BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Public Utilities Commission of the State of California, *et al.*, Petitioners	:	9th Cir. Nos. 01-71051, *et al.* (Consolidated)
v.	:	
Federal Energy Regulatory Commission, Respondent	:	

MOTION FOR LEAVE TO FILE BRIEF OF *PRO SE AMICUS CURIAE* THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION AND THE CALIFORNIA DEMOCRATIC STATE LEGISLATIVE LEADERS IN REPLY TO RESPONSES TO MOTION FOR CLARIFICATION AND MOTION TO COMPEL; PROPOSED *AMICUS* BRIEF

Pursuant to Federal Rules of Appellate Procedure 27 and 29, The Honorable Dianne Feinstein, The Honorable Barbara Boxer, The Honorable Nancy Pelosi, The Honorable Zoe Lofgren, The Honorable Pete Stark, The Honorable George Miller, The Honorable Henry Waxman, The Honorable Robert Matsui, The Honorable Tom Lantos, The Honorable Howard Berman, The Honorable Cal Dooley, The Honorable Maxine Waters, The Honorable Xavier Becerra, The Honorable Anna Eshoo, The Honorable Bob Filner, The Honorable Lucille Roybal-Allard, The Honorable Lynn Woolsey, The Honorable Sam Farr, The Honorable Jane Harman, The Honorable Juanita Millender-McDonald, The Honorable Loretta Sanchez, The Honorable Brad Sherman, The Honorable Ellen Tauscher, The Honorable Lois Capps, The Honorable Barbara Lee, The Honorable Grace Napolitano, The Honorable Mike Thompson, The Honorable Joe Baca, The Honorable Susan Davis, The Honorable Mike Honda, The Honorable Adam Schiff, The Honorable Hilda Solis, The Honorable Diane Watson, The Honorable Dennis Cardoza, The Honorable Linda Sanchez ("The California Democratic Congressional Delegation") and The Honorable John Burton and The Honorable Fabian Nuñez ("The California Democratic State Legislative Leaders") (collectively, "*Amicus Curiae*" or "*Amicus*"), hereby move for leave to file the brief submitted herewith, as *pro se amicus curiae*, in reply to the responses of the

Federal Energy Regulatory Commission ("FERC") and various sellers[1] to two motions in which parties seeking economic relief from FERC for the inflated prices California citizens and businesses were forced to pay for energy during the 2000-2001 electricity crisis have requested this Court[2] to take appropriate action to interpret and enforce its August 21, 2002 Order (the "August 21 Order").

I. INTEREST OF *AMICUS*

Amicus consists of California's duly elected United States Senators, 33 of California's members of the United States House of Representatives, the President pro Tempore of the California State Senate, and the Speaker of California's State Assembly. These individuals represent the interests of millions of Californians in

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[1] The responses to which *Amicus* seeks to reply were filed by FERC, the Generator Petitioners (Reliant Energy Power Generation, Inc., Duke Energy North America, LLC, *et al.*, and Mirant Americas Energy Marketing, LP, *et al.*), 17 Indicated Intervenors (Avista Energy, Constellation Power Source, Inc., Coral Power LLP, El Paso Merchant Energy, L.P., IDACORP Energy L.P., Pinnacle West Capital Corporation, Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, Public Service Company of Colorado, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Trading Corp., TransCanada Energy Ltd., and Tucson Electric Power Co.), Los Angeles Department of Water and Power, M-S-R Public Power Agency, *et al.*, Northern California Power Agency and Enron Power Marketing, Inc., *et al.*

[2] The two pending motions are: (1) The People of the State of California, *ex rel.* Bill Lockyer, Attorney General, and Southern California Edison Company ("AG/SCE's") Motion For Clarification Or, In The Alternative, For Establishment Of A Briefing Schedule; Request for Oral Argument ("Motion for Clarification"); and (2) California Public Utilities Commission, the California Electricity Oversight Board, and Pacific Gas & Electric Company ("CPUC/EOB/PG&E's") Motion To Compel Compliance With August 21, 2002 Order And Other Relief ("Motion To Compel").

Congress and the State Legislature. The vast majority of their constituents suffered significant economic harm during the 2000-2001 electricity crisis as the result of inflated energy prices caused by widespread illegal manipulation of California's energy markets by energy wholesalers and marketers. FERC, the federal agency charged with enforcing the Federal Power Act, has failed to discharge its responsibilities under the applicable statutes and this Court's August 21 Order, as set forth in detail in the AG/SCE Motion For Clarification and in the CPUC/EOB/PG&E Motion To Compel. *Amicus* has an interest in supporting the movants, for the benefit of the millions of Californians who are being denied adequate relief through FERC's improper implementation of the August 21 Order.

For the most part, FERC's actions, if allowed to stand, are insulated from Congressional scrutiny as well. FERC's Resolution of cases through investigatory dockets precludes public participation, judicial scrutiny, and Congressional oversight. *Amicus* believes that FERC's actions, behind closed doors, violates this Court's Order and precludes judicial and Congressional oversight functions and must be corrected.

II. NEED FOR AN *AMICUS* BRIEF

An *amicus* brief from the California Democratic Congressional Delegation and the California Democratic State Legislative Leaders is desirable, and the matters set forth herein are relevant to the disposition of this case. Contrary to the

responses of FERC and the responding sellers, FERC's improper implementation of the August 21 Order adversely affects the substantive rights of California consumers.

III. PROPOSED BRIEF OF *AMICUS CURIAE*

The responses filed by FERC and the intervening sellers to the AG/SCE Motion For Clarification and the CPUC/EOB/PG&E Motion To Compel argue that FERC's implementation of this Court's August 21 Order is merely a procedural matter within FERC's exclusive domain, and that it has merely procedural, rather than substantive, effects on the ultimate decisions that FERC makes.[3] Nothing could be further from the truth.

In the August 21 Order, this Court directed FERC to provide the refund claimants with the opportunity to discover and adduce new evidence concerning market manipulation by sellers, focused principally on seller behavior that occurred during the Summer of 2000 -- the months from May-September 2000. The August 21 Order was issued in the context of appeals from the Remedy

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[3] *See, e.g.,* FERC Response at 6 ("[A]gencies enjoy broad discretion in determining what procedures and priorities are appropriate to allow efficient consideration of pending matters."); LADWP response at 18 ("[T]he FERC has not denied relief for any violations of ISO or PX Tariffs or illegal market manipulation that may have occurred during the Pre-October 2000 Period. It has determined to pursue such actions in investigative and individual enforcement proceedings, rather than the Refund Proceeding."); M-S-R response at 11 ("[T]he commission may exercise broad discretion in structuring proceedings and investigations before it.").

Proceeding,[4] and directed FERC to permit the parties to adduce new evidence in the Remedy Proceeding, with a view towards the possibility that FERC would change its Remedy Proceeding Orders in light of the new evidence. Instead of taking action within the Remedy Proceeding on the basis of the newly-adduced evidence, as this Court ordered, FERC instead has initiated a plethora of new, frequently non-public investigations and enforcement actions against individual sellers. In so doing, FERC has removed from the Remedy Proceeding all issues relating to seller misconduct during the Summer of 2000, and has directed that these issues be resolved exclusively in the new investigative and enforcement proceedings.

FERC's action in removing these issues from the Remedy Proceeding and placing them in the new investigative and enforcement proceedings has very significant substantive effects on the rights of Californians who are entitled to economic relief for the high prices that prevailed during the May-September 2000 period. Regardless of whether FERC has the legal authority to initiate these new proceedings,[5] FERC clearly lacks the power under this Court's August 21 Order to

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[4] As defined in the pending Motion For Clarification and the Motion to Compel, the "Remedy Proceeding" is *San Diego Gas & Electric Co., et al.*, Docket Nos. EL00-95 and EL00-98. The purpose of the Remedy Proceeding is to address the appropriate measure of relief for high prices and market manipulation in California electric markets from May 2000 through June 2001.

[5] In their Motion for Clarification, the AG/SCE maintain that FERC likely does have the authority to initiate these new investigations and enforcement

use these new investigative and enforcement proceedings as the *exclusive* forum for deciding whether and to what extent sellers are liable for remedies for the high prices they inflicted on California ratepayers during the Summer of 2000. This is so for a simple reason: although the August 21 Order conferred upon California refund claimants the right to pursue new evidence of market manipulation and new remedies associated with that evidence, FERC has largely prohibited refund claimants from participating in its new investigative and enforcement proceedings that are the sole venue for FERC decision-making concerning seller culpability, and therefore, consumer relief, for the Summer of 2000.

FERC has managed to shut refund claimants out of the process through two mechanisms. The first is its resort to *non-public* investigations for the claims that are most likely to produce the highest level of monetary relief. These include: economic withholding of generation; pricing and bidding patterns inconsistent with prevailing supply and demand conditions; and physical withholding of generation.

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proceedings, so long as those proceedings do not negate the existence nor take the place of the Remedy Proceeding, over which this Court has already asserted its exclusive jurisdiction, and which is the proceeding in which this Court ordered FERC to consider evidence related to May-September 2000 relief. Motion for Clarification at 27-28. On the other hand, the CPUC/EOB/PG&E, in their Motion To Compel, maintain that the issue of May-September 2000 relief, which was the focus of the motion that resulted in this Court's August 21 Order, is a matter over which this Court has exclusive jurisdiction, thereby barring FERC from initiating new investigative and enforcement proceedings for the purpose of determining relief during that period. In offering this brief, *Amicus* does not take a position on the relative merits of the approaches taken in the two motions.

FERC has removed these claims from the Remedy Proceeding and is addressing them either in Docket No. IN03-10, a non-public investigation, or in a secret investigation to which FERC has not even assigned a docket number, involving the physical withholding of generation. FERC maintains that these non-public proceedings can never be subject to judicial review, even though they arose out of evidence gathered as a result of this Court's August 21 Order. The second mechanism that FERC has used to exclude the public involves its approximately 68 enforcement proceedings that are directed at individual sellers for involvement in market manipulation gaming practices detailed in the now-infamous Enron memos. Although FERC has permitted refund claimants to participate in these enforcement proceedings, all but a few of these proceedings have been settled as between FERC Staff and the accused sellers, before hearings (and in many cases before discovery was initiated or completed), without the participation of refund claimants.

Plainly, FERC's procedural machinations in implementing this Court's August 21 Order have had and will continue to have dramatic substantive consequences for California's consumers. As a practical matter, FERC's approach has shut California's consumers out of the process of pursuing remedies for most of the excess profits at issue. In so doing, as a result of the settlements reached to date between FERC and individual sellers for market manipulation during the

Summer of 2000, FERC has been able to minimize the amount that sellers will be required to pay back: as a group, sellers will get away with paying cents on the dollar -- tens of millions -- even though they overcharged California consumers in excess of $2.5 billion during the Summer of 2000. Indeed, it is in the Remedy Proceeding, rather than in seller-specific proceedings, that FERC can effectively consider and remedy the market-wide harm caused by the fact that multiple sellers engaged in multiple and interrelated forms of manipulation of a single-price auction where manipulation by even one seller could result in overcharge by all sellers and overpayments by all consumers.

FERC's approach to enforcement of the Federal Power Act and implementation of this Court's August 21 Order indicates that FERC has intentionally embarked upon a procedural approach that will defeat the substantive rights of California's consumers. FERC's use of non-public investigations as the exclusive method of dealing with evidence that sellers massively manipulated California's single-price auction -- and FERC's dogged refusal to deal with this evidence in the Remedy Proceeding, is precisely the approach that FERC proposed, and that this Court implicitly rejected, when California first sought an order from the Court requiring FERC to allow California to adduce this evidence in the Remedy Proceeding. *Amicus* respectfully requests that the Court clarify that FERC's approach is inconsistent with this Court's August 21 Order, and that, at a

minimum, the August 21 Order requires that FERC provide a forum -- the Remedy Proceeding -- in which California's consumers and their representatives can litigate their claims in an on-the-record proceeding that will be subject to this Court's judicial review.

IV. CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court clarify that the August 21 Order and Section 313(b) of the Federal Power Act compel FERC to consider and adjudicate within the Remedy Proceeding, a forum subject to judicial review, evidence of sellers' May-September 2000 market manipulation, irrespective of whether FERC has the legal authority to conduct separate and/or parallel investigative and enforcement proceedings related to the same subject matter. California consumers deserve the opportunity for a full and fair adjudication of their claims, and full judicial review of any decision that FERC makes concerning those claims.

Respectfully submitted,

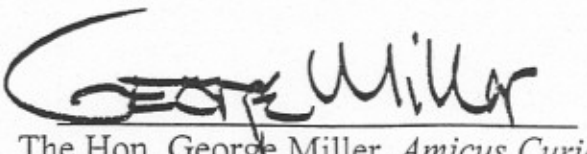
The Hon. Dianne Feinstein, *Amicus Curiae*
U.S. Senator

The Hon. Barbara Boxer, *Amicus Curiae*
U.S. Senator

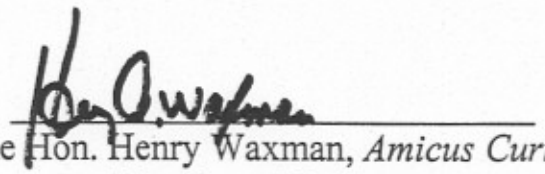
The Hon. Nancy Pelosi, *Amicus Curiae*
Member of Congress

The Hon. Zoe Lofgren, *Amicus Curiae*
Member of Congress

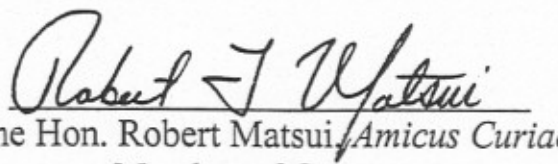
The Hon. Pete Stark, *Amicus Curiae*
Member of Congress



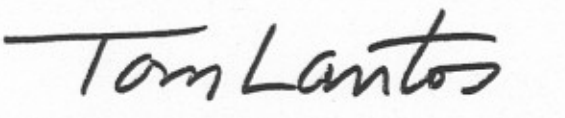
The Hon. George Miller, *Amicus Curiae*
Member of Congress



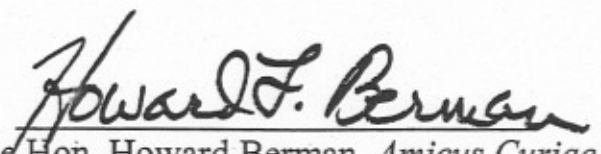
The Hon. Henry Waxman, *Amicus Curiae*
Member of Congress



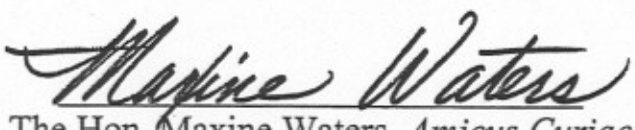
The Hon. Robert Matsui, *Amicus Curiae*
Member of Congress



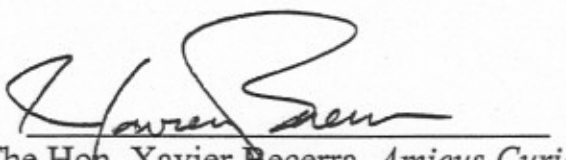
The Hon. Tom Lantos, *Amicus Curiae*
Member of Congress



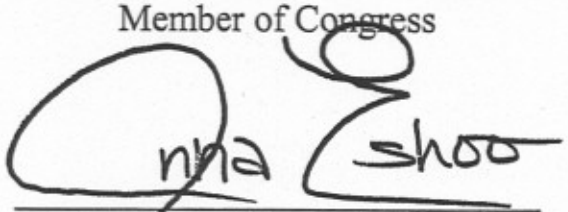
The Hon. Howard Berman, *Amicus Curiae*
Member of Congress



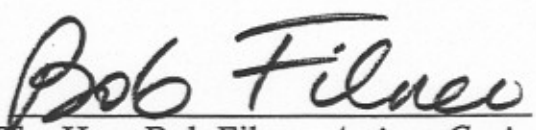
The Hon. Maxine Waters, *Amicus Curiae*
Member of Congress



The Hon. Xavier Becerra, *Amicus Curiae*
Member of Congress

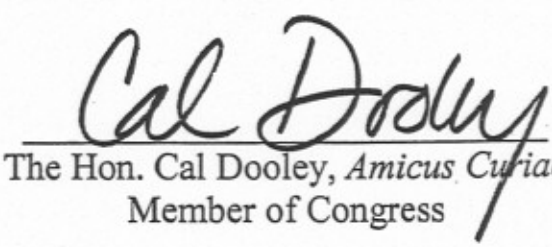


The Hon. Anna Eshoo, *Amicus Curiae*
Member of Congress

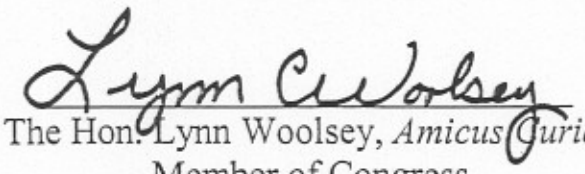


The Hon. Bob Filner, *Amicus Curiae*
Member of Congress

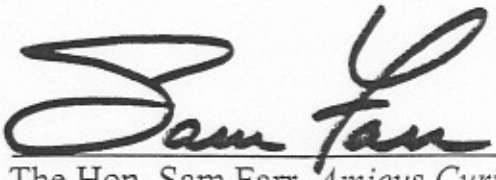
The Hon. Lucille Royball-Allard, *Amicus Curiae*
Member of Congress



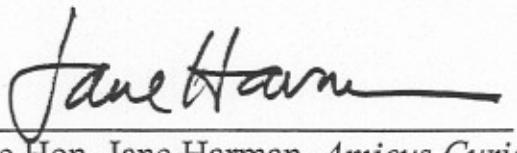
The Hon. Cal Dooley, *Amicus Curiae*
Member of Congress



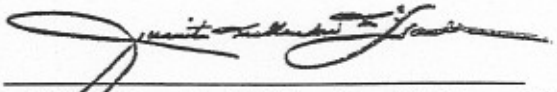
The Hon. Lynn Woolsey, *Amicus Curiae*
Member of Congress



The Hon. Sam Farr, *Amicus Curiae*
Member of Congress



The Hon. Jane Harman, *Amicus Curiae*
Member of Congress



The Hon. Juanita Millender-McDonald,
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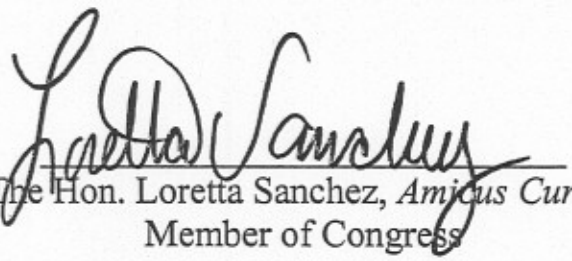
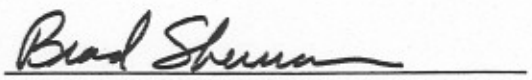
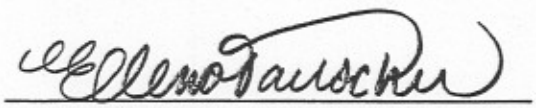
Member of Congress



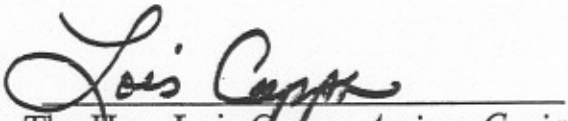
The Hon. Loretta Sanchez, *Amicus Curiae*
Member of Congress



The Hon. Brad Sherman, *Amicus Curiae*
Member of Congress



The Hon. Ellen Tauscher, *Amicus Curiae*
Member of Congress



The Hon. Lois Capps, *Amicus Curiae*
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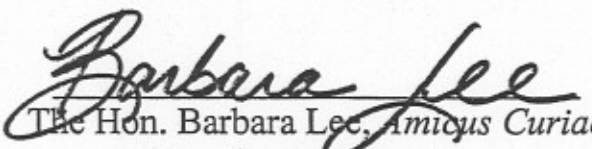
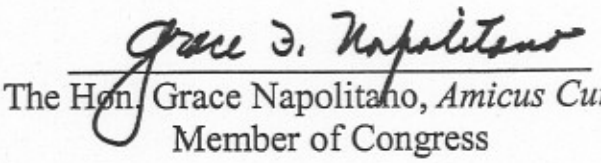


The Hon. Barbara Lee, *Amicus Curiae*
Member of Congress



The Hon. Grace Napolitano, *Amicus Curiae*
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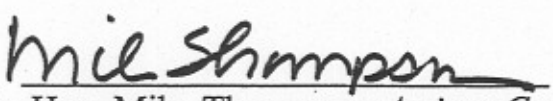
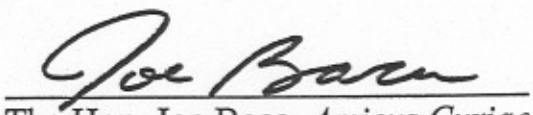
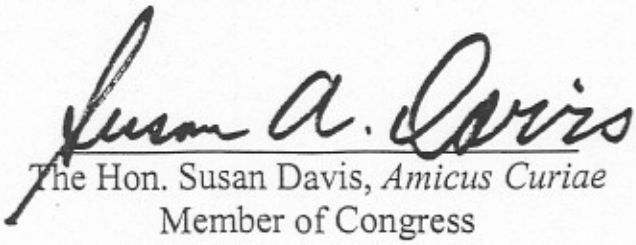


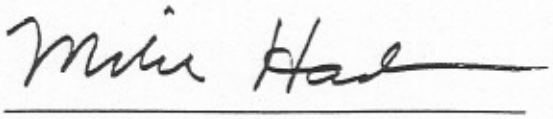
The Hon. Mike Thompson, *Amicus Curiae*
Member of Congress



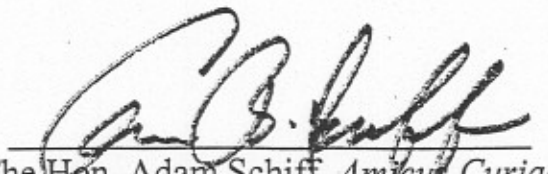
The Hon. Joe Baca, *Amicus Curiae*
Member of Congress



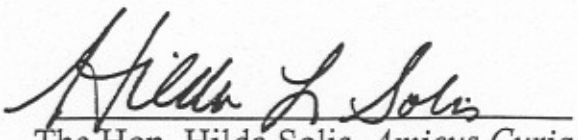
The Hon. Susan Davis, *Amicus Curiae*
Member of Congress



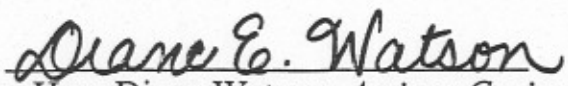
The Hon. Mike Honda, *Amicus Curiae*
Member of Congress



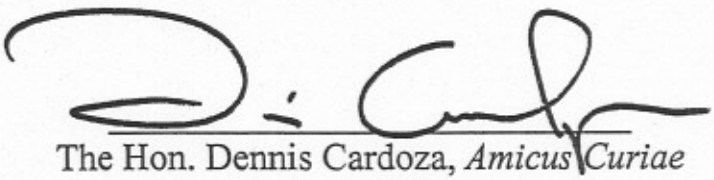
The Hon. Adam Schiff, *Amicus Curiae*
Member of Congress



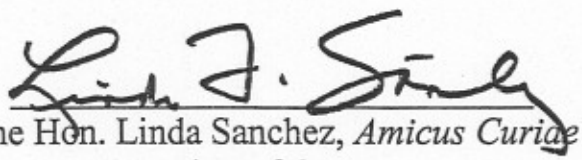
The Hon. Hilda Solis, *Amicus Curiae*
Member of Congress



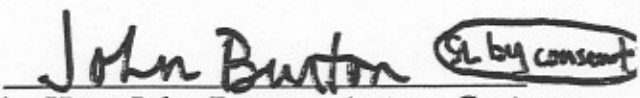
The Hon. Diane Watson, *Amicus Curiae*
Member of Congress



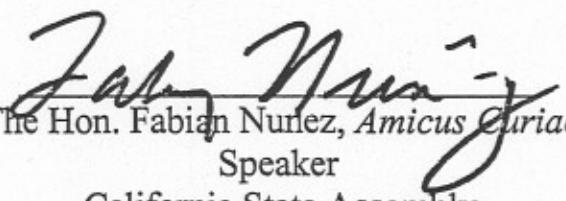
The Hon. Dennis Cardoza, *Amicus Curiae*
Member of Congress



The Hon. Linda Sanchez, *Amicus Curiae*
Member of Congress



The Hon. John Burton, *Amicus Curiae*
President, pro Tempore
California State Senate



The Hon. Fabian Nuñez, *Amicus Curiae*
Speaker
California State Assembly