Seattle*, the voters outlawed a remedy for school segregation – busing – which no one claimed was necessary to overcome *de jure* discrimination. Thus, if it is possible, as the Ninth Circuit suggests, to categorize legislation "beneficial" for minorities as either preferential treatment or a remedy for direct discrimination, the legislation at issue in *Seattle* fell squarely on the "preference" side of the distinction. The Supreme Court held that the voters could not impair minorities' ability to seek that type of legislation – legislation that is indistinguishable from the legislation minorities are thwarted from seeking under Proposition 209 and Proposal 2.

Five Ninth Circuit judges dissenting from the denial of *en banc* review in *Wilson*, the panel in this case below, and an overwhelming majority of scholarly commentators have all eloquently explained the *Wilson* majority's preference/discrimination distinction is both unprecedented and, more importantly, irreconcilable with *Hunter* and *Seattle*. Accordingly, this Court should reject *Wilson* and strike down Proposal 2 for the reasons the panel expressed below.

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ARGUMENT

I. THE NINTH CIRCUIT ERRED IN UPHOLDING PROPOSITION 209, AND THIS COURT SHOULD REJECT ITS OPINION AS UNPERSUASIVE.

A. The First Court To Evaluate Proposition 209 Properly Held That It Violated The Supreme Court's *Hunter-Seattle* Doctrine.

Immediately after Proposition 209 passed, opponents challenged its constitutionality in the United States District Court for the Northern District of California, which enjoined the measure. *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1508 (N.D. Cal. 1996) (*"Coalition I"*), *rev'd* 122 F.3d 692 (9th Cir. 1997) (*"Coalition II"*). The district court held that Proposition 209 violated the Equal Protection Clause based on a straight-forward application of the Supreme Court's decisions in *Hunter,* 393 U.S. at 385 and *Seattle School District No. 1,* 458 U.S. at 457. These cases teach that making the political process more onerous only for issues of particular interest to minorities is akin to a racial classification, and the law establishing such a classification is subject to strict scrutiny.

In *Hunter*, the United States Supreme Court applied the Equal Protection Clause to invalidate a voter-enacted amendment to the city charter of Akron, Ohio. That measure repealed all existing housing anti-discrimination ordinances and required voter approval of any future anti-discrimination ordinances. *Hunter*, 393 U.S. at 387. Importantly, in striking down the enactment, the Court did not find that it facially discriminated against any specific group, or that it was adopted for discriminatory purposes. Rather, the Court explained that the charter amendment disadvantaged any group that might seek protection against racial, religious, or ancestral discrimination in the

sale and rental of real estate, as compared to any group that might seek to regulate real property transactions in the pursuit of other purposes (*e.g.*, rent control or urban renewal advocates). *Id.* at 390. Because racial minorities are the groups that typically would pursue laws aimed at protection against racial discrimination in housing, the Court concluded, the measure "places special burdens on racial minorities within the governmental process" by forcing those groups to run a "gantlet" of voter approval that other interest groups were spared. *Id.* at 390-91. Put another way, the measure discriminated against racial minorities because the practical effect of the measure was to make it more difficult for racial minorities to seek political redress than for other groups. Accordingly, the Court subjected the measure to heightened scrutiny, and determined that there was no justification for the special burdens the measure imposed on racial minorities, holding that "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393.

In *Seattle*, the United States Supreme Court similarly applied the Equal Protection Clause to invalidate a voter-approved measure prohibiting local school districts from assigning students beyond their neighborhood schools. The initiative was adopted in response to the Seattle School District's race-conscious integration plan that made extensive use of busing and pupil reassignment to combat segregation. The initiative made no explicit reference to race. However, it contained broad exceptions that permitted busing for any purpose other than racial desegregation, and thus operated as a bar only to

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race-conscious busing. *Seattle*, 458 U.S. at 474. Applying *Hunter*, the *Seattle* Court observed that the challenged law banned desegregative busing statewide, but permitted local decisions to use busing for any other purpose. Thus, groups that would benefit from the former were forced to seek redress at a different level of government – the state legislature or the statewide electorate – than groups that might benefit from the latter, who could still appeal to local school boards. "The initiative removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474 & 479-80.

The *Seattle* Court further observed that *Hunter* did not require that racial minorities always win, or never lose, in the political process; it merely required that the process not be altered in a manner that "subjected [them] to a debilitating and often insurmountable disadvantage." *Id.* at 483-84. The companion case to *Seattle* clearly illustrated this important distinction. In *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 532 (1982), voters repealed a state constitutional provision that required race-conscious busing in some circumstances. But the repeal did not affect the future capacity of a "public entity, board or official" to voluntarily adopt a desegregation program. Thus, unlike the measures at issue in *Hunter* and *Seattle*, the initiative in *Crawford* did not alter the political process in any way: the parents of minority children could still urge their local school boards to adopt busing plans to remedy segregation. Because the measure did not "place special burdens" on the ability of racial minorities "to achieve legislation that is in their interest" locally or

statewide, it did not run afoul of the *Hunter-Seattle* doctrine. *Id.* at 541-542.

After examining these cases, the district court in *Coalition I* found Proposition 209 to be presumptively unconstitutional. The court asked whether Proposition 209 "removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Coalition I*, 946 F. Supp. at 1505 (quoting *Seattle*, 458 U.S. at 474). The court first observed what all parties to the litigation had effectively conceded: "that Proposition 209, at the very least, will prohibit race- and gender-conscious affirmative action efforts" but that "preferences unrelated to race and gender remain unaffected" by the legislation. *Id.* at 1505. Because the former are "of special interest to minorities and women" and have "been singled out for unfavorable political treatment" by Proposition 209, that law has a "racial focus" within the meaning of the *Hunter-Seattle* doctrine. The court went on to conclude that Proposition 209 "displaces authority with respect to a race and gender issue to 'a new and remote level of government,' *Seattle*, 458 U.S. at 483, and thus reorders the political process to the detriment of women and minorities. . . ." *Coalition I*, 946 F. Supp. at 1508. The court concluded, "the initiative plainly rests on distinctions based on race," and as such violates the *Hunter-Seattle* doctrine. *Id.*

B. The Ninth Circuit Misapplied the *Hunter-Seattle* Doctrine In Reversing the District Court, As Five Ninth Circuit Judges Demonstrated.

In *Coalition II*, the Ninth Circuit Court of Appeals reversed *Coalition I*. Writing for the panel, Judge O'Scannlain purported to

distinguish *Hunter* and *Seattle* on the basis that those cases did not invalidate statutes that interfered with "preferential treatment," but rather statutes that denied minorities the right to seek protection from direct discrimination. The panel reasoned, incorrectly, that Proposition 209 *could not* deny equal protection by forbidding racial or gender preferences, because by their very nature "preferences" do not guarantee "equal" treatment:

> Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment . . . Impediments to preferential treatment do not deny equal protection . . . While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

Coalition II, 122 F.3d at 708.

After a fractious internal battle, the Ninth Circuit declined to rehear the case *en banc*. In a pointed dissent from the decision denying rehearing, Judge Norris, joined by Judges Schroeder, Pregerson and Tashima, noted that the panel had minted a distinction – between affirmative action programs (i.e., "preferential treatment") on the one hand and other laws aimed at protecting minorities on the other – that found no support in *Hunter* or *Seattle*. The mandate of *Hunter* and *Seattle* was quite simple: a state may not enact any law that has the purpose and effect of making it more difficult for minorities or women to secure legislation that is in their interest. "The relevant inquiry under *Hunter* and *Seattle* is simply to ask whether legislation is *beneficial to minorities*." *Id.* at 714 (emphasis in original). If it is, any law that places special burdens on it in the political process is unconstitutional. Thus, when the *Hunter-Seattle* doctrine is applied to Proposition 209, a court "*has no legitimate*

choice but to declare it unconstitutional." *Id.* at 712 (emphasis added).

The panel's contrary conclusion, Judge Norris observed, was based on the *political* proposition that equal treatment cannot be achieved by granting preferential treatment to groups that had historically been treated unequally. Judge Norris emphasized that the panel's "personal view" of affirmative action was by no means universal. Indeed, "[t]he proponents of affirmative action . . . would no doubt argue that such programs do in fact secure equality because they level the playing field by remedying the inequalities that are the product of the long history of state-sponsored discrimination." *Id.* at 714. The courts' task, reminded Judge Norris, is not to choose sides in that policy battle, as the panel had done, but instead faithfully to apply the clear test set out in *Hunter* and *Seattle*. By choosing sides in a policy debate, the panel had neglected its duty to follow precedent "in favor of a path of conservative judicial activism." *Id.* at 717.

In addition to the four-judge dissent, Judge Hawkins wrote separately, likewise to criticize the panel decision for ignoring the clear mandate of the *Hunter-Seattle* doctrine. Judge Hawkins correctly noted that, whatever the wisdom of affirmative action or Proposition 209, the Ninth Circuit was duty-bound to faithfully apply *Hunter* and *Seattle*, and strike the measure down. He criticized the panel for eschewing that faithful and straightforward application of the law in favor of trying to predict what they believed the Supreme Court *would do* if it re-examined the doctrine. The Supreme Court has criticized lower courts for engaging in this sort of "precedent-defying predictionism," a practice that Justice Stevens described as

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"an indefensible brand of judicial activism." *Id.* at 2 n. 1 (citing *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 & 486 (1989)).

C. The Panel Below Correctly Identified The Fundamental Flaws In The *Wilson* Majority's Decision.

In the decision below, *Coalition to Defend Affirmative Action, et al. v. Regents*, 652 F.3d 607 (6th Cir. 2011), the three-judge panel of this Court properly applied the *Hunter-Seattle* doctrine and recognized the basic shortcoming in the Ninth Circuit's reasoning. The Court summarized the doctrine as follows:

> While "laws structuring political institutions or allocating political power according to neutral principles" are not subject to challenges under the Fourteenth Amendment, "a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process."

Id. at 616 (citing *Seattle*, 458 U.S. at 469–70).

The Court observed that, contrary to the Ninth Circuit's pronouncement, the Supreme Court's doctrine was not limited to addressing simply political impediments to non-discrimination laws; it also forbids barriers to other types of legislation that might be "beneficial" to minorities. *Id.* at 629. The Court understood that the *Hunter-Seattle* doctrine provides substantially broader protection than the Ninth Circuit's limited shield against facially unequal treatment:

> It is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities. In effect, the political process theory hews to the unremarkable belief that, when two competitors are

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> running a race, one may not require the other to run twice as far, or to scale obstacles not present in the first runner's course.

Id. at 614.

The Court also honed in on the Ninth Circuit's intellectually dishonest effort to distinguish *Seattle*. It recognized that *Seattle* presented a "case identical in many respects to the one we confront here." *Id.* at 615. Because "there had been no finding that the *de facto* segregation in Seattle's schools was the product of discrimination," the ballot measure at issue in *Seattle* was not impeding a non-discrimination law, it was placing a burden on minorities seeking beneficial busing legislation that might ameliorate the unquestionable harm caused by a segregated education. *Id.* at 615.

There is no principled way to distinguish *Seattle* from the present case, or from the case presented in *Wilson*:

> Just as the desegregative busing programs at issue in *Seattle* were designed to improve racial minorities' representation at many public schools, *see id.* at 460, 102 S.Ct. 3187, race-conscious admissions policies increase racial minorities' representation at institutions of higher education.

Id. at 618.

D. The Overwhelming Majority Of Legal Scholars Find The *Wilson* Majority's Reasoning Untenable.

Legal scholars have nearly unanimously reached the same conclusion as the well-reasoned judicial determinations discussed above that Proposition 209 is unconstitutional under *Hunter* and *Seattle*. Indeed, the great weight of the scholarly commentary on the issue concludes that Proposition 209 cannot be reconciled with the

Hunter-Seattle doctrine. Even before Proposition 209 was passed, legal commentators pointed out its vulnerability under the *Hunter-Seattle* doctrine. *See, e.g.*, Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019 (1996).

Then, in the wake of its enactment and the decisions in *Coalition I* and *II*, the legal literature burgeoned with articles decrying the Ninth Circuit's failure to accurately apply *Hunter* and *Seattle*. Michael G. Moore, *Comment: Constitutional Law: The Redefinition of "Minority" and its Impact on Political Structure Equal Protection Analysis*, 9 U. Fla. J.L. & Pub. Pol'y 121, 126-27 (1997) (arguing Ninth Circuit distorted *Hunter* doctrine by redefining "minority"); Ryan Goodman, Note, *Gender Blindness and the Hunter Doctrine*, 107 Yale L.J. 261 (1997) (criticizing Ninth Circuit's variance from *Hunter* doctrine as undermining gender-based equal protection); Rebecca Smith, *Comment: A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action*, 38 Santa Clara L. Rev. 235, 263 (1997) (finding Ninth Circuit's analysis of the constitutional issues before it suggests a lack of understanding of the United States Constitution); Emmanuel Margolis, *Affirmative Action: Deja Vu All Over Again?*, 27 Sw. U. L. Rev. 1, 65 (1997) (warning that Ninth Circuit's opinion will allow Equal Protection Clause to tolerate racial supremacy); Girardeau A. Spann, *Proposition 209*, 47 Duke L.J. 187, 252 (1997) (criticizing Ninth Circuit failure to develop the arguments necessary to justify such a major jurisprudential revolution); Vikram D. Amar, *Recent Cases: The Equal Protection Challenge to Proposition 209*, 5 Asian L.J. 323, 328 (1998) (finding

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Ninth Circuit wide of the mark in not applying the equal protection analysis established in *Hunter* and *Seattle*); Jeremy Moeser, *Comment: Rough Terrain Ahead: A New Course for Racial Preference Programs*, 49 Mercer L.Rev. 915, 934 (1998) (faulting Ninth Circuit interpretation of equal protection under *Hunter* and *Seattle*); Stephen M. Rich, Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments after Romer v. Evans*, 109 Yale L.J. 587, 605-06 (1999) (arguing Ninth Circuit's avoidance of *Hunter* doctrine has led to doctrinal instability for future political restructuring cases); Jodi Miller, *Democracy in Free Fall: The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 Ann. Surv. Am. L. 1, 37 (1999) (faulting Ninth Circuit's distinguishing of *Hunter* as flawed); Keith Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection*, 27 Cap. U. L. Rev. 337, 338-39 (1999) (arguing Ninth Circuit wrongly ignored political structure equal protection in *Coalition II*); Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 Ohio St. L.J. 399, 537 (1999) (finding Ninth Circuit misses the main thrust of the *Hunter/Romer* line of cases). [2]

[2] *See* Martin D. Carcieri, *A Progressive Reply to Professor Oppenheimer on Proposition 209*, 40 Santa Clara L. Rev. 1105, 1118 (2000) (contending *Hunter/Seattle* doctrine does not apply to invalidate Proposition 209); Douglas W. Kmiec, *The Abolition of Public Racial Preference--An Invitation to Private Racial Sensitivity*, 11 Notre Dame J.L. Ethics & Pub. Pol'y 1, 6-7 (1997) (suggesting *Seattle* was not sufficiently analogous to invalidate Proposition 209).

Even years after Proposition 209 was on the ballot, the legal literature continued to criticize the Ninth Circuit's analysis. *See, e.g.*, Richa Amara, *Unequal Protection and the Racial Privacy Initiative*, 52 UCLA L. Rev. 1279, 1302 (2005) (criticizing the Ninth Circuit's decision in *Wilson* for failing to make an explicit holding under the *Hunter* inquiry, and for engaging instead "in a long-winded discussion wherein it lumped all women and minority voters together to make them one supermajority and wondered how such a majority could discriminate against itself"); Victor Suthammanonta, Note, *Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 N.Y.L. Rev. 1173, 1207-11 (2004-05) (noting that "[t]he Ninth Circuit's application of the 'political structure' doctrine is hampered by its incomplete analysis of the Hunter and Seattle School cases" in describing its failure to apply the doctrine correctly to Proposition 209); Chris Chambers Goodman, *Redacting Race in the Quest for Colorblind Justice: How Racial Privacy Legislation Subverts Antidiscrimination Laws*, 88 Marq. L. Rev. 299, 344 (2004) (describing Ninth Circuit argument that Proposition 209 does not classify because it prevents classifying as "miss[ing] the point of the Hunter Doctrine: that where the burden of the challenged legislation falls more heavily on minority access to the political process, the resulting unequal treatment violates the Equal Protection Clause"); Mark Strasser, *Symposium: "Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Same-Sex Marriage Referenda and the Constitution: On* Hunter, Romer, *and Electoral Process Guarantees*, 64 Alb. L.Rev. 949, 974 (2001)

(observing Ninth Circuit misrepresented the spirit of *Hunter*); Elizabeth T. Bangs, *Who Should Decide What Is Best for California's LEP Students? Proposition 227, Structural Equal Protection, and Local Decision-Making Power*, 11 La Raza L.J. 113, 149 (2000) (determining *Coalition II* opinion flies in the face of *Hunter*).

Nonetheless, despite the reams of arguments to the contrary, it is the Ninth Circuit panel's opinion upholding Proposition 209 that remains the law. And that law has had very real consequences for millions of Californians, not least Amici's school children and young adults whose experience of public education shapes, for better or for worse, their path in life.

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CONCLUSION

"The 'simple but central principle' of *Hunter* and *Seattle* is that the Equal Protection Clause prohibits requiring racial minorities to surmount more formidable obstacles to achieve their political objectives than other groups face." *Coalition to Defend Affirmative Action v. Regents of Univ. of Mich.*, 652 F.3d at 626. This Court should reject the 1997 decision of the Ninth Circuit in *Wilson* as poorly reasoned and contrary to the "simple and central principle" of binding Supreme Court precedent, and should hold that Proposal 2 violates *Hunter* and *Seattle*.

Dated: November 1, 2011

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,619 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

Dated: November 1, 2011 By: /s/ G. Scott Emblidge
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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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