Nos. 15-35738, 15-35739

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.E.F.M, *et al.*,
Plaintiffs-Appellees,

v.

LORETTA LYNCH, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
NO. 2:14-CV-01026-TSZ

BRIEF OF PROFESSORS HIROSHI MOTOMURA, ADAM COX, JONATHAN HAFETZ AND STEPHEN VLADECK, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC

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INTEREST OF AMICI CURIAE[1]

Amici curiae Hiroshi Motomura, Adam Cox, Jonathan Hafetz, and Stephen Vladeck are leading professors of immigration law, constitutional law, and civil procedure. *Amici* have substantial expertise related to the due process rights of noncitizens and have a professional interest in ensuring that the Court is fully informed of the jurisprudence relevant to this case, which addresses fundamental questions related to the due process rights of noncitizens.

SUMMARY OF ARGUMENT

The Panel's analysis of whether plaintiffs' constitutional claims could receive meaningful judicial review conflicts with decisions of other circuits and is deeply flawed.

First, the Panel failed to recognize the constitutional principles embodied in the presumption of judicial review of administrative action, and thus failed to apply this presumption to the "meaningful review" analysis. Claim-channeling statutes must provide "meaningful judicial review," which in turn must be informed by the constitutional principles—such as the Due Process Clause's

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[1] *Amici curiae* submit this brief in accordance with Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2. Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29-2(a), all parties have consented to the filing of this brief. *Amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission.

requirement of procedural fairness—and other bedrock tenets of the rule of law underlying the presumption of judicial review. By failing to accord the appropriate weight to these principles, the Panel erroneously concluded that plaintiffs' claims could receive meaningful judicial review.

Second, the Panel misread the Supreme Court's cases requiring courts to analyze whether "meaningful judicial review" is available, and in doing so, it interpreted 8 U.S.C. § 1252(b)(9) in a manner that conflicts with decisions of other circuits. Contrary to the Panel's conclusion that the alleged plain meaning of the statute is dispositive, the term "arising from" does not have a plain meaning and therefore must be construed in light of the presumption in favor of judicial review. Where, as here, there have been, at most, only isolated instances of judicial review among thousands of channeled claims, the meaningful judicial review requirement is not satisfied.

ARGUMENT

I. The Panel Ignored the Constitutional Underpinnings of the Presumption in Favor of Judicial Review

There is a longstanding, "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). The Panel paid lip service to this presumption, but failed to explore its purpose, resulting in a denial of meaningful judicial review to children asserting their right to appointed counsel in removal

proceedings. This section explains the constitutional underpinnings of the presumption of judicial review, and the presumption's applicability to claim-channeling statutes such as 8 U.S.C. § 1252(b)(9).

We begin by describing the Supreme Court's tests for examining statutes that either preclude or channel judicial review of administrative action. Where a statute precludes all judicial review, the Court requires a "heightened showing," under which Congress's intent to preclude all review "must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). Alternatively, where a statute channels judicial review to a particular forum, the question is whether it is "fairly discernible" that Congress intended the claims in question to be channeled to that forum. *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132 (2012).

Before a court engages in the "fairly discernible" analysis in a channeling case, it must address the predicate question whether the statute and administrative scheme provide "meaningful review of [plaintiffs'] claims." *Id*. at 2133. Statutes that facially provide for judicial review do not automatically satisfy this requirement. Indeed, *Elgin* first analyzed whether plaintiffs' claims could receive meaningful judicial review if channeled through the administrative process; this was a necessary step to reach its ultimate conclusion that Congress intended to channel those claims. And a statute that purports to channel judicial review, but in practice denies meaningful review, is equivalent to one that precludes all review.

Therefore, as will be discussed further in Section II, to avoid the "serious constitutional questions" that result from denying judicial review, the "meaningful review" analysis of a claim-channeling statute must be informed by the constitutional principles that undergird the presumption of judicial review.

A. Procedural Due Process Requires Fairness of Decision-Making Procedures.

The presumption of judicial review can be traced in part to the Due Process Clause of the Fifth Amendment, which requires executive agency action to be procedurally fair. This was recognized in the immigration context long ago, in the *Japanese Immigrant Case*, *Yamataya v. Fisher*, 189 U.S. 86, 98 (1903). Addressing a constitutional challenge to the deportation procedures employed by the Secretary of Treasury, the Court made clear that noncitizens in deportation proceedings were entitled to due process of law, thus acknowledging that administrative procedures are subject to judicial review for compliance with due process. *Id.* at 101.

The Supreme Court has repeatedly reaffirmed the principle that administrative schemes are subject to the procedural fairness requirement of the Due Process Clause and that judicial review may be required to ensure such fairness. *See, e.g.*, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985); *see also* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 333-34

(1993) ("[T]he Supreme Court has consistently read statutes purporting to preclude judicial review as allowing a judicial determination of whether the broad outlines of an administrative scheme satisfy constitutional requirements. In particular, the pattern of decisions strongly suggests that due process requires judicial review of the fairness of decisionmaking procedures.").

B. The Presumption of Judicial Review of Agency Action and the Canon of Constitutional Avoidance are Grounded in Similar Constitutional Principles.

The presumption that Congress intends judicial review of administrative action absent a clear intent to the contrary is grounded in principles similar to the canon of constitutional avoidance, which militates against construing a statute in such a way as to raise constitutional concerns.

1. The canon of constitutional avoidance.

Under the canon of constitutional avoidance, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (citation omitted). Thus, in the administrative action context, as the Supreme Court has repeatedly observed, any construction of an agency authorizing statute that would totally preclude judicial review of constitutional questions would raise serious constitutional concerns. *See, e.g.*, *St.*

Cyr, 533 U.S. at 299, 313; *Webster*, 486 U.S. at 603. This observation reflects the close connection between the presumption of judicial review and the canon of constitutional avoidance. *See Kucana v. Holder*, 558 U.S. 233, 251 (2010) ("When a statute is 'reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)).

The canon of constitutional avoidance is built on the "rules basic to the federal system and this Court's appropriate place within that structure." *Rescue Army v. Mun. Court of City of L.A.*, 331 U.S. 549, 570 (1947). For instance, avoiding unnecessary constitutional decisions is rooted in Article III's case-or-controversy limitation. *Id.* at 568-71. In other words, passing judgment on a statute's constitutionality, when such a judgment is not necessary to resolve the case, may in essence be to render an unconstitutional advisory opinion.

2. The presumption of judicial review.

The Supreme Court has similarly traced the roots of the "strong presumption that Congress intends judicial review of administrative action" to bedrock tenets of the rule of law. *Bowen*, 476 U.S. at 670. Citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803), *Bowen* explained that "[i]n *Marbury*, a case itself involving review of executive action, Chief Justice Marshall insisted that '[t]he

very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'" 476 U.S. at 670. Thus, while acknowledging that Congress may sometimes withhold judicial review of agency action, the Court emphasized that any attempt to withhold such review is always "[s]ubject to constitutional constraints." *Id.* at 672; *see also* Bernard Schwartz, *Administrative Law* § 8.6, at 482-83 (3d ed. 1991) ("The clear implication [of the Court's jurisprudence] is that there is a constitutional right to review of constitutional issues that may not be barred by a preclusion provision.").

3. The presumption of judicial review applies across administrative schemes, including immigration, and it is not limited to statutes that wholly preclude review.

Courts have applied the presumption of judicial review to require judicial review of constitutional issues raised by agency action—in the face of statutes that appeared to preclude such review—across administrative schemes as varied as reimbursement for physicians under Medicare, *see Bowen*, 476 U.S. 667, termination of a Central Intelligence Agency employee, *Webster*, 486 U.S. 592, and veterans' benefit determinations, *Walters*, 473 U.S. 305.

This presumption applies with equal force in the immigration context. *See, e.g.*, *Kucana*, 558 U.S. at 251 ("We have consistently applied [the presumption of judicial review] to legislation regarding immigration, and

particularly to questions concerning the preservation of federal-court jurisdiction.”).[2]

In *I.N.S. v. St. Cyr*, the Supreme Court considered whether a lawful permanent resident convicted of a drug offense could bring a habeas challenge in district court to “the Attorney General’s conclusion that, as a matter of statutory interpretation, he is not eligible for discretionary relief.” 533 U.S. 289, 298 (2001). The INS argued that recent statutory amendments stripped the district court of jurisdiction to hear the case. The Court held, however, that the INS failed to “overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.” *Id.* at 299. Specifically, the Court held that “a serious Suspension Clause issue would be presented if we were to accept the INS’ submission that the 1996 statutes have withdrawn that power

[2] Courts’ application of the administrative exhaustion doctrine to due process claims is instructive. This Court has held that “due process claims generally are exempt from [the exhaustion requirement] because the BIA does not have jurisdiction to adjudicate constitutional issues.” *Vargas v. I.N.S.*, 831 F.2d 906, 908 (9th Cir. 1987). *Vargas* held ultimately that due process claims based on procedural errors—as plaintiff alleged in that case—were subject to exhaustion requirements. But the Third Circuit, citing *Vargas*, explained that “[w]here . . . an alleged due process violation is a ‘fundamental constitutional claim’ that the BIA is powerless to address, there is no exhaustion requirement, and the claim need not be raised in the first instance before the BIA.” *Daud v. Gonzales*, 207 F. App’x 194, 200–01 (3d Cir. 2006) (citing *Hadayat v. Gonzales*, 458 F.3d 659, 665 (7th Cir. 2006); *Vargas*, 831 F.2d at 908; *Sewak v. I.N.S.*, 900 F.2d 667, 670 (3d Cir. 1990)). In essence, this acknowledges that “fundamental constitutional claim[s]”—like the children’s right-to-counsel claim here—are better suited to adjudication by an Article III court than in the immigration system.

from federal judges and provided no adequate substitute for its exercise." *Id.* at 305. In reaching this conclusion, the Court was clearly influenced by both the presumption of judicial review and the canon of constitutional avoidance.

Moreover, the presumption of judicial review is not limited to statutes that wholly preclude review. In *McNary v. Haitian Refugee Center, Inc.*, the Court, emphasizing the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action," held that plaintiffs could properly bring suit in the district court despite a statute appearing to channel such review through removal proceedings to the courts of appeals. 498 U.S. 479, 496 (1991). The Court explained that, if it accepted the government's position, plaintiffs "would not as a practical matter be able to obtain meaningful judicial review . . . of their objections to INS procedures" if they were barred from bringing suit in district court. *Id.* (citing *Bowen*, 476 U.S. at 670).

The Court in *McNary* stressed that even a channeling statute—such as one in the removal process—may not provide meaningful judicial review where, for instance, the administrative record would not contain the facts necessary for full review by a court of constitutional questions. *Id.* at 496-97 (discussing the issue at length and emphasizing district court factfinding as particularly important in "pattern and practice" cases); *cf. Boumediene v. Bush*, 553 U.S. 723, 790 (2008) (holding that foreign nationals held as enemy combatants were protected by the

Suspension Clause, and that Detainee Treatment Act administrative procedures were an inadequate substitute because, *inter alia*, they would not provide an adequate record for court of appeals review). Indeed, *McNary* noted that *Bowen*—where the question was whether the statute wholly precluded review—supported and controlled the outcome. 498 U.S. at 498.

II. The Panel's Analysis of Section 1252(b)(9) Conflicts With Supreme Court Precedent and With Precedent From Other Circuits.

As discussed above, in claim-channeling cases, the Supreme Court has made clear that courts must undertake an independent determination of whether the administrative scheme provides the opportunity for "meaningful judicial review" of the claims at issue. *Elgin*, 132 S. Ct. at 2132; *McNary*, 498 U.S. at 496-97. A channeling statute that in practice denies all meaningful review is no different from a statute that facially precludes judicial review. *See McNary*, 498 U.S. at 498 (holding that conclusion of no meaningful review was supported by *Bowen*). Thus, a proper meaningful review analysis must incorporate the constitutional principles underlying the presumption of judicial review by taking account of the "serious constitutional questions" that would result from preclusion of all judicial review.

Here, the meaningful review analysis is *the* critical predicate to determining whether plaintiffs' claims were among those intended to be channeled by section 1252(b)(9). The Panel, however, believed that it could dispense with

this analysis because the language of section 1252(b)(9) is supposedly unambiguous; as a result, it failed to follow the well-settled practice of applying the presumption in favor of judicial review to guide the interpretation of ambiguous words in a claim channeling-statute. This was error.

First, the Panel erred by concluding that the "plain meaning" of the statute was dispositive. Rather, because "arising from" is ambiguous, the statute must be construed in light of the presumption in favor of judicial review. Second, the Panel wrongly characterized the "meaningful judicial review" requirement as limited to the specific context of the statute at issue in *McNary*; it thus failed to consider the presumption of judicial review in conducting its "meaningful judicial review" analysis. Third, the Panel refused to acknowledge that where there have been, at most, only isolated instances of judicial review among thousands of channeled claims—as is the case here—the meaningful judicial review requirement is not satisfied.

A. "Arising From" Is Susceptible to More Than One Meaning.

The Panel's characterization of "arising from" as having a "plain," Op. at 18, and "unambiguous" Op. at 21, meaning conflicts with decisions of sister circuits and led the Panel to end its statutory interpretation analysis prematurely.

In a variety of contexts, courts have examined whether the words "arising from" have a plain meaning. For example, in interpreting section

1252(b)(9), the First Circuit observed that "[t]he words 'arising from' do not lend themselves to precise application." *Aguilar v. U.S. Immigration and Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 10 (1st Cir. 2007).[3] Similarly, when determining whether claims "'ar[ose] from' certain decisions or actions" under 8 U.S.C. § 1252(g), the Fifth Circuit found "little assistance in the precise language of the statute." *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 942-43 (5th Cir. 1999). Indeed, the simple fact that different courts purporting to find a plain meaning in "arising from" disagree as to that meaning demonstrates that the term is susceptible to more than one meaning. *See id.* (collecting cases with disparate purported plain meanings of "arising from"); *see also United States v. Ninety Three Firearms*, 330 F.3d 414, 421 (6th Cir. 2003) ("[T]he proof of the ambiguity [of the statutory term "any"] is evidenced by the disagreement [among various district courts] over its meaning.").

Whether "arising from" has a plain meaning is critical to the statutory analysis. It is well-settled that "[w]hen the words of a statute are unambiguous . . .

[3] The court in *Aguilar* did invoke the plain meaning of section 1252(b)(9), but only to rebut "the petitioners['] claim that the district court's habeas jurisdiction remains intact for all legal challenges that are unaccompanied by any challenge to a particular removal." 510 F.3d at 9. Notably, even that aspect of *Aguilar* has been rejected by other circuits. *See Chehazeh v. Attorney Gen. of U.S.*, 666 F.3d 118, 133 (3d Cir. 2012) ("The reasoning of *Aguilar*, however, appears to conflict with the Supreme Court's explicit instruction in *St. Cyr* . . . and with the language of § 1252(b). . . . We therefore join with the Ninth and Eleventh Circuits and hold that § 1252(b)(9) applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'"). In any event, *Aguilar* did not rely on the plain meaning of section 1252(b)(9) when construing the statutory term "arising from."

this first canon [of construction] is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citation omitted). But when a statutory term is susceptible to multiple meanings, courts look to presumptions and canons of statutory interpretation. Here, the Panel should have considered whether the presumption of judicial review was "overcome by . . . specific language or . . . a specific congressional intent to preclude judicial review." *See Bowen*, 476 U.S. at 672-73 (citation omitted).

Instead of using the presumption to inform its analysis, however, the Panel relied on the alleged plain meaning of the statute and failed to discuss the presumption altogether—an error that must be corrected by granting rehearing. Moreover, as shown below, application of the presumption would lead to a result different from that reached by the Panel.

B. The Panel Failed to Apply the Presumption in Favor of Judicial Review in its "Meaningful Judicial Review" Analysis.

The Panel erred in dismissing the plaintiffs' argument about meaningful judicial review as an "attempt to get around the statute" and improperly reliant on *McNary*. Op. at 18, 20. Instead, as shown above, the Supreme Court *requires* a court to ask whether a claim-channeling scheme permits meaningful review of a given claim.

The requirement of meaningful judicial review—as informed by the presumption of judicial review—is especially important when interpreting section 1252(b)(9). As the First Circuit has recognized,

> certain claims, by reason of the nature of the right asserted, cannot be raised efficaciously within the administrative proceedings delineated in the INA. . . . Given Congress's clear intention to channel, rather than bar, judicial review through the mechanism of section 1252(b)(9), reading "arising from" as used in that statute to encompass those claims would be perverse.

Aguilar, 510 F.3d at 11.

Instead of interpreting "arising from" in light of whether plaintiffs' claims would be afforded meaningful judicial review if channeled, the Panel invoked various textual formulations without elaborating on any of them. *See* Op. at 11-12 (distinguishing between claims that "arise from" removal proceedings under section 1252(b)(9) and those that are "independent" or "collateral" to the removal process); Op. at 13-14 (reasoning that claims that are "inextricably linked" to the order of removal or "inextricably intertwined" with the administrative process "arise from" removal proceedings). Yet, the application of each formulation of the scope of "arising from" ultimately turns on whether meaningful judicial review is available if the claim at issue is channeled.

As the First Circuit concluded, "the words 'arising from' in section 1252(b)(9) . . . exclude claims that are independent of, or wholly collateral to, the

removal process. Among others, claims that cannot effectively be handled through the available administrative process fall within that purview." *Aguilar*, 510 F.3d at 11; *see id.* at 13-14 (discussing the availability of meaningful judicial review in the context of whether the claim at issue was "inextricably intertwined with[] the administrative process"). Even the legislative history of the REAL ID Act indicates that Congress had in mind the availability of meaningful judicial review when it preserved an exception in 1252(b)(9) for claims "independent" of removal. *See id.* at 10-11 (citing H.R. Rep. No. 109-72, at 175, *reprinted in* 2005 U.S.C.C.A.N. at 300).

The Panel erroneously characterized the children's "meaningful judicial review" argument as "stem[ming] from dicta in *McNary*." Op. at 19. The Panel therefore concluded that "[t]he difficulty with the minors' argument is that *McNary* was, at its core, a statutory interpretation case involving a completely different statute." To be sure, *McNary* did involve a different statute. But the presumption in favor of judicial review and the requirement of meaningful judicial review apply with equal force in the section 1252(b)(9) context.

C. The Panel Misapplied the "Meaningful Judicial Review" Standard.

The Panel erred by concluding that the plaintiffs have not been denied meaningful judicial review over their right-to-counsel claims. As a preliminary matter, the Panel erroneously found the statutory language unambiguous, and

thus—it appears—failed to consider the presumption of judicial review in its "meaningful judicial review" analysis. This is reason enough to grant rehearing.

But even if the Panel had properly considered the presumption of judicial review and reached the same conclusion, that conclusion would have been erroneous. Isolated instances of judicial review out of thousands of channeled claims do not make review of those claims "meaningful." Because the Panel could point to only one example—involving a settled case where there was *almost* judicial review over a child's right-to-counsel claim *after the child obtained pro bono counsel*—its ultimate conclusion is flawed and warrants rehearing.

The meaningful judicial review test is not satisfied where review of a channeled claim is unavailable as a practical matter. *See McNary*, 498 U.S. at 496-97. In *McNary*, the Court held that meaningful judicial review was unavailable where aliens denied SAW status would have had to surrender themselves voluntarily for deportation to seek review of their application denials. *Id.* Critically, it was sufficient to find that meaningful review had been denied as a practical matter to "most," but not all, undocumented immigrants. *See id.* at 496-97. Similarly, the First Circuit reasoned in *Aguilar* that meaningful judicial review is unavailable for claims that "cannot be raised *efficaciously* within the administrative proceedings delineated in the INA." *Aguilar*, 510 F.3d at 11 (emphasis added).

The notion that a modicum of review does not make for meaningful review is well settled. Thus, in applying the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), courts ask whether a right is "adequately vindicable" or "effectively reviewable" if the party must wait to raise it until after a final judgment, not whether the right is reviewable at all. *Dig. Equip.Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878 (1994). Similarly, a contract containing an arbitration clause may not preclude a prospective litigant from being able to "effectively vindicate" federal statutory rights. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

The Panel was unable to cite a single case in the more than twenty years since the enactment of section 1252(b)(9) in which a court of appeals actually reviewed a child's right-to-counsel claim brought in a petition for review. *See* Op. at 23 (citing one case where a child represented by pro bono counsel at the PFR stage raised a right-to-counsel claim, but the case ultimately settled). This demonstrates that there would be no meaningful judicial review over the plaintiffs' right-to-counsel claims in this case. Rehearing is warranted to correct the Panel's application of an erroneous standard for meaningful judicial review that conflicts with that of other circuits and its conclusion that meaningful judicial review through the PFR process would exist over the plaintiffs' right-to-counsel claims.

CONCLUSION

The presumption in favor of judicial review directs courts to construe claim-channeling statutes so as not to preclude meaningful judicial review over channeled claims. The constitutional principles underlying this presumption are eroded when courts dilute the requirement of meaningful judicial review to the point that it becomes a practical nullity. Here, the children's right-to-counsel claim in removal proceedings has never been meaningfully reviewed. Rehearing should be granted to safeguard the constitutional principles at stake, as well as the rights of those who depend on them.

Dated: December 15, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rules 28-1(a) and 29-2(c)(2), and Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby attest this brief contains 4,140 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(f), and the brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 15, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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