IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Case No.: 14-80065

ERIC STILLER AND JOSEPH MORO, on behalf of themselves individually and all others similarly situated,	)	**Plaintiffs-Petitioners' Petition for Rehearing and for Rehearing En Banc**
Plaintiffs-Petitioners,	)	
v.	)	**Seeking Appeal from the United States District Court for the Southern District of California**
COSTCO WHOLESALE CORPORATION, and DOES 1 through 25, inclusive	)	**Case No.: 09CV2473-GPC-BGS**
	)	**Hon. Gonzalo P. Curiel**
Defendants-Respondents.	)	

PLAINTIFFS-PETITIONERS' PETITION FOR REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

I. INTRODUCTION AND RULE 35 STATEMENT

In a one-sentence summary decision (Ex. A) denying Plaintiffs-Petitioners' Petition for Leave to Appeal Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure (Doc. 1-1) ("23(f) Petition"), a two-judge panel of this Court (the Honorable Judges Mary M. Schroeder and N. Randy Smith) denied interlocutory review of a district court decision contradicting three recent decisions of this Circuit and two decisions of the United States Supreme Court. En banc review is necessary here not only to restore uniformity in this Court's decisions, but because this case presents a question of exceptional importance where at least one of the errors at issue – decertifying a class because determinations of individual defenses and damages may be needed after a finding of class-wide liability – "may well [] effectively [] sound the death knell of the class action device." *Leyva v. Medline*, 716 F.3d 510, 514 (9th Cir. 2013) (quoting *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1054 (Cal. 2012)); *see also Jimenez v. Allstate Ins. Co*., No. 12-56112, 2014 U.S. App. LEXIS 17174, at *16 (9th Cir. Sept. 3, 2014).

Interlocutory review under Rule 23(f), while discretionary, is appropriate where: (1) there is a death-knell situation for either party and a questionable class certification decision; (2) the certification decision presents an unsettled, fundamental issue of class action law, important to the case and generally, that will likely evade end-of-case review; or (3) the decision is manifestly erroneous.

Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005). This case meets every one of these standards. First, the panel's decision preserved the district court's manifestly erroneous holding that, contrary to controlling Circuit authority in *Leyva*, individualized damages determinations as such defeat Rule 23(b)(3)'s predominance requirement. Second, the panel decision preserved the district court's manifestly erroneous holding that representative proof *may not* be used to determine liability, contra the controlling authority of the Supreme Court in *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946), and this Court's recent holding just last month in *Jimenez* that representative proof *may* be used to determine liability. The panel decision also preserved the district court's manifestly erroneous decertification of the class based upon its improper resolution of merits issues, contrary to controlling Ninth Circuit and Supreme Court authority in *Stockwell v. City & County of San Francisco*, 749 F.3d 1107 (9th Cir. 2014), and *Amgen v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). Without interlocutory appeal, all of these more-than-questionable rulings will evade review due to the "death knell" that decertification presents for plaintiffs. Indeed, this Court has granted 23(f) review in cases raising such issues. *See Jimenez; Stockwell*.[1]

[1] Plaintiffs-Petitioners sought an unopposed extension of time to file this Petition on August 29, 2014, requesting an additional 30 days from the original deadline of

II. STATEMENT OF THE CASE

This class action seeks unpaid wages for Costco's hourly employees who were detained in its warehouses after the end of their shifts per companywide warehouse closing policies. On December 13, 2010, U.S. District Judge Marilyn Huff certified the California (Rule 23) and FLSA Classes. After further discovery, Costco filed a Motion to Decertify the Rule 23 Class Action and the FLSA Collective Action on April 13, 2012.

Judge Gonzalo P. Curiel, to whom the case had been reassigned, concluded in an April 25, 2014 opinion that Plaintiffs had satisfied Rule 23(a)'s commonality requirement but not Rule 23(b)(3)'s predominance requirement, decertifying the class and collective actions on essentially the same grounds[2] despite his own finding that "Plaintiffs have offered substantial evidence of a companywide, uniformly enforced policy of detaining employees during closing procedures without pay." Order at 33.

Beyond its internal inconsistencies, the district court's decision, now preserved by the two-judge panel's summary denial of 23(f) review, hinges upon

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September 5, 2014. Doc. 5-1. Plaintiffs-Petitioners' request is pending and this Petition is submitted timely on the date to which Plaintiffs-Petitioners sought an extension, October 6, 2014.

[2] *See* Order, Ex. A to Pls.' 23(f) Pet. at 33-35 (Doc. 1-2) (relying on findings with respect to Rule 23(b)(3)'s predominance requirement to decertify FLSA collective action).

three manifest errors of law that contradict three recent controlling decisions of this Circuit, as well as two Supreme Court decisions. First, relying on an erroneous interpretation of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), that directly conflicts with this Court's decision in *Leyva*, the district court found that "individualized damages issues" as such defeat predominance. Order at 25-26. Second, the district court concluded that "there is no classwide method, of determining whether, how often, and for how long class members actually experienced unpaid [off-the-clock] time." *Id.* at 26. In doing so, the court erroneously rejected Plaintiffs' proposal to use representative evidence to make these determinations (Order at 28-29, 34), ignoring the decades-old holding of the Supreme Court in *Mt. Clemens* and this Court's holding just last month in *Jimenez* that representative proof *may* be used to prove class-wide liability. Third, the district court denied certification on the basis of an improperly decided merits question unnecessary to questions of commonality or predominance (finding that "not all employees experienced unpaid delays as a result of the [p]olicy" (Order at 20)), contradicting this Court's recent decision in *Stockwell* and the Supreme Court's decision in *Amgen*.

In a Petition submitted timely on April 29, 2014, Plaintiffs-Petitioners sought interlocutory review under Rule 23(f), asserting that the district court's decision presented every one of the three bases for granting appellate review

established in *Chamberlan*, 402 F.3d at 959. First, the order signifies a "death-knell situation" for Plaintiffs and the thousands of employees they seek to represent, whose individual claims may only be worth a few thousand dollars or less. For them, "the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation." Fed. R. Civ. P. 23(f) Advisory Committee's note. Second, the district court's departures from controlling precedent and well-established methods represent an upheaval of "fundamental issue[s] of law relating to class actions." *Chamberlan*, 402 F.3d at 959. The decision creates new and unsettled questions regarding the requisites of predominance under Rule 23(b)(3) after *Comcast* and the viability of representative proof of liability long since established in *Mt. Clemens* and recently affirmed in *Jimenez*, all of which will go unresolved without interlocutory review due to the "death knell" decertification presents for Plaintiffs. Third, these departures from settled law represent "manifest error," the final basis for granting review set out in *Chamberlan*. *See, e.g.*, *Stockwell*, 749 F.3d 1107 (granting Rule 23(f) review where court improperly determined merits issues unrelated to Rule 23 inquiry).

III. ARGUMENT

a. The panel decision conflicts with Ninth Circuit authority by preserving the district court's manifestly erroneous holding that, contra *Leyva v. Medline*, 716 F.3d 510 (9th Cir. 2013), individualized damages determinations as such defeat Rule 23(b)(3) predominance.

The panel's decision to deny 23(f) review conflicts with this Court's holding in *Leyva* that "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." 716 F.3d at 514. By denying review, the panel preserved the district court's manifestly erroneous holding that *Comcast* overrules this Court's decisions in *Stearns v. Ticketmaster*, 655 F.3d 1013 (9th Cir. 2011), and *Yokoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087 (9th Cir. 2010), and "makes clear that individualized damages determinations can defeat Rule 23(b)(3)'s predominance requirement." Order at 25-26 (so holding without acknowledging *Leyva*).[3]

Relying on this erroneous interpretation, the district court ignored the fact that Plaintiffs' case fits *Leyva*'s reading of what *Comcast* requires, namely that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." 716 F.3d at 514 (quoting *Comcast,* 133 S.

[3] Although *Leyva* went unmentioned in the district court's decertification order, the case was addressed in briefing, *see* Ex. D to Pls.' 23(f) Pet. (Doc. 1-2), and in the hearing on decertification, *see* Tr. of Sept. 27, 2013 Hr'g, Ex. C to Pls.' 23(f) Pet. at 22-25, 29-30 (Doc. 1-2).

Ct. at 1435). In fact, this Court's observation in *Leyva* holds true in Plaintiffs' case: "Here, unlike in *Comcast*, if putative class members prove [Costco's] liability, damages will be calculated based on the wages each employee lost due to [Costco's] unlawful practices." *Id.* Plaintiffs' proposed methods of proof will demonstrate that the companywide policy Judge Curiel acknowledged Plaintiffs had substantially proven (Order at 33) applied to the class and caused unpaid time, for which class members are owed compensation. *See* Order at 27-28; Pls.' Trial Plan, Ex. B. to Pls.' 23(f) Pet. (Doc. 1-2). Consistent with *Leyva* and *Comcast*, Plaintiffs propose establishing class liability using common evidence (including written policies and protocols, admissions of Costco's managers and executives, an expert time-and-motion study, and Costco's electronic databases), and suggest four methods for assessing damages due to class members, all of which are driven by findings on the existence and extent of liability to the class or individual class members. *Id.*

The misreading of *Comcast* that led the district court to reject Plaintiffs' trial plan not only contradicts this Circuit's decision in *Leyva* (affirmed just last month in *Jimenez*), but also deviates from decisions by other Circuits and district courts in this Circuit, all of which concur that while class damages must derive from the theory of class liability pursuant to a workable methodology, individualized damages questions as such do not defeat predominance. *See*, *e.g.*, *Jimenez*, 2014

U.S. App. LEXIS 17174, at *16; *In re Deepwater Horizon*, 739 F.3d 790, 815-17 (5th Cir. 2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *Glazer v. Whirlpool Corp*., 722 F.3d 838, 860-61 (6th Cir. 2013); *Lindell v. Synthes USA*, No. 11-cv-02053, 2014 U.S. Dist. LEXIS 27706, at *48-49 (E.D. Cal. Mar. 4, 2014); *Rosales v. El Rancho Farms,* No.: 1:09-cv-00707, 2014 U.S. Dist. LEXIS 11134, at *16 (E.D. Cal. Jan. 29, 2014), *adopted by* 2014 U.S. Dist. LEXIS 20708 (E.D. Cal. Feb. 18, 2014). Where, as here, Plaintiffs presented substantial evidence of a uniformly-enforced companywide policy, predominance is established because questions regarding the policy and its impact on class members overwhelm individual issues.[4] The two-judge panel's decision preserving the district court's manifestly erroneous ruling thus creates both inter- and intra-Circuit conflicts as to the proper interpretation of *Comcast*.

Finally, the denial of interlocutory appeal sustains the district court's ruling, contra *Leyva*, that the volume of individual damage determinations undermines predominance. *See* Order at 29 ("undertaking individualized inquiries as to approximately 30,000 individuals—even in a bifurcated proceeding as Plaintiffs

[4] *See, e.g.*, *Sullivan v. Kelly Servs.*, 268 F.R.D. 356, 364 (N.D. Cal. 2010) (in off-the-clock case, "uniform corporate practices and policies that cumulatively impact the class in a particular manner can satisfy the predominance requirement"); *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 404 (C.D. Cal. 2008) (predominance satisfied where defendant used a "standardized split shift policy," because individualized questions went to damages).

propose—would result in the commons [sic] questions here being overcome by individualized inquiries"). To the contrary, in *Leyva* this Court held that the lower court "abused its discretion when it based its manageability concerns on the need to individually calculate damages" for a class of approximately 500 members, noting that "courts routinely certify larger and more complex classes." 716 F.3d at 515 (citing certified classes of 6,000 and 15,000 members). District courts within this Circuit, *including* the court below, have since affirmed that class size *does not* defeat predominance. *See Makaeff v. Trump Univ., LLC,* No. 3:10-cv-0940, 2014 U.S. Dist. LEXIS 22392, at *22 (S.D. Cal. Feb. 21, 2014) (Curiel, J.); *Arredondo v. Delano Farms Co.*, 1:09-cv-01247, 2014 U.S. Dist. LEXIS 22658, at *30 (E.D. Cal. Feb. 21, 2014) (certifying class of 14,000 employees, though damages would vary).

Here, as in *Leyva*, it is an abuse of discretion to deny class certification due to a need for individual damage determinations where the court is unable to "suggest any other means for putative class members to adjudicate their claims." *Leyva*, 716 F.3d at 515. Indeed, where there is no such finding and no apparent alternative exists, denying class certification, as this Circuit noted in *Leyva*, would essentially ring the "death knell" for just the sort of case for which the class action mechanism was created. Here, as in *Leyva*, "[i]n light of the small size of the putative class members' potential individual monetary recovery, class certification

may be the only feasible means for them to adjudicate their claims." *Id*.

b. The panel decision conflicts with Ninth Circuit and Supreme Court authority by preserving the district court's manifestly erroneous holding that representative proof *may not* be used to determine liability, contra *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946) and *Jimenez v. Allstate Ins. Co.*, No. 12-56112, 2014 U.S. App. LEXIS 17174 (9th Cir. Sept. 3, 2014), holding that representative proof *may* be used to determine liability.

The district court manifestly erred in holding that representative proof *may not* be used to determine liability, contrary to the Supreme Court's holding in *Mt. Clemens* and this Court's decision just last month in *Jimenez* holding that representative proof *may* be used to determine liability. Specifically, the district court erroneously held that Plaintiffs must make individualized showings of uncompensated work, even though Costco failed to record unpaid time during warehouse closings. Order at 28-29.[5] This manifestly erroneous conclusion, preserved by the panel's denial of interlocutory review, directly contradicts the central principle established by the Supreme Court in *Mt. Clemens*, namely that:

> where the employer's records are inaccurate or inadequate . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work *as a matter of just and reasonable inference*.

[5] Costco acknowledged its failure to record all time worked by its employees. *See* Tr. of Sept. 27 Hr'g at 22-23.

328 U.S. at 687 (emphasis added).[6] Just last month, this Circuit reaffirmed that this principle is unaffected by *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast*, agreeing with other circuit courts that forms of representative proof "are acceptable ways to determine liability." *Jimenez*, 2014 U.S. App. LEXIS 17174, at *14; *see also In re Perez,* 749 F.3d 849, 853 (9th Cir. 2014); *McLaughlin v. Seto*, 850 F.2d 586, 589 (9th Cir. 1988).

Contrary to the dictates of *Mt. Clemens* and this Circuit, the district court's decision, preserved by the panel's summary ruling, penalizes employees for their employer's illegal and inadequate record-keeping. As *Mt. Clemens* explicitly recognized, "such a result [] place[s] a premium on an employer's failure to keep proper records" by "allow[ing] the employer to keep the benefits of an employee's labors without paying due compensation . . . ." 328 U.S. at 687.

The district court also manifestly erred in holding that class-wide pattern-or-practice liability cannot be established without common proof as to "whether, how often, and for how long class members actually experienced unpaid [off-the-clock] time." Order at 26. It is well settled that *Mt. Clemens* provides the means to prove liability without testimony, or other individual proof, as to each class member's experience of unpaid time. *See, e.g.*, *McLaughlin v. Seto*, 850 F.2d at 589 (*Mt.*

[6] The *Mt. Clemens* model of proof has been adopted for use in cases alleging violations of California wage laws. *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 747-51 (Cal. App. 2004); *Kamar*, 254 F.R.D. at 403-04.

Clemens "allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of other employees"); *In re Perez*, 749 F.3d at 853; *Reich v. S. New England Telecomms. Corp*., 121 F.3d 58, 66-67 (2d Cir. 1997). Under the *Mt. Clemens* model, even the possibility of "undamaged" class members does not destroy predominance. *See, e.g.*, *Bouaphakeo v. Tyson Foods Inc*., No. 12-3753, 2014 U.S. App. LEXIS 16283, at *10-11 (8th Cir. Aug. 25, 2014); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985); *Khadera v. ABM Indus.*, NO. C08-0417, 2012 U.S. Dist. LEXIS 22327, at *6-9 (W.D. Wash. Feb. 22, 2012).

Class liability is proven where the employer had a policy that applied to the class and caused unpaid work. Absent the basis for a class-wide damage award, the separate questions whether *individual* members of the class suffered unpaid work and the compensation due them are properly addressed during stage-two proceedings after a class-wide liability finding. As this Court reaffirmed in *Jimenez*, individualized damages as such are not a basis for denial of certification because "'no matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action,'" even where some class members "might have no harms at all." *Jimenez*, 2014 U.S. App. LEXIS 17174, at *16 (quoting *Whirlpool*, 722 F.3d at 853-855); *see also In re Deepwater Horizon*, 727

F.3d at 816-18 (Rule 23(b)(3) satisfied, despite possibility of uninjured class members, because phased proceedings could be used to address individualized issues after resolution of common questions).

A stage-one class liability determination – followed by stage-two proceedings to determine whether individual class members suffered unpaid work and, if so, the damages to which they are entitled – is entirely consistent with the two-step process of determining class liability and individual entitlement to damages in pattern or practice discrimination cases expressly endorsed in *Dukes*:

> We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings ... to determine the scope of individual relief." [*Int'l Bhd. of*] *Teamsters* [*v. United States*], 431 U.S. [324], at 361 [1977] . . . . At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id*., at 362. . . .

Dukes, 131 S.Ct. at 2561.

In accordance with this clearly established model for handling potential individualized questions during stage-two proceedings, Plaintiffs have identified a variety of methods to assess individualized damages and defenses. *See* Pls.' Trial Plan at 14-16. Courts in this jurisdiction routinely conduct creative second-stage proceedings to accommodate individualized determinations, including mechanisms such as surveys, claims forms, and mini-hearings. *See, e.g.*, *Jimenez*, 2014 U.S.

App. LEXIS 17174, at *18-19 (approving bifurcation of liability and damages proceedings to determine claims for unpaid overtime, including opportunity to present individual defenses during second-stage proceedings).[7]

c. The panel decision conflicts with Ninth Circuit and Supreme Court authority by preserving the district court's manifestly erroneous decertification of the class based upon improper resolution of merits issues, contra *Stockwell v. City & County of San Francisco*, 749 F.3d 1107 (9th Cir. 2014), and *Amgen v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

The district court manifestly erred in basing its decertification decision upon its merits finding that "*not all employees* experienced unpaid delays as a result of the [p]olicy." Order at 20 (emphasis added). It is reversible error of law for a court to deny class certification based on its resolution of merits issues rather than deciding only whether the requirements of Rule 23 are met. *Amgen*, 133 S. Ct. at 1194-95 ("[m]erits questions may be considered [at class certification] to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied"); *Stockwell*, 749 F.3d at

[7] *See also, e.g., Kurihara v. Best Buy Co.,* No. C 06-01884, 2007 U.S. Dist. LEXIS 64224, at *32 (N.D. Cal. Aug. 30, 2007) ("courts have developed numerous efficient means to resolve [individualized damages issues], including questionnaires, surveys, representative testimony, and other aggregate analysis"); *Tierno v. Rite Aid Corp*., No. C 05-02520, 2006 U.S. Dist. LEXIS 71794, at *35-36 (N.D. Cal. Aug. 31, 2006) ("[C]ourts in overtime cases . . . may properly couple uniform findings on common issues . . . with innovative procedural tools that can efficiently resolve individual questions regarding eligibility and damages . . .").

1111-14. "Rule 23(b)(3) . . . does not require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.'" *Amgen*, at 1196; *see also Stockwell,* at 1113.

The district court's conclusion that the class should be decertified even where it found that "Plaintiffs have offered substantial evidence of a companywide, uniformly enforced policy of detaining employees during closing procedures without pay" (Order at 33) can only be explained by its unjustified usurpation of the fact-finder's role at the class certification stage. Specifically, the district court improperly found that Plaintiffs' "substantial evidence" of a uniform policy was "partially rebutted" by Costco's "convincing evidence" that "not all employees experienced unpaid delays as a result of [that policy]" (Order at 20). Instead of deciding the contested issue, the court should have recognized that the evidence demonstrated predominating common questions to be tried on a class basis, and should have left determination of merits questions to the jury. Moreover, as discussed above, the district court is simply incorrect that a finding that *every* employee may not have experienced unpaid time, even if it were proper at this stage, would defeat certification.

d. This proceeding presents a question of exceptional importance where the effect of at least one of the errors at issue – decertifying a class because determinations of individual defenses and damages may be needed after a finding of class-wide liability – "'may well be effectively to sound the death knell of the class action device.'" *Leyva*, 716 F.3d at 514.

If this Court permits the two-judge panel's summary denial of interlocutory review to stand, the district court's myriad errors, contradicting three recent decisions of this Circuit as well as two Supreme Court decisions, will evade review due to the "death knell" that decertification here means for Plaintiffs. This alone renders 23(f) review appropriate under *Chamberlan*. In addition, at least one of the errors at issue – decertifying a class because determinations of individual defenses and damages may be needed after a finding of class-wide liability – threatens to ring an even broader death knell for all class actions. As this Court affirmed in *Leyva*, "damages determinations are individual in nearly all wage-and-hour class actions. . . . 'Indeed, to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device.'" *Id*. at 514 (quoting *Brinker*, 53 Cal. 4th at 1054); *see also Jimenez*, 2014 U.S. App. LEXIS, at *16. This dire consequence alone warrants en banc review under Federal Rule of Appellate Procedure 35(a)(2).

CONCLUSION

On the basis of the foregoing arguments and authorities, the Court should grant Plaintiffs' petition for en banc review.

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CERTIFICATE OF SERVICE

I hereby certify that 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 on October 6, 2014.

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 6, 2014

Respectfully Submitted,

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

I certify that, pursuant to Circuit Rules 35-4 and 40-1, the attached Petition for Panel Rehearing and Rehearing En Banc is: (check applicable option)

_X__ Proportionately spaced, has a typeface of 14 points or more and contains 4,194 words (petitions and answers must not exceed 4,200 words).

or

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or

_____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Dated: October 6, 2014 Respectfully Submitted,

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