No. 09-5050

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OSAGE NATION,
*Appellant/Plaintiff*,

v.

THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; JERRY JOHNSON, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION,
*Appellees/Defendants*.

On Appeal from the United States District Court
For the Northern District of Oklahoma (Payne, J.)
Case No. 01 CV – 0516 – JHP – FHM

# APPELLEES' ANSWER TO APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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## I. INTRODUCTION

The Appellant's Combined Petition for Rehearing and Rehearing *En Banc* ("Petition") should be denied because this Court's March 5, 2010 decision ("Decision") is consistent with this Court's and the Supreme Court's precedent and does not present issues of exceptional importance. Petitioner, the Osage Nation ("Nation"), and its supporting *amici curiae* mischaracterize the Decision and its analysis as "unprecedented," Petition at 1; invert the Supreme Court's disestablishment jurisprudence; and advance unsupported conjecture about the consequences of a sound decision fully supported by undisputed facts of record. The Supreme Court has never required statutory language explicitly expressing intent to disestablish reservation boundaries; in fact, it has expressly rejected a proposed "clear-statement rule" in favor of its "traditional approach to diminishment cases, which requires us to examine all the circumstances surrounding the opening of a reservation." *Hagen v. Utah*, 510 U.S. 399, 411-412 (1994). The Decision correctly recognizes that, in every disestablishment case, the Supreme Court and this Court have inferred congressional intent to diminish or disestablish a reservation from statutory language reflecting congressional purpose and from consideration of the very types of evidence that this Court considered here. The Decision does not "radically depart[]"from Tenth Circuit and Supreme Court jurisprudence. *See* Pet. at 5.

Nor does the Decision "infer Congress' intent . . . solely from modern events and the statement of one witness who opposed the bill." Pet. at 1. Rather, the Decision

correctly concludes that the Osage Division Act[1] and the Oklahoma Enabling Act,[2] along with the circumstances surrounding their passage and the legislative history, unequivocally reflect Congressional intent to disestablish the former Osage Reservation. This Court had before it the language of the Osage Division Act and the Oklahoma Enabling Act, legislative history and surrounding circumstances, contemporaneous administrative interpretations, demographic changes immediately following the operative acts, and changes in landholdings. Because the arguments the Petition presents serve only to amplify the Nation's earlier arguments that this Court has rightly rejected, rehearing or rehearing *en banc* should be denied.

## II. THE SUPREME COURT HAS EXPRESSLY REJECTED THE NARROW DISESTABLISHMENT ANALYSIS THE NATION AND *AMICI* ADVANCE.

Appellant's contention that a statute must contain specific disestablishment language is founded on a misapprehension of the Supreme Court's disestablishment jurisprudence. The Nation and *amici* ignore that none of the Supreme Court's major disestablishment cases has addressed a statute that expressly terminated, abolished, or disestablished a reservation. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (collecting authorities and recognizing the Supreme Court has "construe[d]" language that "indicates diminishment" from Acts that do not explicitly terminate, abolish, or disestablish). Rather, the Court has always inferred the intent to disestablish

[1] Act of June 28, 1906, ch. 3562, 34 Stat. 359 (titled, "An Act for the division of the lands and funds of the Osage Indians . . . ").
[2] Act of June 16, 1906, ch. 3335, 34 Stat. 267.

or diminish a reservation from other language that reflected the purpose, together with surrounding circumstances and subsequent events.

The Supreme Court's early disestablishment cases made clear that, "[a] congressional determination to terminate must be expressed on the face of the Act *or* be clear from the surrounding circumstances and legislative history." *See, e.g., Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (emphasis added). As the test has evolved in subsequent cases, the Supreme Court has expressly rejected the type of rule the Nation and *amici* advance here—that there must be explicit language of termination in the act. *See Solem v. Bartlett*, 465 U.S. 463, 471 (1984) ("Explicit language of cession and unconditional compensation are not prerequisites."). More recently, the Supreme Court has twice rejected narrow, text-bound arguments like those the Nation and its *amici* advance.

In *Hagen v. Utah*, 510 U.S. 399, 411-412 (1994), the Supreme Court rejected the Solicitor General's arguments that the Court's cases establish a "'clear-statement rule,' pursuant to which a finding of diminishment would require both explicit language of cession or other language evidencing the surrender of tribal interests and an unconditional commitment from Congress to compensate the Indians." Instead, the Court found "although the statutory language must 'establish an express congressional purpose to diminish,' *Solem*, 465 U. S., at 475, *we have never required any particular form of words before finding diminishment*." *Id.* at 411 (emphasis added). Contrary to the argument that an analysis that looks to legislative history and demographics in addition to plain language statutory analysis is "anathema to fundamental principles of statutory

construction," *Amicus Curiae* Brief of the National Congress of American Indians, the Council of Energy Resource Tribes, and the Rosebud Sioux Tribe ("NCAI Brief") at 4, the Supreme Court in *Hagen* "decline[d] to abandon our traditional approach to diminishment cases, which *requires us to examine all the circumstances surrounding the opening of a reservation*." 510 U.S. at 412 (emphasis added).

Reinforcing *Hagen*'s rule, the Supreme Court's most recent disestablishment case recognized that the "*touchstone . . . is Congressional purpose*," and that purpose need not be derived solely from statutory text. *Yankton Sioux Tribe*, 522 U.S. at 343 (emphasis added). Because, in part, "the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar" during the allotment era, "Congress naturally failed to be meticulous in clarifying" whether a reservation was disestablished. *Id.* (*quoting Solem*, 465 U.S. at 468). Consequently, "*even in the absence of a clear expression of congressional purpose in the text* of [the dispositive] Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Id.* at 351 (emphasis added). Time and again, the Court has looked comprehensively to legislative history, subsequent administrative history, and demographics to find a reservation diminished or disestablished "although the context of the Act is not so compelling that, standing alone, it would indicate diminishment." *Id.* This Court's Decision, therefore, correctly recognized that its observations that "neither the Osage Division Act nor the Oklahoma Enabling Act contain express termination language" and "the operative language of the statute does not unambiguously suggest diminishment or disestablishment," Decision at 11, are not

inconsistent with its conclusion that consideration of all factors compels a finding of disestablishment. The Decision does not conflict with the Supreme Court's disestablishment jurisprudence.

This Court's prior decisions have applied a similar analysis. *See Shawnee Tribe v. United States*, 423 F.3d 1204, 1222 (10th Cir. 2005) (rejecting a "magic words" requirement and recognizing the Supreme Court "look[s] to subsequent events 'for the obvious practical advantages' and to decipher parties' earlier intentions."); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990) (even where statutory language "would otherwise suggest unchanged reservation boundaries, . . . the [Supreme] Court is willing to infer a contrary congressional intent [to disestablish] when events surrounding the passage of a surplus land Act 'unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink . . .'"). The Petition is simply wrong that the Decision conflicts with this Court's disestablishment jurisprudence.

The Supreme Court's and this Court's disestablishment jurisprudence requires a sensitive blending of statutory interpretation and subsequent history, honoring the understandings and expectations of participants with a closer view of dispositive enactments. The Nation's and its *amici*'s advocacy of a rote application of the familiar Indian law canon of construction counseling that ambiguities should be resolved in favor of Indians, *see* Petition at 14-15, disregards the Supreme Court's requirement that in the disestablishment context ambiguity is to be read in favor of tribes only when statutory language, in combination with contemporaneous history, demographics, and

jurisdictional treatment leaves open the substantial uncertainty whether a reservation remains. *See Yankton Sioux Tribe*, 522 U.S. at 344 (listing the elements of the disestablishment test and noting that, "*Throughout this inquiry*, 'we resolve any ambiguities in favor of the Indians . . .'" (emphasis added)). The Petition does not invoke the "canon" to interpret an ambiguous word or phrase; it seeks to compel a pro-tribal decision without regard to the unequivocal and undisputed evidence of record establishing that every element of the Court's disestablishment analysis points to an intent to terminate the Osage Reservation.

Contrary to NCAI's argument that *Carcieri v. Salazar*, 555 U.S. _, 129 S. Ct. 1058 (2009), counsels a "plain language" interpretation in this case, *see* NCAI Br. at 7-8, *Carcieri* demonstrates that the Decision correctly applied Supreme Court interpretive guidance.[3] *Carcieri* applied conventional statutory analysis to interpret the phrase "now under federal supervision" and concluded "now," when used in a 1934 statute, meant in 1934. 129 S. Ct. at 1061. *Carcieri*, unlike this case, is not a disestablishment case governed by the Supreme Court's disestablishment-specific interpretive rules. Indeed, *Carcieri* completely "ignores" the Indian-favoring canon of construction the Nation and its *amici* advance, finding other interpretive maxims more pertinent. *See* 129 S. Ct. at 1078-1079 (Stevens, J., dissenting).

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[3] Interestingly, in *Carcieri*, NCAI's *amicus curiae* filing cautioned that "plain language" interpretation must be tempered by a "holistic endeavor . . . [that] cannot . . . focus on any particular word or provision." U.S. S. Ct. Case No. 07-526, Brief of the National Congress of American Indians as *Amicus Curiae* Supporting Respondents at 23 (filed Aug. 25, 2008) ("NCAI *Carcieri* Br.") (*available at:* http://narf.org/sct/carcieri/merits/ncai.pdf).

## III. THIS CASE DOES NOT PRESENT THE EFFECT OF STATUTORY SILENCE, BECAUSE THE OSAGE DIVISION ACT AND THE OKLAHOMA ENABLING ACT REFLECT A CLEAR INTENT TO DISESTABLISH.

The Nation is wrong on two counts in arguing that the Decision "radically" departs from precedent because it finds disestablishment "despite the absence of *any* statutory support." Pet. at 5. The Decision effects no departure, radical or otherwise, from precedent. The Osage Division Act and Oklahoma Enabling Act provide substantial evidence of Congressional intent to disestablish. Because the record establishes that the other factors the Supreme Court requires be considered point unequivocally to disestablishment, the Decision is an unexceptional application of existing law.

The Osage Division Act and the Oklahoma Enabling Act are rife with evidence of Congressional intent to disestablish the reservation. The Osage Division Act effected a remarkable transfer of essentially all assets of the Osage Tribe to 2,229 identified tribal members and provided for or authorized the sale of all remaining tribal assets. In stark contrast to the March 22, 1906 Act that the Supreme Court inferred had maintained the reservation status of the southern half of the Colville reservation by depositing funds in the United States Treasury "to the credit of the Colville and confederated *tribes* of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington . . . . ," *see Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 355 (1962) (emphasis added), the Osage Division Act (1) disbursed nearly all tribal assets to individual members, including substantial accrued tribal funds and the

rights to proceeds of sales of the few remaining tribal properties not transferred to members; (2) provided for the issuance of fee patents of "surplus lands" allotments[4], which the allottee could dispose of "the same as any citizen of the United States," upon the allottee's demonstrating competence, clearly contemplating that most tribal lands allotted would be alienated to nonmembers, and provided for all "surplus lands" allotments to be taxable the earlier of three years after passage of the Act or upon issuance of a certificate of competency; (3) retained as the remaining tribal interest the mineral estate, but with proceeds, with the exception of a small fund for the tribe to administer the mineral estate for the benefit of the 2,229 members, to be distributed exclusively to individual members, not the Osage Nation; and (4), imposed strict federal limits on the structure of tribal government, a government which functioned for nearly a century primarily to assist with the distribution of oil and gas proceeds and other assets. *See* Brief of the Appellees (filed September 14, 2009) ("Aplee. Br.") at 15-20.

Contrary to the Nation's assertion that the Osage Division Act "did not sell lands or open areas to non-Indian settlement," Petition at 5, the Osage Division Act provides, "the United States Indian agent's office building, the Osage council building, and all other buildings which are for the occupancy and use of Government employees, in the town of Pawhuska, together with the lots on which said buildings are situated, shall be

[4] The Osage Division Act provided each Osage member a "homestead" allotment, which was to remain inalienable for twenty-five years, and three "surplus lands" allotments, *see* Osage Division Act § 2, Seventh, representing over two-thirds of the former Reservation. Contrary to Petitioners' contention that the Osage Division Act is not a "surplus lands act," Petition at 8, over two thirds of the lands allotted, those authorized to be transmuted into fee lands, the Act deemed "surplus lands." The record reflects almost all surplus lands became fee lands, precisely as contemplated by the Osage Division Act.

sold to the highest bidder . . ." with the proceeds to be "placed to the credit of the individual members of the Osage tribe of Indians. . . . " Osage Division Act, § 2, Eleventh.[5] The Osage Boarding School, the residence of the United States interpreter for the Osage, and even the Chief's house, also were to be sold. *Id.*, § 2, Tenth & Eleventh. The Act sold tribal and agency lands that were not allotted and contemplated the sale of the surplus lands on which restrictions would be removed, with the then-contemporary understanding that sale would divest the lands of reservation and "Indian country" status. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). Only such fee lands are material in this case. The Act provided that the "lands, moneys, and mineral interests . . . of . . . any deceased member" shall descend "according to the laws of the Territory of Oklahoma, or of the State *in which said reservation may be hereinafter incorporated*." Osage Division Act, § 6 (emphasis added). The emphasized language recognizes that the "reservation" will be made "a part of another thing," or "merged" into, or "form[ed] (individual or units) into a legally organized group that acts as one." *See Webster's New World Collegiate Dictionary* 684 (3d ed. 1988). The statute unequivocally contemplated the Osage Reservation being terminated and becoming a unit of Oklahoma and an Osage Tribe stripped of the land base, assets and authority necessary to govern a reservation.

The Court correctly recognized that the legislative history of the Osage Division Act and "the manner in which the [Act] was negotiated reflects clear congressional intent

[5] *See* Osage Division Act, § 2, Ninth; Pet. at 8 (contending all surface lands were allotted to Osage members).

and Osage understanding that the reservation would be disestablished." Decision at 12. The Nation and its *amici* disregard that the Decision outlines in detail the historical background leading to the act and the statements of Osage and congressional participants in the legislative process, as well as historians, recognizing that the Act would lead to "dissolution of the reserve." *See* Decision at 13-14.

The Oklahoma Enabling Act, passed two weeks before the Osage Division Act, set the stage for dismantling barriers between tribal members and state government that persisted in other states, in particular reclassifying the Osage Reservation as Osage County and giving Osage members the right to vote to establish State government. *See* Aplee. Br. at 20-26; *see also United States v. Osage County Comm'rs,* 193 Fed. 485, 490 (W.D. Okla. 1911), *aff'd,* 216 Fed. 883 (8th Cir. 1914), *app. dismissed,* 244 U.S. 663 (1917) (contemporaneous decision finding the Enabling Act required the Oklahoma constitutional convention "to constitute the Osage reservation a single county . . . . These Indians were to obtain the advantages of state and local government which would redound to their welfare and advancement."). Because the Enabling Act was passed just two weeks before the Osage Division Act, its provisions, and the sharp contrast between those provisions and the parallel provisions of the New Mexico and Arizona portions of the same statute, *see* Aplee. Br. at 21-24, reinforce the intent of the Osage Division Act to disestablish the Osage Reservation, as it was "incorporated" into a State in which historians, Congress, and courts have concluded there are no remaining reservations. *See* Aplee. Br. at 29-30.

## IV. THE COURT CORRECTLY UNDERSTOOD THE EFFECT OF ALLOTMENT OF OSAGE LANDS.

The Nation and its *amici* are simply wrong in accusing the Court of equating allotment with disestablishment. The Decision expressly recognizes that, "[i]n ascertaining Congress's intent, the effect of an allotment act depends on both the language of the act and the circumstances underlying its passage." Decision at 8 (*citing Solem*, 465 U.S. at 469). Accordingly, the Decision *did not* rely on the effect of allotment alone to find the former Osage Reservation was disestablished, as the Petition charges. Pet. at 3 ("The Panel Decision conflicts with Supreme Court precedent in *Mattz*, 412 U.S. at 495-496, that mere allotment is insufficient to disestablish an Indian reservation.").

The Decision expressly recognizes that not just allotment of the Osage Reservation, but that consideration of all factors prescribed by the Supreme Court's disestablishment analysis compels its conclusion. *See* Decision at 11-19. The Court assessed the unique situation of the State of Oklahoma and the Osage at the time the Osage Division Act divided the former Osage Reservation, as illuminated by the Congressional record and the work of historians. Decision at 12-16. The Decision's consideration of the work of historians and the legislative history is entirely consistent with disestablishment jurisprudence. *See Hagen v. Utah*, 510 U.S. 399, 416-420 (1994) (finding diminishment of the Uintah Indian Reservation after considering the historical and legislative record); *Mattz v. Arnett*, 412 U.S. 481, 496 n.5 (1973) (relying heavily on

the work of historians to conclude the Klamath River Indian Reservation was preserved).[6] The Decision properly discounted the weight of congressional references to the Osage Reservation made nearly a century later, which serve as geographic references. *See, e.g.,* Reaffirmation Act of 2004, Pub. L. No. 108-431 (referring to the historic allotment of Osage Reservation lands, not the continuing reservation status of those lands); *see Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1409 (10th Cir. 1990) ("references to a reservation must be discounted as convenient colloquialisms"); *see also Hagen*, 510 U.S. at 420 ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (citation omitted)).

The Decision also considered and discussed the relevant demographic and landholding data,[7] which demonstrated an influx of non-Indians immediately following division of the former reservation, and the subsequent jurisdictional history, which reflected in the decade following 1906 the Department of the Interior's recognition that State and County law enforcement had displaced federal criminal jurisdiction over

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[6] The Petition and *amici* mount an apocryphal attack on the role of history and historians in Indian law. *See* Pet. at 9-14. These positions disregard that the Supreme Court and this Court have relied repeatedly on authoritative historians, including Francis Paul Prucha and Lawrence Kelly, relied upon by the District Court below and approved by the Nation's expert witness. *See Hagen v. Utah*, 510 U.S. 399, 426 n.5 (1994) (citing Prucha); *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817 (10th Cir. 1999) (citing Prucha); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 181 n.12 (1989) (citing the work of Lawrence Kelly); Aplee. Br. at 6 (collecting authority citing Prucha). In fact, in its *amicus curiae* filing in *Carcieri*, NCAI advanced as authoritative Francis Paul Prucha's *The Great Father*, relied upon by the District Court below. *See* NCAI *Carcieri* Br. at 31.

[7] The Petitioner and *amici* misleadingly refer repeatedly to "modern" or "questionable" demographic data. *See* NCAI Br. at 12-13; Pet. at 9. To the contrary, demographer Warren Glimpse addressed undisputed changes in the demographics of Osage County between the 1907 Special Census and 1930. *See* Aplee. Br. at 36.

"Osage County, formerly the Osage Indian Reservation."[8] Decision at 17-19; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) ("The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding [of diminishment of the Yankton Sioux Reservation]."). The Petition ignores this evidence entirely. The Nation left uncontroverted in the district court the demographic evidence this Court considered and described accurately in the Decision; the Nation cannot now assail this evidence as "questionable." *See* Petition at 9. The Decision correctly recognized that allotment alone does not result in disestablishment and found that the unequivocal, uncontroverted evidence presented to the district court supported its finding of disestablishment, in accordance with the factors the Supreme Court has prescribed.

## V. THE DECISION DOES NOT CREATE NEW PRECEDENT ADVERSELY AFFECTING OTHER TRIBES.

The Decision does not threaten the broader effect the Nation and *amici* predict. *Amici*'s ominous predictions stem both from the same misperception of Supreme Court disestablishment jurisprudence that the Petition reflects and, perhaps not surprisingly, from a profound ignorance of the record below. Of course, a decision correctly applying Supreme Court precedent does not threaten to infect the jurisprudence of other courts. A decision interpreting the unique statutes and histories applicable to the Osage does not

[8] *Amici* turn the disestablishment test on its head in contending such undisputed evidence should be discounted because federal, State, and County officials may have been mistaken in their understandings. *See* Brief of Osage County Bar Association at 9-10. The Supreme Court requires that such contemporaneous understandings inform the legal conclusion regarding disestablishment.

imply the same result for other tribes affected by different statutes and dissimilar histories. Significantly, the Decision rests on a record of undisputed facts regarding the unique history surrounding the Osage Division Act and the subsequent administrative and demographic history of Osage County.[9]

The undisputed facts of record, unchallenged on this appeal, refute any contention the Decision will cast a shadow affecting other tribes. The Osage Nation did not present countervailing facts or witnesses to controvert the Commissioners' historic, landholding, or demographic expert witnesses and factual record. To the contrary, the Nation's ethno-anthropologist expert, Dr. Garrick Bailey, testified not only that the Commissioners' expert historian, Dr. Lawrence Kelly, is recognized as authoritative, but also that he did not differ with Professor Kelly's conclusions.[10] The evidentiary record established unequivocally that (1) the legislative history of the Osage Division Act reflected the understanding that the Reservation would terminate; (2) federal administrative officials responsible for services to Osage Tribe members considered the Osage Reservation disestablished in the period soon following the dispositive Acts; (3) population demographics shifted dramatically towards non-Indians and nonmembers immediately following 1906; (4) landholding shifted dramatically from Osage members to non-

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[9] Ironically, *amici* Named Oklahoma Indian Tribes, while decrying the pernicious expected effect of the Decision, state that "[e]very Oklahoma Indian tribe has its own history" formed by "over a dozen various acts," and "should be treated according to the particular treaties or laws affecting it . . . ." Brief *Amici Curiae* of Named Oklahoma Indian Tribes at 7-8. Recent letters providing notice of the Decision as supplemental authority in other cases advance it in support of uncontroversial applications of the Supreme Court's existing precedent. *See* NCAI Br., App. A & B.

[10] *See* Aplee. Br. at 29.

Indians; and (5) historians addressing the Osage have unanimously concluded the Reservation was terminated. Conclusively establishing the summary judgment record as admissible and undisputed, the Nation did not appeal from the district court's order denying the Nation's late-filed motion to strike portions of the Commissioners' expert testimony.[11] The Decision on this record poses no threat to the status of tribes having different histories and impacted by different statutory schemes.

## CONCLUSION

The Decision adheres to this Court's and the Supreme Court's disestablishment analysis and is unequivocally supported by the record. The Petition for Rehearing or for Rehearing *En Banc* should be denied.

Respectfully submitted,

**MODRALL, SPERLING, ROEHL, HARRIS, & SISK, P.A.**

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[11] *See* Aplee. Br. at 5 n.5 & 29.

## CERTIFICATE OF DIGITAL SUBMISSION COMPLIANCE

I hereby certify that on April 22, 2010, I electronically filed the foregoing **APPELLEES' ANSWER TO APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*** with the Clerk of the Court via electronic mail to esubmission@ca10.uscourts.gov, and I hereby certify that all privacy redactions have been made, the foregoing **APPELLEES' ANSWER TO APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*** is an exact copy of the written document filed with the Clerk, and that this submission has been scanned for viruses with Symantec Antivirus, and according to the program, it is free of viruses.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2010, a true and complete copy of the foregoing **APPELLEES' ANSWER TO APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*** was electronically transmitted to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the ECF registrants:

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