DOCKET NO. 08-15693

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BINYAM MOHAMED, ET AL.,

PLAINTIFFS-APPELLANTS,

V.

JEPPESEN DATAPLAN, INC.,

DEFENDANT-APPELLEE,

AND

UNITED STATES OF AMERICA,

INTERVENOR-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE JAMES WARE, UNITED STATES DISTRICT JUDGE, PRESIDING

BRIEF AMICUS CURIAE OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS BINYAM MOHAMED ET AL. ON REHEARING EN BANC

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INTEREST OF AMICUS

The Electronic Frontier Foundation is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF serves as counsel in two cases arising out of the warrantless domestic dragnet surveillance conducted by the National Security Agency together with AT&T. In those cases, as in this one, the Executive has claimed that the state secrets privilege requires the Judiciary to be excluded from adjudicating the lawfulness of its actions. *Hepting v. AT&T* (09-16676) is currently pending before this court on another issue and *Jewel v. NSA* (08-4373-VRW) is currently pending before the Federal District Court for the Northern District of California.

Founded in 1990, EFF is based in San Francisco. EFF has dues-paying members all over the United States and maintains one of the most-linked-to websites in the world.

Counsel for the plaintiffs has consented to the filing of this brief. Counsel for the government and counsel for defendants have stated that they have no position on the filing of this brief.

INTRODUCTION

This case is another in a set of post-September 11, 2001 cases in which the Executive, having made new and tremendously broad assertions of its unilateral power, seeks to prevent the Judiciary from adjudicating the lawfulness of those new powers. To do so, the Executive skews the relevant caselaw on the state secrets privilege, attempts to rely on a case in which the

privilege was not even the basis for the decision and claims that the court must blind itself to credible, admissible, nonsecret evidence because the Executive has determined that it cannot confirm or deny a particular fact. Adopting the government's position would abdicate the Judiciary's Article III responsibility to adjudicate the constitutional and statutory limits on Executive authority.

ARGUMENT

I. The Panel Decision Correctly Concluded That Threshold Dismissals For Nonjusticiability In State Secrets Privilege Cases Are Contrary To Controlling Supreme Court Precedent

A. In *Tenet v. Doe*, The Supreme Court Clarified That Threshold Dismissal Is Limited To Cases Seeking To Enforce Duties Arising From A Confidential Espionage Relationship Between The Plaintiff And The Government

The panel decision correctly concluded that, under controlling Supreme Court decisions, threshold dismissal for nonjusticiability in state secrets cases is limited to lawsuits seeking to enforce duties arising from secret relationships the plaintiff and the government voluntarily enter into. Op. at 4936. It is only when the "very subject matter" of the lawsuit is a secret relationship between the plaintiff and the government that the case is nonjusticiable and must be dismissed at the outset. The government's argument to the contrary lacks merit.

The government's argument erroneously conflates two different lines of authority. One line is the line of cases recognizing that the state secrets privilege is a common-law evidentiary privilege, exemplified by *United States v. Reynolds*, 345 U.S. 1 (1953). The other line of case are cases recognizing that duties arising from espionage relationships are nonjusticiable, exemplified by *Totten v. United States*, 92 U.S. 105 (1876).

The state secrets privilege is a common-law evidentiary privilege, not an absolute immunity from suit. As the Supreme Court explained in *Reynolds*, the "privilege" is "well established *in the law of evidence*." *Reynolds*, 345 U.S. at 7-8 (emphasis added). Invoking the state secrets privilege thus raises only a "question of the Government's privilege to resist discovery" and exclude evidence. *Id.* at 3. For that reason, *Reynolds* was not a threshold dismissal case, and indeed was not a dismissal case at all. Instead, the Supreme Court ruled that, although the government had properly asserted the state secrets privilege to exclude certain evidence, the case was justiciable and should proceed forward to a decision on the merits so that the plaintiffs could attempt to "adduce the essential facts as to causation without resort to material touching upon military secrets." *Id*. at 11.

Totten was a case quite different from *Reynolds* or from this case. The plaintiff in *Totten* was seeking to enforce an alleged secret espionage contract with the United States for spying during the Civil War. The Civil War had been over for 11 years, so there were no military secrets to protect. The Supreme Court held nonetheless that such contracts were not judicially

enforceable: "The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." *Totten*, 92 U.S. at 107; *see also Reynolds*, 345 U.S. at 11 n.26 (describing the "very subject matter of the action" in *Totten* as "a contract to perform espionage").

In *Tenet v. Doe*, the Supreme Court, reversing a decision by this Court, made clear that the nonjusticiability threshold dismissal rule recognized in *Totten* is limited to actions seeking to enforce duties arising from voluntarily-created secret relationships between the plaintiff and the government, and does not extend to cases like *Reynolds* and this one, in which the "evidentiary 'state secrets' privilege" is at issue. *Tenet v. Doe*, 544 U.S. 1, 8 (2005). In *Tenet*, the Court consistently described the nonjusticiability threshold dismissal rule as one that applies to suits seeking to enforce duties arising from voluntary secret relationships: "*Totten's* . . . holding [is] that lawsuits premised on alleged espionage agreements are altogether forbidden." *id.* at 9; "the longstanding rule, announced more than a century ago in *Totten*, prohibiting suits against the Government based on covert espionage agreements," *id*. at 3; "the very essence of the alleged contract [in *Totten*] . . . was that it was secret, and had to remain so: [¶] . . . [¶] Thus, we thought it entirely incompatible with the nature of such a contract that a former spy could bring suit to enforce it." *id*. at 7-8; "No matter the clothing in which alleged spies dress their claims, *Totten*

precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the Government." *id.* at 8.

Having made clear that the *Totten* bar was limited to lawsuits seeking to enforce espionage or other secret relationships, the Supreme Court then carefully distinguished "the unique and categorical nature of the *Totten* bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry" (*Tenet*, 544 U.S. at 6 n.4) from the evidentiary state secrets privilege at issue in *Reynolds*. It described *Reynolds* as follows: "We recognized [in *Reynolds*] 'the privilege against revealing military secrets, a privilege which is well established in the law of evidence,' and we set out a balancing approach for courts to apply in resolving Government claims of privilege." *Id*. at 9 (citations omitted).

The Supreme Court concluded its decision in *Tenet* by rejecting this Court's conflation of the state secrets privilege and the threshold dismissal rule of *Totten*, thereby reaffirming the fundamental distinction between these two doctrines. It held that "[t]here is, in short, no basis for . . . the Court of Appeals' view that the *Totten* bar has been reduced to an example of the state secrets privilege." *Tenet*, 544 U.S. at 10. "Relying mainly on *United States v. Reynolds*, 345 U.S. 1 (1953), the Court of Appeals . . . claimed that *Totten* has been recast simply as an early expression of the evidentiary 'state secrets' privilege." *Tenet*, 544 U.S. at 8. But invocations of the state secrets privilege are the purview of *Reynolds*, which "set out a balancing approach

for courts to apply in resolving Government claims of privilege." *Id*. at 9. "[T]he categorical *Totten* bar," by contrast, applies "in the distinct class of cases that depend upon clandestine spy relationships." *Id*. at 9-10.[1]

B. The Supreme Court's Decision In *Weinberger v. Catholic Action of Hawaii/ Peace Education Project* Does Not Support The Government's Position

The government's assertion that *Weinberger v. Catholic Action of Hawaii/ Peace Education Project*, 454 U.S. 139 (1981), supports a nonjusticiability threshold dismissal rule in state secrets privilege cases is ill-founded, for *Weinberger* was not a state secrets case and was not a threshold dismissal case. Instead, *Weinberger* decided only a question of statutory interpretation regarding the scope of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C).

As the Supreme Court noted in *Tenet*, 544 U.S. at 9-10, its distinction between the state secrets privilege and the threshold dismissal rule of *Totten* is consistent with its decision in *Weinberger*. In *Weinberger*, the plaintiffs had brought a NEPA action seeking to compel the Navy to prepare and publicly disclose an Environmental Impact Statement ("EIS") analyzing the environmental impacts of the storage of nuclear weapons at a proposed

[1] Another of the cases on which the government relies, *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), was also a lawsuit based on an employment relationship with an intelligence agency, and thus fell within the scope of the *Totten* bar.

weapons storage facility. Whether the Navy intended to store nuclear weapons or only conventional weapons was a classified secret, and in NEPA Congress expressly exempted from public disclosure any EIS involving information classified for national defense reasons, such as information relating to the storage of nuclear weapons. *Weinberger*, 454 U.S. at 142-45.

The Supreme Court held that by this statutory exemption Congress had foreclosed any NEPA lawsuit on the facts presented. Analyzing the "express intent of Congress manifested by the explicit language" in the relevant statutes (*Weinberger*, 454 U.S. at 144), the Supreme Court concluded that "Congress has thus effected a balance" that excluded from public disclosure any EIS that the Navy might have prepared (*id*. at 145), therefore making it impossible for plaintiffs to prove their NEPA claim. NEPA applies only once a project is proposed, and because of the statutory exemption "it has not been and cannot be established that the Navy has proposed the only action that would require the preparation of an EIS"—"a proposal to *store* nuclear weapons." *Id*. at 146 (emphasis original). Accordingly, the plaintiffs "have made no showing in this case that the Navy has failed to comply, or even need comply, with NEPA's requirements regarding the preparation and public disclosure of an EIS." *Id*. at 142. Because "Congress intended that the public's interest in ensuring that federal agencies comply with NEPA must give way to the Government's need to preserve military secrets" (*id*. at 145), it had foreclosed any possible statutory claim under NEPA. Here, of course, Congress has not determined

that the plaintiffs' lawsuit must give way to the government's need to preserve military secrets and has not created any statutory exemption foreclosing the plaintiffs' lawsuit.

In *Weinberger*, the Navy did not invoke the state secrets privilege and the Supreme Court made no ruling on the law of state secrets. At the conclusion of its opinion, the Supreme Court analogized the outcome of its statutory interpretation of NEPA, under which Congress had put the plaintiffs' allegations "beyond judicial scrutiny" (*Weinberger*, 454 U.S. at 146), with the "other circumstances" (*id.*) of *Totten's* nonjusticiability rule barring lawsuits seeking to enforce duties arising out of a secret relationship between the plaintiff and the government. It did not hold by any stretch that threshold dismissals for nonjusticiability were permissible when the evidentiary state secrets privilege is invoked.

C. This Court's Remarks In *Kasza v. Browner* On Threshold Dismissal Were Dicta, And In Any Event Were Superseded By The Supreme Court's Subsequent Decision In *Tenet v. Doe*

In *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998), this Court affirmed the dismissal of an action under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, after the government had asserted the state secrets privilege in response to discovery requests and the district court had concluded that without the privileged evidence the plaintiff could not "establish[] her *prima facie* case." 133 F.3d at 1170.

In describing the state secrets privilege, the Court also stated: "Finally, notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Kasza*, 133 F.3d at 1166. To the extent this statement might suggest that threshold nonjusticiability dismissals are not limited to espionage agreement lawsuits but extend to cases in which the government invokes the evidentiary state secrets privilege, it is contrary to the Supreme Court's subsequent decision in *Tenet*. It is also dicta.

After *Kasza* was decided, the Supreme Court decided *Tenet*. As explained above, in *Tenet* the Supreme Court rejected this Court's conflation of the state secrets privilege and the threshold dismissal rule of *Totten*, making clear that threshold dismissal for nonjusticiability is limited to lawsuits seeking to enforce duties arising out of a secret relationship between the plaintiff and the government.

Kasza is in any event dicta on the issue of whether threshold dismissal of actions not seeking to enforce a secret agreement is permitted. *Kasza* was not a threshold dismissal case, but one where summary judgment was granted after the state secrets privilege was invoked to exclude specific evidence in response to specific discovery requests; the plaintiff was thereafter unable to prove her prima facie case without the excluded evidence. *Kasza*, 133 F3d at 1170 ("the state secrets privilege bar[s] Frost [the plaintiff] from establishing her *prima facie* case on any of her eleven

claims"). As *Kasza* correctly explained at one point in its analysis, a case like *Kasza* itself or *Reynolds* in which the government successfully asserts the state secrets privilege goes forward without the excluded evidence; if, as was the case in *Kasza*, the plaintiff is unable to make out a prima facie case with other evidence, the defendant is entitled to judgment on the merits. *Id*. at 1166. Because *Kasza* was a summary judgment on the merits because of the plaintiff's failure of proof, its additional assertion that "if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege" (*id*. at 1166) is dicta.[2]

[2] To the extent that *Al-Haramain Islamic Foundation v. Bush*, 507 F.3d 1190 (9th Cir. 2007), similarly suggests that threshold dismissals for nonjusticiability are proper in evidentiary state secret privilege cases, it, too, both conflicts with *Tenet* and is dicta. The holding of *Al-Haramain* was that the action should not be dismissed on the ground that its very subject matter was a state secret, that certain evidence was within the scope of the state secrets privilege, but that the case should go forward if the plaintiffs could prove their case with non-secret evidence or if the procedures for using the secret evidence set forth in 50 U.S.C. § 1806(f) applied. 507 F.3d at 1201, 1204.

II. The Panel Correctly Prevented the State Secrets Privilege From Being Turned into an Immunity that Prevents the Courts from Applying the Constitutional and Statutory Limits On Executive Power.

A. The Judiciary Retains Its Constitutional Role of Reviewing Executive Assertions of Power Even in Cases Implicating National Security.

The government's attempt to secure threshold dismissal here is part of a broader pattern. Since September 11, the Executive has engaged in unprecedented assertions of its power without regard to the constitutional and statutory limits of its authority. It has correspondingly sought to exclude the Judiciary from adjudicating whether these novel exercises of Executive power have stayed within the limits set by the Constitution, by treaty and by Congress. These attempts have not only been in cases involving rendition, but also in those involving alleged enemy combatants[3], warrantless surveillance[4] and the Guantanamo detentions.[5] While the argument has been presented in several guises, shifting from the naked claim that the Executive's war power trumps all limitations, to other, more subtle arguments, the effect is the same: to avoid the Constitution's mandate of judicial review to determine the actual limits of Executive power.

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[3] *Hamdi v. Rumsfeld*, 542 US 507, 535-6 (2004).

[4] *Hepting v. AT&T Corp.,* 439 F. Supp. 2d 974 (N.D. Cal. 2006)

5 *Boumediene v. Bush,* 553 U.S. ___, 128 S.Ct. 2229 (2008).

The tool the Executive attempts to use here to bar the Judiciary from its constitutional duty of reviewing Executive claims to power is the state secrets privilege. This is clear because, as explained further below, the state secrets privilege is not being raised here to protect anything that is an actual secret—the core "secret" the government says it must protect has long been revealed and is available to the court in the form of credible, admissible, nonsecret evidence. Instead of protecting "secrets" by any reasonable definition of the term, the Executive is attempting to transform the state secrets privilege from a powerful but targeted evidentiary shield into an impenetrable immunity, under which the judiciary must not only refuse to perform its constitutional duties, but must blind itself to publicly known facts in order to do so.

The dangers of allowing the Executive these broad unfettered powers to "turn the Constitution on and off at will" (*Boumediene v. Bush* 553 U.S. ___, 128 S.Ct. 2229, 2259 (2008)), and escape judicial review of the legality of its conduct, are plain and strike at the heart of our constitutional system of government. The Judiciary's role to apply the Constitution and to "say what the law is" (*Marbury v. Madison,* 1 Cranch 137, 177 (1803)) is central to what the Supreme Court recently called "our tripartite system of government." *Boumediene* 128 S.Ct. at 2259. In *Boumediene*, the Executive, along with Congress, attempted to block judicial consideration of habeas corpus claims of Guantanamo Bay detainees. The Supreme Court rejected the attempt to block judicial review of the detentions entirely, noting: "The

test for determining the scope of this provision [the constitutional prohibition against the suspecnsion of habeas corpus] must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene* 128 S.Ct. at 2259.

Similarly in *Hamdi v. Ashcroft,* 542 U.S. 507, 536 (2004) the Supreme Court rejected the government's argument that the separation of powers required the Court to consider only the broader detention scheme at Guantanamo and forego review of any individual case. The plurality held that this cramped view of the role of the Judiciary "cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi* 542 U.S. at 536. (citation omitted)(emphasis in original).

The government's justification for its current attempt to use the state secretes privilege to block judicial review is the same as it has been in nearly all of the other cases: the need to protect national security. There is no dispute that protecting national security is a paramount task for the nation as a whole and a key duty of the Executive. Yet the Supreme Court in *Boumediene* recognized that security includes more than just protecting the nation's intelligence apparatus and military might: "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from

arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers." *Boumediene* 128 S.Ct. at 2239.

The Supreme Court has been vigilant in preserving the Judiciary's role in enforcing the constitutional and statutory limitations imposed on the Executive, even in times of war and notwithstanding Executive claims that judicial review is incompatible with national security. As the *Hamdi* plurality explained, quoting from *Home Building & Loan Assn. v. Blaisdell,* 290 U. S. 398, 426 (1934): " 'the war power' is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties." *Hamdi,* 542 U.S. at 536. And the role of safeguarding those liberties falls primarily to Judiciary: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536.

B. The Panel Decision Correctly Preserves the Constitutional Role of the Judiciary While Ensuring Ongoing Protection of State Secrets; the Government's Position Would Require the Court to Blind Itself to Public Evidence.

The difference between the panel's view of the state secrets privilege process and the Executive's view is the difference between preserving the

role of the Article III courts in setting limits on Executive power and eliminating it. The panel decision does allow dismissal of a case due to the removal of state secrets evidence, even early dismissal in some instances. But before doing so it requires a court to give serious and non-conclusory consideration of whether the case can proceed without the secret evidence. This is based on (1) an actual request for discovery of specific evidence, (2) an explanation from plaintiffs of their need for the evidence, and (3) a formal invocation of the privilege by the government with respect to that evidence, explaining why it must remain confidential. Panel decision 4947.

In contrast, the government's proposed interpretation of the privilege would remove the first two steps, leaving only the third, a nonspecific presentation by the Executive at the threshold of a case of the categories of "information," -- not evidence -- it believes the parties may later seek in discovery. It would bind the Court to "narrow" review of this presentation. Govt. en banc brief at 18.

Importantly, the government's proposal eliminates consideration of what specific evidence is actually needed for the case, as well as consideration of whether the case can proceed based on nonsecret evidence. This is akin to the Government's rejected attempt in *Hamdi* to limit the Judiciary's role in the Guantanamo cases to considering whether the detention scheme as a whole passed constitutional muster while prohibiting specific review of individual cases. *Hamdi* 542 U.S. at 536.

The dangers inherent in the government's approach are manifest, including requiring the court to blind itself to public facts as part of avoiding adjudication of the Executive's authority. The government here asserts that the "very thing" that is a state secret is "the existence of . . . a secret intelligence relationship between Jeppeson and the CIA," Govt. en banc brief at 20. But plaintiffs have already presented multiple items of nonsecret, credible, admissible evidence detailing the government's relationship with Jeppeson, including sworn declaration from a former Jeppeson employee and their own declarations. *See e.g.* Panel decision at 4929-30. Thus, as a factual matter the central "secret" that the Executive claims must be protected appears not to be a secret at all.

The government's position, however, would allow it to block adjudication of the truth of facts it wishes to suppress, regardless of whether the evidence that would be used to prove those facts is secret or public. This leads the Executive to propose switching the focus of state secrets privilege analysis from "evidence" to "information" or "facts." It proposes that courts should analyze not whether the *evidence* that the plaintiffs seek to introduce is properly secret, but whether the *facts* that the plaintiffs seek to adjudicate are ones that the Executive wants to bar the courts from adjudicating, no matter how public those facts are.

Thus the government takes the position that even if the plaintiffs could prove their case entirely with public evidence, they should be barred from doing so because it would result in a judgment by an Article III court

confirming what all the world knows but what the Executive refuses to admit: that the United States has carried on a widespread program of extraordinary rendition over the past eight years that has led to serious abuses. The essence of the government's position thus is that the rule of law itself must give way to any assertion by the Executive of a threat to national security.

The courts, however, are not part of a unitary Executive. Our Constitution prohibits the Executive from acting as the puppetmaster of the Judiciary and controlling the course and scope of judicial proceedings to avoid adjudications that would define the limits of Executive power. To the contrary, it affirmatively requires the Judiciary to act as a check on Executive power and to ensure Executive adherence to the rule of law, even in the face of claims of national security.

By attempting to turn the state secrets privilege in this and many other cases into a bar to justiciability, and by doing so in cases where the fact of underlying conduct is not secret (even if some of the details are, and are properly subject to the evidentiary state secrets privilege), the Executive is trying to escape the rule of law and deny the Judiciary the ability to review the legality of its actions. If the Executive succeeds it is not just the plaintiffs, but all of us, who will suffer. Our constitutional system of government depends upon the availability of the courts to rein in the Executive when it acts lawlessly. Future lawless conduct will be deterred

only if courts can fulfill their constitutional function of adjudicating the lawfulness of past conduct.

CONCLUSION

The district court's order and judgment should be reversed and the action remanded for further proceedings.

Dated: November 25, 2009 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. Pro. 29(d) and 32(a)(7)(B) and Ninth Circuit Rule 32-1 because it contains 4,231 words.

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____*s/Cindy Cohn*_____

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, amicus Electronic Frontier Foundation ("EFF") reports that it is a 501(c)(3) non-profit corporation incorporated in the Commonwealth of Massachusetts and makes the following disclosure:

1. EFF is not a publicly held corporation or other publicly held entity.
2. EFF has no parent corporations.
3. No publicly held corporation or other publicly held entity owns 10% or more of EFF.

Dated: November 25, 2009

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CERTIFICATE OF SERVICE

I am over the age of 18 years, and not a party to this action. My business address is 454 Shotwell Street, San Francisco, California, 94110, which is located in the county where the service described below took place.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 25, 2009. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 08-15693

I, Cindy Cohn , certify that this brief is identical to the version submitted electronically on [date] 11/25/2009 .

Date 12/7/2009

Signature s/Cindy Cohn

(either manual signature or "s/" plus typed name is acceptable)