No. 09-5678646 & No. 09-56846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSALINA CUELLAR DE OSORIO; *et al.*,
Plaintiffs-Appellants,
v.

ALEJANDRO MAYORKAS; *et al.*,
Defendants-Appellees.

TERESITA G. COSTELO, and LORENZO P. ONG, Individually
And On Behalf Of All Others Similarly Situated,
Plaintiffs – Appellants,
v.

JANET NAPOLITANO,
Secretary Of The Department Of Homeland Security; *et. al.*
Defendants - Appellees.

APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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I. STATEMENT

These consolidated cases involve a question of exceptional importance warranting en banc consideration: the proper interpretation of a key provision of the Child Status Protection Act (CSPA), 8 U.S.C. § 1153(h)(3), INA § 203(h)(3). Congress passed the CSPA in 2002 to ensure that parents would not be separated from their sons and daughters after the family had spent years of waiting in line to immigrate to the U.S. together. This is exactly what occurs under the flawed reasoning of the Board of Immigration Appeals (BIA) in *Matter of Wang*, 25 I&N 28 (2009) to which the panel deferred.

Administrative agencies are not permitted to nullify laws passed by Congress. Despite clear and unambiguous statutory language to the contrary, *Matter of Wang* restricts the benefits of § 203(h)(3) solely to a single category of immigrants: sons and daughters who were sponsored by a permanent resident parent. The BIA thereby denies the benefits of § 203(h)(3) to sons and daughters who were sponsored along with their parents by close relatives who are U.S. citizens. The panel's decision conflicts with established precedent which holds that, "when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion." *See, e.g., Padash v. INS*, 358 F.3d. 1161, 1173 (9th Cir. 2004).

Moreover, the panel's decision conflicts with recent holdings issued by two

other Circuit Courts. Shortly after the panel's decision, the U.S. Court of Appeals for the Fifth Circuit held that the language of the statute was clear and unambiguous and refused to defer to *Matter of Wang*. *See, Khalid v. Holder*, 2011 U.S. App. LEXIS 18622 (5th Cir., Sept. 8, 2011). Unlike the panel's decision, *Khalid* cites this Court's decision in *Padash* with approval and rejects the restrictive and erroneous holding of the BIA in *Matter of Wang*. Also relevant is the holding of the U.S. Court of Appeals for the Second Circuit on this issue which, despite reading the CSPA in a restrictive fashion, also declines to defer to *Matter of Wang*. *See*, *Li v. Renaud*, 2011 U.S. App. LEXIS 13357 (2nd Cir., June 30, 2011).

These consolidated cases include a nationwide class action, and thus the panel's decision has a broad impact nationwide. Rehearing en banc is required in light of the overriding need for national uniformity in the proper application of § 203(h)(3).

II. BACKGROUND

Immigration laws permit children to immigrate to the United States together with their parents, whether the parents have been sponsored for permanent residence by their relatives, through employment, or through the visa lottery. INA § 203(d). To qualify as a child one must be unmarried and under 21 years of age. INA § 101(b). However, many immigration preference categories entail waiting

times of 10 to over 20 years. Prior to the enactment of the CSPA in 2002, if a child reached the age of 21 years before obtaining permanent residence, he was no longer able to immigrate to the U.S. along with his other family members. Also, the child was not given credit for the years he spent waiting to qualify for permanent residence.

The CSPA was enacted in order to address the predicament of certain individuals who were classified as children under the immigration laws when an immigrant visa petition was filed, but who turned 21 and lost their eligibility to immigrate to the U.S. together with the rest of their family. Section 3 of the CSPA is entitled "Treatment of Certain Unmarried Sons and Daughters Seeking Status As Family-Sponsored, Employment-Based, and Diversity Immigrants." This section provides two distinct benefits to children who would otherwise lose immigration benefits when they reach the age of 21. First, the law allows a child to subtract agency processing times from his or her age, thus enabling some children to remain eligible as derivative beneficiaries of their parent's visa petitions even after turning 21. INA § 203(h)(1).

If the individual does not benefit from the subtraction contained in § 203(h)(1), he or she is no longer eligible to immigrate as a derivative child. But the CSPA provides an alternative benefit to these individuals. Under INA § 203(h)(3), such an aged-out child may retain the priority date associated with the

petition filed on behalf of the parent, and may automatically convert to the appropriate immigrant category. This provision credits children with the years they already spent waiting in line with their parents, thereby shortening or in some cases eliminating their period of separation from the rest of their family.

There is no factual dispute in the cases at hand. Appellants are all lawful permanent residents of the United States who immigrated based on the visa petitions submitted by their U.S. citizen family members.[1] Each Appellant is the parent of a child initially included as a derivative beneficiary of the visa petition filed on their parent's behalf. Their children turned 21 before visa numbers were available, and consequently lost the ability to immigrate as derivatives. After attaining lawful permanent residence, the Appellants filed visa petitions on behalf of their adult sons and daughters. However, the U.S. Citizenship and Immigration Service (USCIS) failed to accord their sons and daughters the original priority date as required by the CSPA. Consequently, depending on their country of origin, they will be separated from their families for 8 - 18 years. See State Department Visa Bulletin: http://travel.state.gov/visa/bulletin/bulletin_5572.html (accessed October 10, 2011).

Appellants assert that their children are entitled to automatic conversion and

1 Specifically, petitions by U.S. citizens on behalf of a married son or daughter under INA § 203(a)(3), and petitions by U.S. citizens on behalf of a sibling under

priority date retention under INA § 203(h)(3), and they filed suit in 2008 seeking declaratory and mandamus relief.[2] The District Court denied Appellants' motions for summary judgment and deferred to a contrary interpretation of § 203(h)(3) set forth in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). In *Wang*, the BIA limited the applicability of § 203(h)(3) to beneficiaries in the second family preference category (INA § 203(a)(2)). On appeal a three member panel of this Court affirmed the District Court's decision deferring to the BIA's interpretation of § 203(h)(3). *De Osorio v. Mayorkas*, 2011 U.S. App. LEXIS 18289 (9th Cir. Sept. 2, 2011).

III. REASONS WHY REHEARING SHOULD BE GRANTED

A. Rehearing is required in light of the existing circuit split regarding § 203(h)(3).

The need for national uniformity on this issue is acute. Decisions from the three Circuit Courts that have addressed the issue have essentially created a three-way split. The Second Circuit was the first to address § 203(h)(3) in *Li v. Renaud*, 2011 U.S. App. LEXIS 13357 (2nd Cir., June 30, 2011). In *Li,* the Court refused to defer to the BIA's interpretation in *Matter of Wang* because it found that Congress' intent was clear. *Li* at

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INA § 203(a)(4).

2 The case of Rosalina Cuellar de Osorio involved several named plaintiffs who sought relief under INA §203(h)(3). The case of Teresita G. Costelo and Lorenzo Ong was filed as a class action lawsuit presenting an identical legal issue. On appeal, the cases were consolidated before this Court.

18 – 19. In analyzing the text of § 203(h)(3), the Court in *Li* focused exclusively on the phrase "converted to the appropriate category," and held that the phrase does not "encompass transformations of a petition filed by one family sponsor to a petition filed by another family sponsor." *Id.* at 25. A petition for rehearing en banc is pending in the *Li v. Renaud* case.

Subsequently, in the instant case, the panel took a different approach. They held that despite the plain language of § 203(h)(3), it did not practicably apply to certain petitions covered by its plain terms. The panel deferred to the interpretation set forth in *Matter of Wang.*

The Fifth Circuit held otherwise in *Khalid v. Holder*, 2011 U.S. App. LEXIS 18622 (5th Cir., Sept. 8, 2011). The Court held that the BIA's interpretation of § 203(h)(3) contravened the plain language of the CSPA. They found that under traditional canons of statutory construction the ambiguity alleged by the BIA was in fact nonexistent. In this regard the Fifth and Ninth Circuits are in agreement, as both decisions recognize the interdependency between each subsection in § 203(h). However, the Fifth Circuit refused to ignore the plain language of the Act. Despite the alleged differences between § 203(h)(3) and prior practice regarding conversion and retention, the Court held that "resort to these arguments cannot make ambiguous what the statute's plain language and structure make so clear." *Khalid,* at 20 – 21.

The need for national uniformity in immigration laws presents an issue of

exceptional importance warranting en banc consideration. This court should follow the straightforward approach taken by the Fifth Circuit in *Khalid*, and apply § 203(h)(3) to all beneficiaries covered by its terms.

B. The panel's deference to *Matter of Wang* is inappropriate in light of the clear and unambiguous statutory scheme.

The panel's decision violates a fundamental rule of statutory construction: Courts do not owe deference to an agency's interpretation when the language of the statute is plain. "If the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*. 467 U.S. 837, 842 – 43 (1984).

In *Matter of Wang*, the BIA found that INA § 203(h)(3) was ambiguous because it was unclear which petitions are covered by its terms. The BIA stated: "Unlike §§ 203(h)(1) and (2), which when read in tandem clearly define the universe of petitions that qualify for the 'delayed processing formula', the language of § 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates. Given this ambiguity, we must look to the legislative intent behind § 203(h)(3)." *Wang*, 25 I & N Dec. at 33. Without further analysis, the District Court held that it "endorse[d] the explanation of this ambiguity articulated in *Wang* itself." *Zhang v. Napolitano*, 663 F.Supp. 2d 913,

919-920 (C.D. Cal., 2009).

The panel finds no such ambiguity and explains:

> Paragraph (3)'s initial clause makes it contingent upon the operation of paragraph (1)… Thus, paragraph (3) is triggered only if one has determined by doing the age-reduction calculation in paragraph (1) that an alien is 21 or over. If it is triggered, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id*. Because "the alien" is necessarily one to whom paragraph (1) was applied, "the alien's petition" naturally refers to the "applicable petition" that was considered in paragraph (1)(B). *De Osorio*, at 17 – 18.

The panel correctly recognizes the interrelated nature of each subparagraph of § 203(h). *See also, Khalid*, at 18 -19 (Congress intended (h)(3) to apply to any alien who "aged out" under the formula in (h)(1) with respect to the universe of petitions described in (h)(2)). The panel's reasoning thus conflicts with the BIA's finding of ambiguity in *Matter of Wang.* As a result of their faulty reasoning, the BIA found § 203(h)(3) ambiguous and moved on to an analysis of legislative intent; an analysis which the panel ultimately finds "permissible." However, when there is a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6, (1997); *see also Ratzlaf v. United States*, 510 U.S. 135, 147 (1994) ("We do not resort to legislative history to cloud a statutory text that is clear.")

Having refuted the BIA's erroneous finding of ambiguity, the panel should have followed the statute's plain language rather than defer to *Wang*. *See*, *Khalid v.*

Holder, 2011 U.S. App. LEXIS 18622, at 16 ("The only ambiguity the BIA has identified in the statute is the universe of petitions to which subsection (h)(3) applies. On this point, Congress has plainly spoken in subsection (h)(2). Accordingly, we hold that the 'automatic conversion' and 'priority date retention' benefits in (h)(3) unambiguously apply to the entire universe of petitions described in (h)(2)").

C. The panel erred when it determined that the plain language would lead to unreasonable or impracticable results.

The panel recognized that the language of § 203(h)(3) is plain: beneficiaries of all family, employment and diversity categories are covered by the terms of § 203(h)(3). Nonetheless, they reason that "[d]espite paragraph (3)'s plain language, it does not practicably apply to certain of the petitions described in paragraph (2)." *De Osorio*, at 20 (internal citations omitted). The Supreme Court has stated that only the "most extraordinary showing of contrary intentions" will allow a Court to depart from the plain meaning of a statute. *Garcia v. United States*, 469 U.S. 70, 75 (1984); see also *United States v. Wiltberger*, 18 U.S. 76, 96 (1820) ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words ... in search of an intention which the words themselves did not suggest."). The panel's decision runs afoul of this principle.

The panel reasons that the phrase " 'the alien's petition shall automatically

be converted to the appropriate category'…suggests that the same petition, filed by the same petitioner for the same beneficiary, converts to a new category." *De Osorio*, at 20. This reads restrictive language into the statute which simply does not exist. The plain language of § 203(h)(3) does not demand the same petition, filed by the same petitioner for the same beneficiary. Indeed, if this is what Congress intended they could have easily accomplished this result by containing such limiting language in the statute. For instance, 8 CFR § 204.2(a)(4), which the BIA cited in *Wang*, provides that a priority date will be retained "if the subsequent petition is **filed by the same petitioner**." (Emphasis added). There is no such limiting language in § 203(h)(3).

The panel's decision offers no plausible reason why Congress would choose to benefit a small subset of individuals who are otherwise covered by § 203(h)(3). Such an interpretation ignores those in the *nine* other categories who would otherwise be covered by its plain terms.[3] Courts must "assume that in drafting legislation, Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, 757, 1 (1997). If the language of the statute is clear, the agency and the Court must give effect to that language.

Contrary to the panel's decision, there is nothing unreasonable or

3 Those preference categories include unmarried adult children of US citizens, married children of US citizens, siblings of US citizens, beneficiaries of the five

impracticable with applying § 203(h)(3) to all the beneficiaries who are covered by its terms. The practicality and reasonableness of such application is demonstrated by the decision of the Court of Appeals for the Fifth Circuit in *Khalid*, which held that the aged-out beneficiary of a fourth preference petition is entitled to automatic conversion and priority date retention under § 203(h)(3). As noted by the Fifth Circuit, the BIA itself applied § 203(h)(3) in this manner in unpublished decisions disregarded by the BIA in *Matter of Wang*. *Khalid, at 16 – 17.*

In *Matter of Maria T. Garcia*, 2006 WL 2183654 (BIA June 16, 2006), Maria Garcia was the derivative beneficiary of a fourth-preference petition filed on behalf of her mother on January 13, 1983. A visa number did not become available until 13 years later, when Ms. Garcia was 22 years old. Upon becoming a permanent resident Ms. Garcia's mother filed a new I-130 petition on her behalf. Ms. Garcia argued that she benefitted from § 203(h)(3), and a three-member panel of the BIA agreed. The BIA reasoned that:

> [W]here an alien was classified as a derivative beneficiary of the original petition, the 'appropriate category' for purposes of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-à-vis the principal beneficiary of the original petition…The respondent was (and remains) her mother's unmarried daughter, and therefore the 'appropriate category' to which her petition was converted is the second-preference category of family-based immigrants …Furthermore, the respondent is entitled to retain the January 13, 1983, priority date that applied to the original fourth-preference petition…" *Matter of Maria T. Garcia*, 2006 WL 2183654 at p. 4 (BIA June

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employment-based categories, and beneficiaries in the diversity visa category.

16, 2006) (emphasis in original). See also, *Matter of Elizabeth F. Garcia*, 2007 WL 2463913 (BIA July 24, 2007).

It is the BIA's interpretation in *Matter of Wang*, followed by the panel, which leads to the unreasonable result of excluding a significant class of individuals who are otherwise covered by the statute's terms. The Ninth Circuit has recognized that, "when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion. This rule applies with additional force in the immigration context, where doubts are to be resolved in favor of the alien." *Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004); see also *Padash v. INS*, 358 F.3d 1161, 1173 (9th Cir. 2004). The panel ignored this rule and erred in deferring to an administrative decision which seeks to interpret the provisions of INA § 203(h)(3) in the most restrictive way.

D. Only the Appellants' interpretation gives meaning to every word in the statute.

In *Matter of Wang*, the BIA fails to give effect to each of the key phrases in § 203(h)(3). When Congress uses the phrase "for purposes of subsections (a)(2)(A) and (d)," it plainly includes derivatives in all family, employment and diversity categories. However the practical effect of *Matter of Wang* is to the limit the applicability of § 203(h)(3) to the aged-out beneficiaries of second preference family petitions alone. If this result was what Congress intended, there would be

no reason to include an unrestricted reference to § 203(d).

The panel reasons that reference to both § 203(a)(2)(A) and § 203(d) is required so that both primary and derivative beneficiaries of second preference petitions are entitled to automatic conversion and priority date retention. *De Osorio*, at 28 – 29. To the contrary, a child included as a derivative in a second preference petition still meets the definition of § 203(a)(2)(A): "immigrants who are the spouses or children of an alien lawfully admitted for permanent residence." Moreover, it is unreasonable to assume that Congress intended solely to codify a benefit that was already provided by regulation. See 8 C.F.R. § 204.2(a)(4) (if the derivative beneficiary of a second preference spousal petition ages out, he may retain the original priority date associated with the F2A petition upon the filing of a F2B petition by his permanent resident parent.)

Under the BIA's interpretation, Congress' use of the phrase "for purposes of (a)(2)(A) and (d)" means one thing in subsection (h)(1), and something completely different in subsection (h)(3). Such an interpretation is unreasonable and violates the principal that "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs*., Inc., 551 U.S. 224, 232 (2007).

The BIA's interpretation also ignores Congress' use of the terms "appropriate category," "original priority date," and "original petition." If a new

relationship, and perhaps even the filing of a new petition, are not permitted under the CSPA, there will only ever be one petition, with one possible priority date. See *Khalid*, at 25 (Under the BIA's reading, "there would always be only one petition, with an unchanged priority date. The BIA's interpretation renders the retention benefit provision redundant and reads it out of the statute.") By using the broad terms "appropriate category," "original priority date," and "original petition" Congress clearly contemplated benefitting classes beyond the second family preference category.

The Appellants' reading also gives effect to the term "automatic conversion." The BIA reasoned that, when a derivative of a fourth-preference petition ages out, there is no category to which he can automatically convert because there is no category for nieces and nephews of U.S. citizens. *Wang*, at 35. Only the child of a permanent resident would be able to convert from the child of a permanent resident (203(a)(2)(A)), to the adult son or daughter of a permanent resident (203(a)(2)(B) upon aging out. However, under § 203(h) it is clear that the conversion cannot occur at the exact moment the beneficiary reaches the age of 21.

The automatic conversion and priority date retention under § 203(h)(3) can only operate once a determination has been made under § 203(h)(1). That subsection begins with an analysis of the beneficiary's age on the "date on which an immigrant visa number becomes available." INA § 203(h)(1)(A). As explained

by the Fifth Circuit in *Khalid*, "at that time, there would be another category to convert to based on the derivative's relationship with the primary beneficiary." Significantly, the panel's decision supports this reading and thereby undermines the reasoning of *Wang*. The panel states, "[p]aragraph (3) cannot possibly operate at the moment the derivative turns 21, because it is not even triggered until the derivative has already been determined to be at least 21 even after subtracting pending petition time as required by paragraph (1). *De Osorio*, at 22 – 23, footnote 5.

Courts "must make every effort not to interpret the provisions in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Boise Cascade Corp. v. EPA*, 942, F.2d 1427, 1432 (9th Cir. 1991). *United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003) (noting the fundamental principle of statutory construction that a statute should not be construed to render certain words or phrases mere surplusage). See also, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (A statute ought to be construed so that no clause, sentence, or word shall be superfluous, void, or insignificant). The Appellants' interpretation is the only interpretation which gives effect to every word in § 203(h)(3), allowing the plain language of the act to control without the need for the implicit exceptions required under *Wang*.

E. The panel's reasoning misstates and misconstrues Congressional intent

The panel concludes that *Wang* is a permissible interpretation that does not run afoul of Congressional intent. In *Wang*, the BIA reasoned that Congress did not intend to provide any relief for delays attributed to backlogs in visa availability. *Wang*, 25 I & N Dec. at 38. ("…there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates."). This conclusion is plainly wrong. *See Li v. Renaud,* 2011 U.S. App. LEXIS 13357, at 8 – 9 (recognizing that the CSPA was intended to address both agency processing delays and delay due to oversubscription of visa numbers); *see also*, *Khalid v. Holder*, 2011 U.S. App. LEXIS 18622, at 21 – 22 (noting that CSPA's Senate sponsor discussed the "age out" problem both in terms of agency delay and visa demand). Unlike the BIA, the panel does not ignore the comments of Senator Feinstein when she introduced the CSPA in the Senate. However, they state that "she focused only on children of LPRs, who could fall into the F2A category." *De Osorio*, at 31 – 32. This is incorrect.

Senator Feinstein began her statement by discussing one specific example of a lawful permanent resident who filed petitions for her three children, who then subsequently turn 21 and lost their eligibility for permanent residence under the second preference (2A) category. She then states that the CSPA as a whole "would

provide a child, whose timely filed application for a **family-based, employment-based, or diversity visa** was submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa until the visa becomes available. The legislation would also protect the child of an asylum seeker whose application was submitted prior to the child's 21st birthday." 147 Cong. Rec. S 3275 (April 2, 2001) (emphasis added). While Senator Feinstein's *first* example discusses children of lawful permanent residents, it is clear that the CSPA was intended to benefit children in other preference categories as well. To say that Congress as a whole, and Senator Feinstein in particular, was focused only on children of permanent residents is belied by the Congressional record. More importantly it is belied by the plain language of § 203(h)(3) which encompasses derivative beneficiaries in all visa preference categories.

The panel recognizes that Congress intended to "provide some measure of age-out relief to all derivative beneficiaries of family preference petitions." *De Osorio*, at 30. In the panel's view it is apparently enough that all beneficiaries are protected from administrative delays under § 203(h)(1), and that only a tiny subsection of beneficiaries are entitled to receive benefits under § 203(h)(3). However, the agency cannot take away one benefit that Congress provided to a class and justify its actions by saying that they are not taking away all benefits. Congress added INA § 203(h)(3) because they were concerned with separation of

families due to oversubscription of visa categories. The section serves no other purpose, and should be given full effect.

IV. CONCLUSION

For the foregoing reasons, Appellants request that the Petition for Panel Rehearing or Rehearing En Banc be granted.

Dated: October 17, 2011

Respectfully Submitted,
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/s/Amy Prokop

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 4,197 words.

Dated: October 17, 2011

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/s/Amy Prokop

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CERTIFICATE OF SERVICE

I hereby certify that on **October 17, 2011**, I electronically filed the foregoing APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. 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.

Dated: October 17, 2011

Law Offices of Carl Shusterman

/s/Amy Prokop

Amy Prokop