UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-35528

UNITED FARM WORKERS; SEA MAR COMMUNITY HEALTH CENTER; PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE; BEYOND PESTICIDES, FRENTE INDIGENA DE ORGANIZACIONES BINACIONALES, and ARNULFO LOPEZ,

Plaintiff-Appellants,

v.

ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellees,

and

GOWAN COMPANY, MAKHTESHIM AGAN of NORTH AMERICA, INC, and BAYER CROPSCIENCE LP,

Defendant-Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
Civ. No. 04-0099-RSM

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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MISCELLANEOUS

"Then you should say what you mean," the March Hare went on.
"I do," Alice hastily replied; "at least—at least I mean what I say—that's the same thing, you know."
"Not the same thing a bit!" said the Hatter. "Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see'!"

--Lewis Carroll, Alice's Adventures in Wonderland (1865).

REASONS FOR GRANTING REHEARING

Appellants United Farm Workers et al. ("Farmworkers") seek rehearing of the majority opinion because it deviates in two respects from the principles of statutory interpretation consistently embraced by the U.S. Supreme Court and this Court. First, the majority opinion violates years of precedent interpreting the plain meaning of Congressional language by calling a statutory term a metaphor and creating out of whole cloth a definition for that term that is unsupported by reference to the common legal definition, the remainder of the language in the jurisdictional provision at issue, or the same language in other sections of the statute. Because of this judicially created definition, for the first time in this Circuit, the majority opinion equates mere notice and comment procedures with a public hearing that involves parties, orders, and substantial evidence review.

Second, because Congress dictated two separate paths for resolution of administrative and judicial challenges to Environmental Protection Agency ("EPA") pesticide decisions – one to be used by pesticide manufacturers and one to be used by the general public seeking greater pesticide restrictions – the majority's

decision that all challenges that follow public notice and comment are to be heard in circuit court improperly rewrites the statute. Statutory drafting is the purview of Congress, not the Court.

The direct result of the majority's errors is that continued use of a dangerous pesticide that EPA admits poses an unreasonable risk to farmworker health and is highly toxic to fish and wildlife cannot be challenged by farmworker and environmental groups. The broader result of the decision will be less oversight of EPA pesticide decisions, and more restricted access to the courts for farmworkers and other concerned citizens. For the reasons discussed below, consideration by the full court is necessary to secure and maintain uniformity of the Court's decisions.

BACKGROUND

In federal district court, Farmworkers challenged EPA's final decision allowing continued use of a highly toxic pesticide that admittedly poisons farmworkers and the environment. The lower court dismissed the case for lack of subject matter jurisdiction. On appeal, on January 26, 2010, a divided panel addressed the question of whether a citizen challenge under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq., to a final EPA decision allowing continued use of a dangerous pesticide could be brought in district court or had to be brought directly to appellate court under a shorter

timeframe. As the dissent by Judge Pregerson summarized:

> To resolve this case we are required to interpret the words "public hearing" under Section 16(b) of [FIFRA]. Under § 16(b), whether the Farm Workers should have filed for review in federal district court or in the federal court of appeals depends on whether the EPA's notice and comment procedure amounted to a "public hearing." 7 U.S.C. § 136n(b). Simply put, if there was a public hearing, the Farm Workers would have been correct to file in the court of appeals. 7 U.S.C. § 136n(b). If there was not a public hearing, the Farm Workers were correct to file in district court. 7 U.S.C. § 136n(a)-(b).

Dissent at 1499-1500 (emphasis in original).

The majority, written by Judge Noonan and joined by Judge Bea, engaged in a truncated discussion of the relevant statutory language and concluded that the statutory term "hearing" was satisfied when the agency offered a public comment period on the proposed decision. Majority at 1496. Describing the statutory language as "metaphorical," the majority imposed its own definition of the word "hearing" untethered to the language and purposes of FIFRA. Majority at 1495-96. Based on this interpretation, the majority concluded that the farmworker groups had filed their challenge in the wrong court and affirmed the district court's dismissal for lack of jurisdiction. Id. at 1498.

Judge Pregerson's dissent took issue with the majority's reasoning, arguing that the plain language of the jurisdictional provision, other sections of FIFRA, and the case law "leads to the inexorable conclusion that a 'public hearing' requires some sort of quasi-judicial process at the agency level. In the absence of other

procedures, solicitation of written comments from the public will not suffice as a 'public hearing.'" Dissent at 1501.

ARGUMENT

I. THE WORDS OF A STATUTE ARE NOT METAPHORS.

Section 16(a) of FIFRA provides for review of an EPA decision in district court where it is a final agency action not committed to agency discretion by law. Its jurisdictional counterpoint, FIFRA § 16(b), grants exclusive circuit court jurisdiction to any order "following a public hearing" brought by "any person who will be adversely affected by such order and who had been a party to the proceedings…." 7 U.S.C. § 136n(b).

When the majority interpreted the term "public hearing," it departed from the basic canons of statutory construction; it did not reference legal definitions; and it did not consider the use of the same word in the same statute. Instead, the majority held that the word "hearing" simply connoted notice and presentation of positions to a decisionmaker. Majority at 1495. Undaunted by the sweep of its new definition, the majority continued:

> "Hearing" is no doubt metaphorical, and a "hearing" includes proceedings in which there is no presentation of public argument. A judge who reads a brief "hears" the case. An administrator who reads comments "hears" what they say. The plain meaning of "hearing" is satisfied by the process the EPA provided the manufacturers, the growers, the environmental groups, and the Farm Workers.

Id. at 1495-96 (footnote omitted). With respect, the majority was incorrect.

A. The Plain Meaning of "Public Hearing" Does Not Include Submission of Comments Alone.

The words of a statute are never metaphors. As this Court has stated many times, "[t]he starting point for the interpretation of a statute is always its language, and courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1268 (9th Cir. 2009) (citation and internal quotation omitted). The Court must consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

In this case, the majority treated the statutory language requiring a "public hearing" as mere guidance and inserted its own expansive definition of the word into the statute. Farmworkers do not contend that oral argument is a requirement for a "hearing," see Majority at 1496 n.2, but rather that a hearing requires a quasi-judicial adversarial proceeding with the opportunity for parties to present and respond to arguments, either in writing or orally, with a decision on the arguments from the agency. It cannot mean the mere opportunity for the public at large to submit comments without any effort by EPA even to respond to comments, let alone brief the issues, have the issues reviewed by an administrative law judge ("ALJ"), or go through an administrative appeal. "In this case, there has been no public hearing, but only the submission of written comments to the agency."

Dissent at 1504.

The majority ignored the command that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Wilderness Soc'y v. U.S. Fish and Wildlife Serv., 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (internal quotations omitted). The majority's assurance that a "hearing" requires only notice and presentation of positions (Majority at 1495) comes without citation. The first definition in Black's Law Dictionary of the term "hearing" is "[a] judicial session, usually open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying…." Black's Law Dictionary, 8th Edition, 2004. The term "public hearing" is further defined as "[a] hearing that, within reasonable limits, is open to anyone who wishes to observe. Such a hearing is often characterized by the right to appear and present evidence in a case before an impartial tribunal." Id. This meaning is reinforced by the fact that it has not changed in many years. See, e.g., Black's Law Dictionary, 4th Edition, 1951 (defining hearing as a "[p]roceeding of relative formality (though generally less formal than a trial), generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and parties proceeded against have right to be heard, and is much the same as a trial and may terminate in final order."). This definition does not cover mere notice to the public

and an opportunity to submit comments on a proposed agency action.[1]

Federal courts must also look at how Congress used the term at issue elsewhere in the statute. "[W]hen language is used in one section of a statute and the same language is used in another section, we can infer that Congress intended the same meaning." In re Consolidated Freightways Corp. of Del., 564 F.3d 1161, 1165 (9th Cir. 2009); see Dissent at 1502 ("Our interpretation of the words 'public hearing' in § 16(b) should be shaped by the definition set forth in § 6(d) of the same statute."). FIFRA § 6(d), entitled "Public hearings and scientific review," sets forth specific requirements for a public hearing, including requirements for notice, evidence, testimony, subpoenas, guidance by the Federal Rules of Civil Procedure, reference of questions to the National Academy of Science, deadline for decisions, and standard of review. 7 U.S.C. § 136d(d). The fact that FIFRA § 6(d) discusses at length the requirements for a "public hearing" carries weight for any interpretation of the public hearing jurisdictional language in FIFRA § 16(b). Other FIFRA sections incorporate these public hearing requirements, see, e.g., 7 U.S.C. §§ 136a(c)(2)(B)(iv); 136d(e)(2), and still other sections of the statute

[1] This Court decided that a sufficient hearing was held on the entry of injunctive relief when the district court held oral hearings, took testimony, and reviewed extensive documentary submissions. Geertson Seed Farms v. Johanns, 570 F.3d 1130 (9th Cir. 2009), cert. granted, No. 09-475 (U.S. Jan. 15, 2010). Given the extensive discussion in Geertson of whether these proceedings were sufficient to constitute a hearing and the grant of certiorari on the question of whether more might be required, the majority's metaphorical interpretation of the term "hearing" cannot be sustained.

discuss comment periods and hearings as separate events. See 7 U.S.C. § 136a-1(d)(5)(A) (after 60-day comment period on involuntary cancellation, "by order and without a hearing," EPA may cancel the registration). "Congress's explicit decision to use one word over another in drafting a statute is material," and "is a decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning." Secs. and Exch. Comm'n v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003). Here, Congress chose the same words, and yet the majority ignored all other portions of FIFRA, including these portions that would have directly aided its task of statutory construction.

B. The Majority Failed to Examine the Language in FIFRA § 16(b) That Gives Context to the Meaning of the Term "Public Hearing."

This Court does not wear blinders when it reviews and interprets statutory language. As a recent decision of this Court stressed, "when we look to the plain language of a statute to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." United States v. Treadwell, 593 F.3d 990, 1006-07 (9th Cir. 2010) (citation and quotation omitted).

The only contextual examination performed by the majority ignored any statutory language, instead finding that "[c]ontext does determine that 'the hearing' contain written submissions; otherwise judicial review would be awkward." Majority at 1497. This limitation imposed by the majority underscores the ad hoc

nature of its analysis. While the majority initially decided that "public hearing" was a metaphor for EPA's solicitation of public comment, however slight, the majority realized that such an open-ended interpretation would be unworkable. Having expanded the meaning of the term, the majority pulled back to add an "as long as comments are in writing" qualifier. The majority creates this "in writing" requirement out of whole cloth, straying further from the precepts of statutory analysis. As this Court cautioned, "[i]n conducting this analysis, we may not rewrite a statute, but instead simply 'construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain – neither to add nor to subtract, neither to delete nor to distort.'" Resident Councils of Wash. v. Leavitt, 500 F.3d 1025, 1031 (9th Cir. 2007) (quoting 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951)).

However, using the actual language of the statute for context, the language of FIFRA § 16(b) – that a "person who will be adversely affected by [an EPA] order and who had been a party to the proceedings" can bring a challenge in the court of appeals to "any order issued by the Administrator following a public hearing" – indicates that Congress was referring to quasi-judicial process. 7 U.S.C. § 136n(b) (emphasis added). As the dissent stated,

> [t]he phrase "a party to the proceedings" clearly contemplates a quasi-judicial proceeding at the agency level, not the agency's solicitation of written comments from the public. … While the EPA's notice and comment procedure poses special problems in identifying who

> qualifies as a "party to the proceedings," no such confusion arises when the proceedings at the agency level are quasi-judicial in nature. When the proceedings before the agency involve opposing parties presenting their arguments to an "ALJ," the "parties to the proceedings" are readily determinable.

Dissent at 1501-02.

FIFRA § 16(b) also commands that the circuit court use the "substantial evidence" test when reviewing the record. Generally, courts use the substantial evidence test where a formal administrative hearing is required. Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(E), the substantial evidence test is the standard of review for "on the record" proceedings conducted pursuant to 5 U.S.C. §§ 556 and 557 – that is, after formal hearings. See Camp v. Pitts, 411 U.S. 138, 141 (1973) (where agency not required to hold a hearing or make formal findings, "the proper standard for judicial review of the Comptroller's adjudications is not the 'substantial evidence' test which is appropriate when reviewing findings made on a hearing record ….") (citation omitted); Tiger Int'l v. Civil Aeronautics Bd., 554 F.2d 926, 935-36 (9th Cir. 1977) ("we find it significant that the Court [in Camp v. Pitts] recognized a critical difference between review of a hearing record and review in a case where no hearing is held.").

C. The Legislative History Supports the Dissent's Interpretation of "Public Hearing."

The legislative history of FIFRA § 16(b) supports the dissent's reasoning. As the Senate Agriculture and Forestry Committee stated: "In short, the

Committee … believes that matters which have not been heard before should go to courts of original jurisdiction and appeals from cases which have already been administratively heard and decided should go to appellate courts. The question is really that simple." S. Rep. No. 92-838 (June 7, 1972), reprinted in 1972 U.S.C.C.A.N. 3993, 4070. It stretches the concept of "administratively heard and decided" to equate this requirement with an opportunity to submit comments.

Additionally, Congress explained that the language in section 16(b) means that "anyone who intervenes in a public hearing under this Act shall be considered a party for purposes of this provision." H.R. Conf. Rep. No. 92-1540 (Oct. 5, 1972), reprinted in 1972 U.S.C.C.A.N. 4130, 4133. Congress's use of the words "intervenes" and "party" – words typically associated with judicial hearings – indicates that Congress intended a quasi-adjudicatory hearing to be the basis of the FIFRA § 16(b) jurisdiction exception.

II. THE MAJORITY'S DECISION UNDERMINES THE STATUTORY STRUCTURE CREATED BY CONGRESS.

In FIFRA, Congress mandated two different paths for challenges to EPA decisions about pesticides. The path for pesticide manufacturers challenging an order cancelling or restricting a particular pesticide use allows for administrative hearings before an ALJ. However, for groups such as Farmworkers who seek restrictions on pesticide use, there is no path that goes through an administrative hearing.

The D.C. Circuit's decision in Envtl. Def. Fund v. Costle discusses these two separate paths. There, the court held that the environmental petitioner challenging a partial pesticide cancellation decision was not entitled to an administrative hearing because it was not "adversely affected" by the cancellation, but rather by the retention of certain uses, and any challenge to the retention of uses went straight to district court. 631 F.2d 922, 937 (D.C. Cir. 1980) ("A party seeking review of the permissive aspect of the Agency decision (*i.e.,* the retention of certain erstwhile qualified uses) may challenge these notice provisions in district court.").

> The pattern seems to be that decisions regulating more strictly may be challenged in administrative hearings, those regulating less strictly may not. Thus, persons seeking more stringent regulation may sue in the district court without first enduring an administrative hearing; those complaining of regulation as too strict must first exhaust their administrative remedy of a formal hearing before seeking judicial review.

631 F.2d at 937 (emphasis in original; footnote omitted).

The majority opinion ignores this distinction entirely, and yet the question of whether environmental plaintiffs have a right to an administrative hearing precisely implicates which jurisdictional provision should be applied. Following the identified pattern, the Costle court noted the circumstances in which the district courts have jurisdiction under section 16(a):

> [W]ere chlorobenzilate already registered under the restrictions of the subject notice of cancellation, and were EPA upon reviewing the

> situation to conclude that no further restrictions were necessary, EDF's [the environmental party] only remedy would be in the district court.

Id. at 935 (emphasis added).

> Prior to the issuance of the notice any decision not to cancel would have been subject to a district court review under section 16(a), and even now that many of the uses have been cancelled the decision to retain registration for other uses is still subject to district court review.

Id. at 937 (emphasis added). Farmworkers' challenge to EPA's decision to allow AZM uses to continue for at least six years presents the situation anticipated in Costle – Farmworkers challenged EPA's decision to retain registration of certain uses of AZM, and the district court was vested with jurisdiction pursuant to FIFRA § 16(a). See West Harlem Envtl. Action v. U.S. Envtl. Prot. Agency, 380 F. Supp. 2d 289, 293 (S.D.N.Y. 2005) (district court reviewed claim that EPA reregistration of certain rodenticides caused "unreasonable adverse effect on the environment" in violation of FIFRA under FIFRA § 16(a)); see also Nat'l Coal. Against Misuse of Pesticides v. Envtl. Prot. Agency, 867 F.2d 636 (D.C. Cir. 1989) (district court exercised jurisdiction over challenge to voluntary cancellation settlement that allowed allegedly impermissible uses to continue without discussion of jurisdiction), Natural Res. Def. Council v. Envtl. Prot. Agency, 2009 WL 5033959 (S.D.N.Y. Dec. 23, 2009) (district court review of challenge to unlawful pesticide registration).

Because Congress dictated two separate paths for review of pesticide

decisions, the jurisdictional provisions of FIFRA mimic that division. Here, however, the majority opinion discards these congressionally mandated differences and proclaims that all challenges to pesticide registrations following a comment period must go to the appellate court for judicial review. The majority's decision rewrites the command of Congress, and that is a violation of the rules of judicial review.

The majority cites Costle and Nw. Food Processors v. Reilly, 886 F.2d 1075 (9th Cir. 1989) to support its decision that the notice and comment procedure held here amounted to a public hearing. Majority at 1497-98. Yet these decisions do not support the majority's reasoning. First, as discussed above, FIFRA does not grant Farmworkers the ability to request an administrative hearing, so groups like Farmworkers can never have the opportunity to develop the record for review that pesticide manufacturers have. See Costle, 631 F.2d at 937.

Second, under FIFRA § 16(b), judicial challenges must be filed in the appellate court within 60 days "after entry of [the challenged] order." But citizen groups like Farmworkers do not even receive constructive notice of reregistration decisions – while EPA chose to publish the proposed reregistration decision in the Federal Register to allow for public comment here, see 71 Fed. Reg. 33,448 (June 9, 2006) – EPA never published the final decision (or even the availability of the final decision) in the Federal Register. Farmworkers had actual notice of the

decision due to its ongoing litigation, but other commenters were not put on notice at all. Linking that lack of notice to a 60-day deadline for filing a petition in circuit court virtually guarantees that citizen groups will be unable to challenge adverse EPA registration decisions. See *Amicus Curiae* Brief of Santa Clara County (joined by California State Ass'n of Counties) at 14-19 (April 21, 2009) (detailing importance to public entities of ability to seek judicial review). In fact, EPA has sometimes solicited comments after issuing a final decision. See, e.g., 66 Fed. Reg. 59,419 (Nov. 28, 2001). If that occurred, under the majority opinion, the 60-day judicial review period would run concurrently with the comment period, forcing the public to challenge a decision before knowing whether EPA might heed the post-decision comments and change it.

The majority notes that both Costle and Nw. Food Processors discussed the adequacy of the record in allowing direct circuit court review. Majority at 1497-98. In both cases, however, the courts needed to grapple with hyper-technical arguments about particular elements of a public hearing – oral presentation in Costle, an evidentiary hearing in Nw. Food Processors. In contrast, here the argument is not focused on a particular aspect of a hearing, but on the broader question of whether a mere notice and comment opportunity can suffice as a public hearing. And as the dissent correctly highlights, both cases involved quasi-judicial administrative proceedings before an ALJ. Dissent at 1503. In Costle, the

appellate court addressed whether the decision to deny a cancellation hearing request was itself an order following a public hearing giving rise to appellate court jurisdiction under FIFRA § 16(b). Delving into the question, the D.C. Circuit examined "the nature of the proceedings and submissions before the EPA" to determine whether a "public hearing" had been held:

> In the proceedings before the ALJ, legal memoranda were submitted by EDF, the EPA, Ciba-Geigy, and the Department of Agriculture. Although a pre-hearing conference was scheduled, none was held. Oral argument on the issues before the ALJ was requested and denied. At the conclusion of the proceedings, the ALJ issued his Accelerated Decision, and the parties filed exceptions. On appeal to the Administrator, the same parties again submitted briefs, and EDF filed a reply brief to the EPA's memorandum. The Administrator's Final Decision followed. In all, the EPA took 186 pages of argument and supporting exhibits.

Id. at 926.

It was ultimately the extent of the process leading to the denial of the hearing request that led the Costle court to find that a public hearing had been held for purposes of FIFRA § 16(b). The filing of legal briefs, the independent decision of the ALJ, the filing of exceptions to the ALJ's decision, an appeal with briefs and reply briefs, and a final decision by the Administrator – these were all indications of an interactive, adversarial process that could distill and refine arguments and decisions. These were also indications of a process with robust involvement by the parties and the ALJ – a type of process that correctly could be found to be a public hearing.

Similarly, in Nw. Food Processors, the Court looked at the entirety of the proceedings leading up to the challenged cancellation order:

> In the present case, the Administrator considered the ALJ's decision, together with various parties' written exceptions to the decision, objections to the settlement, and responses in support of the decision and settlement. The proceedings were conducted pursuant to notice. The Administrator prepared and filed a comprehensive Final Order approving the settlement.

Id. at 1078. As the Court summarized in that case, it had jurisdiction pursuant to FIFRA § 16(b) "when EPA conducts proceedings in which interested parties are afforded an opportunity to present their positions by written briefs and a sufficient record is produced to allow judicial review." 886 F.2d at 1077. The majority (at 1498) treats the word "briefs" as synonymous with the word "comments," despite the fact that the term "briefs" commonly refers to a legal presentation of argument in a quasi-judicial, adversarial proceeding, and it ignores entirely the surrounding language of proceedings, parties, and review of an ALJ decision – again, all references commonly associated with quasi-judicial proceedings.

CONCLUSION

Farmworkers respectfully ask the Court to grant their petition for rehearing or rehearing en banc.

Respectfully submitted this 3rd day of March, 2010.

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CERTIFICATE OF COMPLIANCE

I certify that: (check appropriate option(s))

☒ 1. Pursuant to Fed. R. App. P. 40 and Ninth Circuit Rule 40-1, the attached Petition for Rehearing With Suggestion for Rehearing En Banc is:

☒ Proportionally spaced, has a typeface of 14 points or more and contains 4,197 words.

Respectfully submitted this 3rd day of March, 2010.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

I hereby certify that on March 3, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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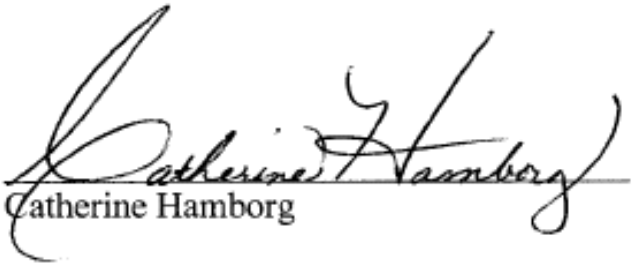
I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 3rd day of March, 2010, at Seattle, Washington.



Catherine Hamborg