Nos. 08-55483 & 08-56740

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYNNE WANG, YU FANG INES KAI, and **HUI JUNG PAO**,
On Behalf of Themselves and all Others Similarly Situated

Plaintiffs-Appellees,

vs.

CHINESE DAILY NEWS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
Central District of California
Case No. CV-04-1498-CBM-JWJ
The Honorable Consuelo B. Marshall

BRIEF FOR *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING OR, IN THE ALTERNATIVE, REHEARING EN BANC

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I. DISCLOSURE STATEMENT OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amicus Curiae* National Employment Lawyers Association hereby discloses that it is a not-for-profit corporation, with no parent corporation and no publicly-traded stock. No party or counsel for any party was involved in authoring or editing this brief in whole or in part and no entity or person, aside from the *Amicus Curiae*, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief.

II. STATEMENT OF *AMICUS CURIAE*

Amicus Curiae National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles developed by the courts in employment cases play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of

individuals in the workplace. NELA respectfully submits this brief pursuant to Rule 29 of the Rules of Appellate Procedure and Ninth Circuit Local Rule 29-2.[1]

III. SUMMARY OF ARGUMENT

Amicus Curiae writes separately in support of Appellees' Petition for Rehearing to express concern with the Panel opinion's discussion of commonality and predominance under Federal Rule of Civil Procedure 23. In sections II.A and II.D, the opinion takes narrow language from *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), specific to a companywide, pattern-and-practice case alleging intentional discrimination on behalf of 1.5 million female employees, and applies it in an overbroad manner to a wage case of only 200 employees. This broad use of narrow language will lead to confusion, and make it more difficult for workers to enforce their rights.

First, the Panel opinion should be modified to clarify the standard for commonality under Federal Rule of Civil Procedure 23(a)(2). As written, Section II.A appears to impose a new, burdensome requirement for class certification in wage cases that plaintiffs must demonstrate significant proof that an employer operated under a general policy of violating state labor laws. Requiring such proof at class certification would entangle courts unnecessarily in determining the merits of plaintiffs' claims, when all that is required to establish commonality is a factual

[1] The Parties have consented to the filing of this *Amicus* brief.

showing that the action has the capacity to generate common answers. The Panel's new standard is, therefore, inconsistent with established law and goes far beyond what has ever been required in employment cases outside the narrow context of pattern-and-practice intentional discrimination claims.

NELA also joins Appellees in requesting that the Panel withdraw Section II.D. That section may be read as requiring individualized damages and liability proof in all employment cases, in conflict with long-standing wage and hour law and practice, and with the policies behind federal and California wage and hour laws that rely on aggregate and representative proof for workers to vindicate their rights. The opinion is therefore likely to sow significant confusion in the district courts and make it more difficult for workers to pursue their wage claims.

IV. ARGUMENT

State and federal law have long recognized that class actions provide an important vehicle for vulnerable, low-wage workers to enforce their rights—a vehicle that the Panel opinion threatens to undermine by imposing an unnecessarily high bar on class certification through an improper expansion of *Dukes*. Case law before and after *Dukes* has held that commonality exists where a common question has the ability to generate common answers, and that wage and hour class actions can depend on aggregate and representative proof to establish liability and damages. By making common and predominant claims that are routinely certified

under current law subject to such a high bar, the Panel opinion could limit access to redress for an enormous number of workers.

Low-wage, immigrant workers face particular challenges in trying to enforce their rights individually, including the threats of retaliation, lack of knowledge about their rights, and high costs of litigation in comparison to relatively small individual claims.[2] Wage theft is a pervasive problem nationally and in California, particularly for such workers.[3] Class actions, when appropriate under Rule 23, provide vulnerable workers a means to recover unpaid wages, enforce other protective labor laws, and serve the judicially-recognized public interest in compliance. *See*, *e.g.*, *Gentry v. Superior Ct.*, 42 Cal. 4th 443, 457-61 (2007) (discussing role of class actions under California law); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1072-73 (9th Cir. 2000) (allowing workers to proceed under pseudonyms as protection against retaliation, and recognizing public interest in enforcing federal labor law).

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[2] *See*, *e.g.*, Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment & Labor Laws in America's Cities* (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1 (hereafter "*Broken Laws*"); *see also Gentry v. Superior Ct.*, 42 Cal. 4th 443, 457-61 (2007).

[3] Bernhardt et al., *Broken Laws* at 2-3; NELP, *Winning Wage Justice: A Summary of Research on Wage & Hour Violations in the U.S.* (Jan. 2012), *available at* http://www.nelp.org.

To ensure that workers can continue to pursue their rights in class actions when Rule 23's prerequisites are satisfied, the Panel opinion should be clarified to eliminate its confusing references to standards for commonality and predominance that do not apply to wage cases. Such clarification will reconcile the opinion with Ninth Circuit and other circuit law, as well as with the recent Supreme Court decisions in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1191 (2013) (discussing commonality), and *Comcast Corp. v. Behrend*, No. 11-864 (S. Ct. Mar. 27, 2013) (discussing predominance).

A. REHEARING SHOULD BE GRANTED TO CLARIFY THE STANDARD FOR COMMONALITY UNDER RULE 23(A).

The Panel opinion appears to impose a new requirement that plaintiffs in every wage and hour class action under Rule 23 demonstrate "significant proof" that an employer "operated under a general policy of [violating state labor laws]." Slip. Op. 10. As written, the decision can be read as requiring both "a general policy" and a finding that the policy itself violates state labor laws. The Panel errs by applying overbroadly a very narrow statement in *Dukes*. No "significant proof of a general policy" of violations is required to demonstrate commonality, with the limited exception of certain intentional discrimination claims. Moreover, commonality does not require a showing on the merits that a challenged policy itself violates the law: a requirement that would be tantamount to proving facial illegality at the class certification phase. By suggesting otherwise, the Panel's

opinion puts the Ninth Circuit at odds with the Supreme Court's recent statement in *Amgen*, 133 S. Ct. at 1191, that class certification does not require that "questions will be answered, on the merits, in favor of the class." It would also conflict with recent decisions of this Court and the Seventh Circuit, which, appropriately, have not required such "significant proof" to demonstrate commonality. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588-89 (9th Cir. 2012); *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 908-10 (7th Cir. 2012).

1. Rule 23(a)(2) Commonality Does Not Require a Showing of "Significant Proof of a General Policy" of Violations.

In *Dukes*, the Supreme Court set forth the general commonality standard:

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.

131 S. Ct. at 2551 (quotation omitted). Prior to the Panel's opinion, this Court has followed this standard, and has never required "significant proof" of an unlawful "general policy" outside the discrimination context. *Compare Mazza*, 666 F.3d at 588-89 (not requiring such proof to show commonality) *with Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011) (instructing district court to consider such proof to establish commonality in case alleging classwide, pattern-and-practice intentional discrimination claims).

In contrast, the Panel's apparent imposition of a new requirement that Plaintiffs show "significant proof" of a "general policy" of violations misapplies *Dukes* by extending it far outside its narrow Title VII context. By importing a discrimination-specific statement first articulated in *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982), which was developed as one possible approach to allow certification of claims challenging companywide, pattern-and-practice intentional discrimination, the Panel opinion appears to erect a new hurdle to certification in straightforward wage class actions.

Nothing in *Dukes* supports its overbroad application in the Panel opinion. After setting forth the general commonality standard, *Dukes* explained "how the commonality issue must be approached" in the context of allegations that "Wal-Mart engages in a *pattern or practice* of discrimination." 131 S. Ct. at 2552 (emphasis added). *Dukes* applied *Falcon*'s approach to "bridging the conceptual gap" between an individual's discrimination claim and the existence of a class of persons subjected to the same general policy of discrimination in the context of an alleged pattern and practice of discriminatory pay and promotions against *all* of Wal-Mart's 1.5 million female employees. *Dukes*' concern was the lack of "glue" necessary to prove that millions of individual employment decisions made by thousands of different managers were all infected with the same discriminatory animus. *See id.* at 2553. *Dukes* explained that proof of a "general policy of

discrimination" is one way to satisfy commonality in a pattern and practice discrimination case. *Id*.

Certainly, *Dukes* does not stand for the proposition that "significant proof of a general policy of discrimination" is the *only* way commonality can be satisfied in *all* cases, or even all employment cases. *Dukes* merely applied one of *Falcon*'s well-established approaches to the intentional discrimination case before it. *Id*. at 2552-53. Given the multitude of different jobs held by the millions of proposed class members in *Dukes*, the size of Wal-Mart, and the many different regional policies in place, the Supreme Court did not find evidence of a "significant proof of a general policy of discrimination." *Id.* at 2554-57.

By contrast, courts considering *Dukes* in cases other than those alleging class claims of a pattern-and-practice intentional discrimination, including this Court and the Seventh Circuit, have not required "significant proof that an employer operated under a general policy of violation [of state labor laws]." Slip Op. 10. Instead, courts properly determine whether the class claims can "generate common answers." *See, e.g.*, *Mazza*, 666 F.3d at 588-89; *Ross*, 667 F.3d at 908. Here, the common practices found by the district court (*i.e.*, a uniform decision to classify as exempt employees with the same job duties, uniform wage statement, pay, and meal break practices) apply to a class of just over 200 persons, and

classwide proceedings will therefore "generate common answers apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551.

2. Requiring Significant Proof of a General Policy of Labor Law Violations Improperly Converts Class Certification into a Judgment on the Merits.

The Panel's apparent requirement that Plaintiffs show significant proof of a general policy of labor law *violations* also conflicts with this Court's prior decisions and with the Supreme Court decision in *Amgen*. *Amgen* admonished that Rule 23 does not require a showing that common "questions will be answered, on the merits, in favor of the class." 133 S. Ct. at 1191. It also noted that "a district court has no 'authority to inquire into the merits of a suit' . . . unless it is necessary 'to determine the propriety of class certification.'" *Id.* at 1195 (quoting *Dukes*, 131 S. Ct. at 2552 n.6 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974))). As *Dukes* recognized and *Amgen* reiterated, "[m]erits questions may be considered . . . only to the extent [] that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195. The Ninth Circuit has followed this approach consistently, including post-*Dukes*. *See Ellis*, 657 F.3d at 981-82, 983 n.8.

As the Seventh Circuit recently explained, *Dukes* concluded that an inquiry into the merits was needed to decide commonality because in *Dukes*, "1.5 million nationwide claimants were required to prove that thousands of store managers had

the same discriminatory intent in preferring men over women for promotions and pay raises." *Ross*, 667 F.3d at 909.

In contrast, wage and hour class actions do not require any inquiry into the employer's subjective intent. Proof that the employer's policies and practices affect class members uniformly allows their lawfulness to be decided with common evidence that yields a common answer for all class members. *See id.* at 909-10. Examples of wage and hour practices or policies that are not *facially* illegal but that should be adjudicated on a classwide basis because common proof will generate a common liability answer include: treating employees with the same job duties as administratively exempt from overtime pay requirements; making employees work at their desks for the majority of the day and treating them as exempt outside salespersons;[4] requiring employees to remain on the premises and maintain constant communication even when they are on a lunch break;[5] requiring employees to return customer calls or emails during the weekends or outside of work hours; imposing production requirements that cannot be completed in forty hours per week; and using identical wage statements.[6]

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[4] *See In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009).

[5] *See Delagarza v. Tesoro Refining & Mktg. Co.*, No. C–09–5803 EMC, 2011 WL 4017967, at *6, *8 (N.D. Cal. Sept. 8, 2011).

[6] *See Nguyen v. Baxter Healthcare Corp.*, 275 F.R.D. 596, 600 (C.D. Cal. 2011).

Plaintiffs need not prove that such practices are illegal at certification in order to satisfy commonality. A preliminary showing that the employer applies these practices uniformly to the class satisfies commonality, because legality can be determined on a classwide basis. Requiring significant proof that the practices themselves are unlawful could be read to require district courts to improperly decide the merits of the claims in reviewing the propriety of class certification, thereby conflicting with *Amgen* and turning class certification into *de facto* summary judgment as well.

For these reasons, the Panel opinion should be modified to remove the sentence that could be read as though commonality requires "significant proof of a general policy that [violates California labor law]."

B. THE PANEL'S DISCUSSION OF "TRIAL BY FORMULA" REQUIRES REVISION.

NELA joins Appellees in requesting the Panel withdraw Section II.D of the opinion, first, because its out-of-context disapproval of "Trial by Formula" in a wage case is inconsistent with long-standing wage and hour law and practice, and second, because it implies incorrectly that individualized proceedings are required in every wage and hour class action.

1. The Panel Opinion Appears to Restrict Unduly the Use of Statistical and Representative Evidence in Employment Cases by Importing the "Trial by Formula" Statement in *Dukes* Out of Context.

As Appellees' Petition states, rehearing is necessary because the Panel appears to misread *Dukes*, and thus conflicts with the Seventh Circuit opinion in *Ross*, 667 F.3d at 909 & n.7. The Panel opinion describes *Dukes* as though it established a blanket evidentiary rule restricting the use of statistical and representative evidence in all employment cases. As *Ross* observed, however, *Dukes* does not limit the use of statistical evidence in wage cases, except to the extent it reaffirms that such evidence must be rigorous and probative. As explained in Appellees' Petition, *Dukes* rejected "Trial by Formula" in the specific context of the *Teamsters* two-stage method of proof for establishing *pattern-and-practice liability* under Title VII: establishing liability through statistical evidence and anecdotal accounts of discrimination, and then allowing the employer to disprove individual liability and damages in individualized hearings. *Id*.[7]

The Panel's seemingly broad disapproval of "Trial by Formula," taken out of its specific context in *Dukes*, does not make sense in light of the well-established use of statistical, aggregate, and representative evidence in wage cases

[7] Further, as *Ross* notes, *Dukes*' rejection of "Trial by Formula" concerned equitable relief under Rule 23(b)(2), not monetary relief under Rule 23(b)(3). 667 F.3d at 909 n.7. The Panel fails to note this distinction.

to prove liability and damages. Indeed, although the phrase is evocative, for a district court deciding whether to certify a class action, it is manifestly unclear what "Trial by Formula" means outside its narrow context in *Dukes.*

Some "formula" or extrapolation is required in almost every wage case, whether individual or multi-employee, to calculate damages by determining hours worked and wages owed. Courts "have encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts." *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1054 (2012) (Werdegar, J., concurring). Such methods include "[r]epresentative testimony, surveys, and statistical analysis," which are "all . . . available as tools to render manageable determinations of the extent of liability." *Id.* (citing, *inter alia*, *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 749-55 (1st Dist. 2004); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010)).

It seems unlikely that the Panel meant to establish a rule particular to employment cases that courts may not rely on mathematically sound formulae to draw inferences or conclusions about liability and damages, given the widespread acceptance of statistical methods of proof in many areas of law, including, for example, employment, antitrust, and voting rights cases. *See* Federal Judicial Center, *Reference Manual on Scientific Evidence* 213-14 (3d ed. 2011); *see also*

Comcast, Slip Op. 11 (citing same). The recent *Comcast* decision, indeed, presumes statistical analysis will be used to demonstrate predominance at class certification, although the specific analysis offered in that case was held insufficient. *Comcast*, Slip Op. 7-8. A contrary rule would be unworkable, and would interfere with the wide discretion granted to courts in managing class actions and determining the sufficiency of evidence. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010) (noting that "District courts are in the best position to consider the most fair and efficient procedure for conducting any given litigation") (citation and internal quotation omitted).

Thus, in wage cases, evidence relying on a statistically reliable formula is far from the "novel" proposal *Dukes* rejected; rather, its use is routine. *See*, *e.g.*, Pet. 13 n.7 (citing representative evidence cases); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 914-15 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) (approving an "'approximate [ ] award based on reasonable inferences'" when it "forms a satisfactory surrogate for unquantified and unrecorded 'actual' times") (citation omitted); *McLaughlin v. Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (holding that "district courts [may] award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of other employees"); *Bell*, 115 Cal. App. 4th at 746-51 (applying extensive case law considering representative evidence to establish liability and damages).

With its seeming rejection of "Trial by Formula" in a wage case, without further definition of the phrase, the Panel opinion threatens to undermine the policies behind the use of aggregate, statistical, and representative evidence, including ensuring enforcement, compensating injured workers, and promoting judicial efficiency. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), expresses the federal policy that when the fact of a wage and hour violation is certain but the amount of damage is not, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." 328 U.S. at 688 (citation omitted). *Bell* describes the strong California public interest in "vindicating the policy underlying the Industrial Welfare Commission's wage orders without clogging the courts or deterring small claimants with the cost of litigation." 115 Cal. App. 4th at 751. As *Bell* further observes, "the alternative to the award of classwide aggregate damages may be the sort of random and fragmentary enforcement of the overtime laws that will fail to effectively assure compliance on a classwide basis." *Id.* Non-individualized methods of proof not only save time for the courts and the parties, they are also essential where employers' records are inaccurate or non-existent. *See Mt. Clemens*, 328 U.S. at 688; *Hernandez v. Mendoza*, 199 Cal. App. 3d 721, 726-28 (2d Dist. 1988). This case itself

demonstrates the necessity of representative evidence, as the trial court found that the employer had failed to keep records as the law requires.

2. The Panel Opinion Requires Modification to the Extent it Suggests that Individualized Proceedings Are Always Required in Wage and Hour Class Cases.

Finally, NELA joins Appellees' concern that the Panel opinion will generate confusion by referring in Section II.D to "individualized proceedings," "individual affirmative defenses," and "'individualized determinations of each employee's eligibility for monetary relief." Slip Op. 15. Like "Trial by Formula," these phrases in *Dukes* referred to statutorily-mandated individual *Teamsters* hearings, and do not apply here where no such mandate exists. *See* Appellees' Petition at 6. By directing the district court to consider such issues, the Panel opinion further threatens to limit workers' abilities to recover unpaid wages, even when the fact of liability is established.

Many defendant employers now argue that district courts must require every individual worker to testify in damages hearings to recover and that once individual trials are required the court must refuse to certify the class as unmanageable. It seems unlikely the Panel intended such a meaning, as class actions are considered "superior" when individual cases are impracticable to bring. *See*, *e.g.*, *Local Jt. Exec. Bd. of Culinary/Bartender Trust Fund*, 244 F.3d 1152, 1163 (9th Cir. 2001) (finding superiority where individual claims were small);

Avilez v. Pinkerton Gov't Servs., 286 F.R.D. 450, 475 (C.D. Cal. 2012) (finding superiority where individual claims would not be brought due to workers' modest claims, limited resources, and fear of retaliation). Moreover, "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal." *Comcast*, No. 11-864 (S. Ct. Mar. 27, 2013) (Ginsburg & Breyer, J.J., dissenting), Slip Op. 4.

Individual participation is particularly difficult for the most vulnerable, as this Court has recognized for immigrant workers. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1074 (9th Cir. 2004); *Does I thru XXIII*, 214 F.3d at 1071. Empirical sources bear this out. One study of 4,387 workers in low-wage industries, including in Los Angeles, found that 43% of surveyed workers who complained about working conditions or tried to organize a union experienced illegal retaliation. Bernhardt et al., *Broken Laws*, *supra* n.2 at 3. "Another 20 percent of workers reported that they did not make a complaint to their employer during the past 12 months, even though they had experienced a serious problem such as dangerous working conditions, discrimination, or not being paid the minimum wage." *Id.* Of the workers who chose not to make a complaint, half were afraid of losing their jobs, and 10% were afraid their employer would retaliate by reducing their hours or wages. *Id.*

The record in this case reflects the coercive power employers can exercise over their employees and the real threat of retaliation. *Wang v. Chinese Daily News, Inc.*, 236 F.R.D. 485, 489 (C.D. Cal. 2006). Indeed, the district court invalidated opt-outs as a remedy for the employer's coercive, threatening tactics, including an "aggressive anti-union campaign," and "the termination of an employee who supported this suit days after she was deposed." *Id.* at 488-89. To require workers facing retaliation to come forward individually would require them to brave daunting risks simply to recover unpaid wages due.

No reason exists, however, to require each individual to participate here, nor does it in the typical class wage case. *See* Appellees' Petition at 6-7 (citing, *inter alia*, *Ross*, 667 F.3d at 909 n.7). As the individual inquiries discussed in *Dukes* do not apply here, the Panel's reference to them raises unwarranted concerns, which could threaten workers' abilities to recover unpaid wages in this and future cases.

IV. CONCLUSION

In sum, to narrow the overbroad application of *Dukes,* and to protect workers' abilities to proceed in class actions when a claim meets Rule 23's requirements, *Amicus Curiae* NELA respectfully requests that the Court modify Section II.A to delete the sentence discussing "significant proof" and grant Appellees' Petition to delete Section II.D, or in the alternative, grant rehearing *en banc*.

Dated: March 28, 2013

Respectfully submitted,

s/David Borgen

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Ninth Circuit Rule 29-2(c) because this brief contains 4,123 words or less excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: March 28, 2013 Respectfully submitted,

s/David Borgen
David Borgen

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Numbers:
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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United Stated Court of Appeal for the Ninth circuit by using the appellate CM/ECF system on March 28, 2013.

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.

s/David Borgen
David Borgen