No.04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA

Plaintiffs/Appellees

v.

WAL-MART STORES, INC.,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPPOSITION TO PETITION FOR REHEARING EN BANC

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I. Introduction

En banc review is reserved for the rarest of cases in which a genuine intra-circuit conflict demands the attention of the full court. While this case is undeniably noteworthy for its size and for the broad reach of Wal-Mart's discriminatory practices, these factors do not substitute for the showing that Federal Rule of Appellate Procedure 35 demands. Because the panel decision rests squarely on the well-established law of this circuit, *en banc* review should be denied.

First, the panel's decision in *Dukes* is consistent with this circuit's standards for the rigorous analysis of Rule 23 requirements. The district court conducted a searching evaluation of the enormous factual and legal record presented at class certification and determined that each element of Rule 23 is satisfied. The panel, in turn, concluded that the district court properly exercised its discretion in granting in part, and denying in part, certification of the proposed class.

Wal-Mart claims that *Dukes* is at odds with the recent decision in *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), in which the Second Circuit reaffirmed that a district court must rigorously analyze Rule 23 criteria, even if the certification inquiry overlaps with the merits. Wal-Mart's claim of an inter-circuit conflict rests on its assertion

that the *Dukes* panel improperly condoned a refusal by the district court to weigh evidence and resolve factual disputes relevant to Rule 23 issues whenever those issues overlapped with the merits. That assertion is wrong. The district court's 84-page opinion thoroughly examined an extensive factual record including evidence also relevant to the merits issues. The district made factual findings relevant to the Rule 23 inquiry, many about the competing expert testimony, even when the evidence overlapped with the merits.

Second, the panel broke no new legal ground when it held the certification under Rule 23(b)(2) was proper. The district court scrupulously followed the standard established in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). Wal-Mart's contention that the panel reduced the *Molski* analysis to mere dogmatic acceptance of the named plaintiffs' declarations does not withstand scrutiny. While Wal-Mart asserts a pre-existing circuit split on this issue, the cases that it cites involved claims for compensatory damages, a remedy not sought in this case. Thus, even if the full court wished to revisit *Molski*, this case is an inappropriate vehicle to do so.

Third, the panel properly rejected Wal-Mart's theory that it must be permitted to defend the claims of each class member at individual hearings. Wal-Mart can cite neither an intra- nor inter-circuit conflict on this issue

because no court has *ever* accepted this radical notion. The panel correctly declined Wal-Mart's invitation to be the first, as its adoption would have the effect of eliminating Title VII class actions in all but the smallest cases. Seven circuits, including this one, have held that courts may use statistical methods to determine individual remedies in a Title VII class action. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984) and cases cited at n.9, *infra*. There is, moreover, no risk that a punitive damage award would violate Wal-Mart's due process rights because the district court's trial plan imposed significant procedural safeguards, protections that Wal-Mart neither acknowledges nor challenges.

There is, therefore, no basis for *en banc* review. Wal-Mart's female workers, having waited nearly six years, should be allowed their day in court without further delay.

II. Wal-Mart Fails to Satisfy the Exacting Standards for *En Banc* Review

The standard for *en banc* review is exceptionally high. This Court grants rehearing *en banc* only when the panel's opinion creates an *intra*-circuit conflict or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Under circuit rules, an *inter*-circuit conflict will not be sufficient to warrant *en banc* review unless the petitioner can demonstrate that the conflict "substantially affects a rule of national

application in which there is an overriding need for national uniformity." 9th Cir. R. 35-1. Wal-Mart has not met these exacting standards for *en banc* review.

Furthermore, this appeal is from a class certification order and, thus, only subject to reversal for an "abuse of discretion." *Staton v. Boeing*, 327 F.3d 938, 953 (9th Cir. 2003). The panel conducted a thorough review of the heavily fact-based lower court decision. Wal-Mart has received the benefit of a discretionary interlocutory appeal, despite the disruption and lengthy delay it entailed, and no further review from this Court is warranted.

III. The Panel Decision Creates No Intra- Nor Inter-Circuit Conflict Concerning the Rigor with Which a District Court Must Analyze Rule 23 Criteria

Wal-Mart entreats this Court to resolve what it claims is an intra-circuit and inter-circuit conflict concerning the "rigor" with which a district court must determine whether the record satisfies Rule 23. The crux of its argument is that, contrary to decisions in this and other circuits, the panel endorsed the district court's refusal to resolve any factual dispute at class certification that overlapped with the merits. Petition at 2, 5. The argument is without merit.

First, the standard that the panel opinion applied comports with the law in this Circuit. The Ninth Circuit holds that "[a]lthough some inquiry

into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage." *Staton*, 327 F.3d at 954 (quoting *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983)); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). In conducting the Rule 23 inquiry, the district court is nonetheless "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992).[1]

These cases recognize the fundamental difference between the class certification and merits inquiries, a distinction that Wal-Mart attempts to blur. The role of the court at class certification is to determine whether the requirements of Rule 23 have been met, not to adjudicate the underlying merits.[2] The language of Rule 23(a)(2) requires the court to ascertain whether there exist *questions* of law or fact common to the class, not to *answer* those questions. *See Hnot v. Willis Group Holding*, -- F.R.D. --,

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[1] The panel decision is consistent with *Hanon*, which held that the defense of non-reliance is a merits issues that "is not a basis" for denial of class certification, citing *Eisen*. *Hanon*, 976 F.2d at 509.

[2] Such merits determinations at class certification would violate the parties' jury trial rights. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1106-07 (10th Cir. 2001).

2007 WL 749675, *6 (S.D.N.Y. 2007). As the *Dukes* panel correctly noted: "[O]ur job on this appeal is to resolve whether the 'evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence ultimately will be *persuasive*' to the trier of fact." *Dukes v. Wal-Mart, Inc. (Dukes III)*, 474 F.3d 1214, 1229 (9th Cir. 2007) (*quoting In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001)). The panel decision, thus, hewed precisely to the Rule 23 law in this Circuit.

Second, the factual predicate for Wal-Mart's argument is demonstrably false. Neither the district court nor the panel shied away from making factual findings relevant to Rule 23 requirements merely because they overlapped with the merits. The district court reviewed merits evidence and made many factual findings that overlapped with the merits. Indeed, the panel cited the lower court's findings:

> Plaintiffs have exceeded the permissive and minimal burden of establishing commonality by providing: (1) significant evidence of company-wide corporate practices and policies, which include (a) excessive subjectivity in personnel decisions, (b) gender stereotyping, and (c) maintenance of a strong corporate culture; (2) statistical evidence of gender disparities caused by discrimination; and (3) anecdotal evidence of gender bias. Together, this evidence raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner.

Dukes III, 474 F.3d at 1225 (*quoting Dukes v. Wal-Mart Stores, Inc. (Dukes I)*, 222 F.R.D. 137, 166 (N.D. Cal. 2004)). These findings indisputably overlap with the ultimate merits question—whether Wal-Mart engaged in a pattern or practice of discrimination. Wal-Mart's petition fails to cite these critical factual findings to this Court.

Moreover, consideration of overlapping certification and merits issues extended to the expert evidence. The district court considered *Daubert* motions filed by both sides and thoroughly evaluated the statistical evidence in eighteen pages of findings on those motions. *See Dukes v. Wal-Mart, Inc. (Dukes II)*, 222 F.R.D. 189 (N.D. Cal. 2004). In the class certification order, the district court painstakingly parsed the expert analyses from both sides, before concluding that commonality had been established. *Dukes I*, 222 F.R.D. at 149-66.

To obtain reversal of the district court's certification order, Wal-Mart must show that the court *actually* failed to make a factual finding on an issue necessary to the Rule 23 determination, not merely some theoretical dispute about the applicable standard. *See Hnot*, 2007 WL 749675 at *4-6. The *only* example Wal-Mart cites involves the extent to which statistical analyses should be aggregated. Plaintiffs' expert offered regression analyses to show a common pattern of pay disparities across the 41 regions, while Wal-Mart

relied on over 7500 separate sub-store regressions. The panel properly rejected Wal-Mart's assertion that, as a matter of law, its disaggregated approach should be adopted. *Paige v. State of California*, 291 F.3d 1141, 1149 (9th Cir. 2002). Instead, the proper level of aggregation "depends largely on the similarity of the employment practices and the interchange of employees at the various facilities"—a factual question. *Dukes III*, 474 F.3d at 1228.[3]

Both the district court and the panel carefully analyzed the factual foundation for each expert's approach to aggregation. As the panel noted, plaintiffs' analysis was grounded in numerous Wal-Mart policies about which the district court had already made factual findings.[4] In contrast, the factual rationale for Wal-Mart's disaggregated sub-store analyses was a store manager survey that was stricken from the record. *Id.* at 1229-30; *Dukes II*,

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[3] Wal-Mart wrongly implies that aggregated statistics may not be used to challenge the delegation of subjective decision-making authority to local decision-makers. Petition at 6. *See, e.g.*, *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 14-17 (D.D.C. 2004); *Butler v. Home Depot, Inc.*, Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754 (N.D. Cal. Aug. 29, 1997).

[4] The panel cited: "(1) the effect of district, regional, and company-wide control over Wal-Mart's uniform compensation policies and procedures; (2) the dissemination of Wal-Mart's uniform compensation policies and procedures resulting from the frequent movement of store managers; and (3) Wal-Mart's strong corporate culture." *Dukes III*, 474 F.3d at 1228-29.

222 F.R.D. at 198 (disallowing use of discredited survey to attack plaintiffs' expert or to support disaggregated analysis).

Wal-Mart asserts that the recent decision in *In re Initial Public Offering Securities Litigation (IPO)*, 471 F.3d 24 (2d Cir. 2007), creates an inter-circuit split with *Dukes*. In *IPO*, the district court had required the plaintiffs to make only "some showing" of compliance with Rule 23, and credited plaintiffs' expert testimony so long as it was not "fatally flawed." The Second Circuit rejected this analysis:

> [O]ur conclusions necessarily preclude the use of a "some showing" standard, and to whatever extent *Caridad* [*v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir.1999)], might have implied such a standard for a Rule 23 requirement, that implication is disavowed. Second, we also disavow the suggestion in *Visa Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed.

Id. at 42. Neither the district court nor the panel decision in *Dukes* endorsed or applied the lax "some showing" standard, nor did either permit expert testimony to satisfy Rule 23 as long as it was not "fatally flawed." Thus, *IPO* creates no conflict with *Dukes.*

Wal-Mart's inter-circuit conflict claim rests instead on the panel's citation to general language from the *VisaCheck* and *Caridad* decisions, in which courts were counseled to "avoid the battle of the experts" at class

certification. *IPO*, however, did nothing more than clarify that courts could examine expert analyses as necessary to determine commonality.[5] It did not, as Wal-Mart argues, mandate that the district court select which expert's analyses is more persuasive. *See Hnot*, 2007 WL 749675 at *6 ("*IPO* does not stand for the proposition that the Court should, or is even authorized to, determine which of the parties' expert reports is more persuasive."). In short, while a district court must address the certification requirements, it "should not assess any aspect of the merits unrelated to a Rule 23 requirement." *IPO*, 471 F.3d at 41.

IV. The District Court and the Panel Correctly Applied this Circuit's Standard for Rule 23(b)(2) Certification

This Court's decision in *Molski v. Gleich* established the standards for Rule 23(b)(2) certification for cases in which plaintiffs seek both injunctive and monetary relief on behalf of the putative class. 318 F.3d 937 (9th Cir. 2003). *Molski* requires that, in determining whether injunctive relief predominates over monetary relief, the district court examine the "specific facts and circumstances of each case" and "focus[] on the language of Rule

[5] *IPO* cited favorably to the decision in *Krueger v. N.Y. Tel. Co*., 163 F.R.D. 433, 440 (S.D.N.Y. 1995), in which the court properly noted that "the experts' disagreement *on the merits*—whether discriminatory impact could be shown—was not a valid basis for denying class certification." *IPO*, 471 F.3d at 35 (emphasis added).

23(b)(2) and the intent of the plaintiffs in bringing the suit." *Id.* at 950. The opinions in *Dukes* follow *Molski* to the letter.

Wal-Mart devotes *only one sentence* of its petition to explaining its contention that *Dukes* creates an intra-circuit split with *Molski*, even though this showing is a prerequisite for *en banc* review. Petition at 12. It asserts that *Dukes* adopted a test that "would make *every* class case certifiable under Rule 23(b)(2) if the plaintiff is willing to sign an affidavit attesting to the importance of injunctive relief." *Id.* Its cynical reading of *Dukes* does not satisfy Federal Rule of Appellate Procedure 35.

Neither the district court nor the panel relied exclusively or uncritically on the declarations of the plaintiffs about their motivation in bringing the case.[6] The district court's Rule 23(b)(2) analysis carefully evaluated the specific nature of the injunctive relief sought and what it would achieve for the class:

> Plaintiffs' claims for injunctive and declaratory relief, if successful, would achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide that would benefit not only current class members, but all future female employees as well.

[6] While Wal-Mart faults the district court for accepting the statements of the plaintiffs, it offered *no* evidence below to contradict or question the sincerity of plaintiffs' explicitly declared goals. *See Dukes III*, 474 F.3d at 1235 n.12.

Dukes I, 222 F.R.D. at 171. In addition, the district court considered the types and amount of monetary relief sought. Plaintiffs' decision to forego compensatory damages but seek punitive damages further supported a finding that injunctive relief was the primary goal of the litigation.[7] *Id.* Contrary to Wal-Mart's assertion, the district court specifically considered the impact of punitive damages on class cohesiveness and homogeneity. *Id.* at 171-72.

Like the district court, the panel carefully considered the range of factors articulated by *Molski* and the language of Rule 23 in determining whether 23 (b)(2) was satisfied. *Dukes III*, 474 F.3d at 1234-37.[8] The panel thoroughly reviewed Wal-Mart's other arguments about the claims seeking injunctive and monetary relief. There is, thus, no basis for Wal-Mart's intra-circuit conflict claim.

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[7] The district court and the panel correctly rejected Wal-Mart's assertion that the potential amount of a punitive damage award makes monetary relief predominate, which would effectively preclude class treatment for the largest or most pernicious violators of Title VII. *Dukes III*, 474 F.3d at 1235-36; *Dukes I*, 222 F.R.D. at 171.

[8] Wal-Mart's claim that *Dukes* departs from the Second Circuit's standard in *Robinson v. Metro-North* is inaccurate. Petition at 10. The panel considered the plaintiffs' subjective intent and evaluated those expressions of intent against an objective standard, concluding that the plaintiffs' expressed intent was grounded in "logic." *Dukes III*, 474 F.3d at 1235.

Wal-Mart instead devotes the lion's share of its argument to the contention that the Rule 23(b)(2) analysis used in this circuit is different from that used in circuits that have adopted the *Allison* test. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). An inter-circuit split alone does not satisfy Rule 35. *See* Section II. Nor did *Molski create* the circuit split, as the split began with conflicting decisions from the Second and Fifth Circuits. The *Molski* court carefully analyzed and correctly rejected *Allison*. "[A]doption of a bright-line rule . . . would nullify the discretion vested in the district courts through Rule 23 . . . [and] holds troubling implications for the viability of future civil rights class actions." *Molski*, 318 F.3d at 950; *see Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 163-64 (2d Cir. 2001); *Allison*, 151 F.3d at 430-31 (Dennis, J., dissenting).

Regardless, *Dukes* is not an appropriate case with which to revisit *Molski* because, unlike *Allison* and *Molski*, it does not include a claim for compensatory damages. Because compensatory damages serve a different purpose (compensating class members) from punitive damages (deterring the defendant), the analysis of Rule 23(b)(2) predominance differs in cases addressing one or the other alone.

V. Wal-Mart's Theory that Individualized Hearings Are Mandatory at the Remedies Stage Presents Neither an Intra- nor Inter-Circuit Conflict

Wal-Mart contends that Title VII and due process mandate that the district court conduct individual remedies hearings for each class member. There is no intra- or inter-circuit conflict on this point, as there is no appellate authority that has ever accepted this radical theory.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court articulated the standards for bifurcated litigation of Title VII "pattern or practice" cases. *Teamsters* noted that, after a liability determination, "additional proceedings" will "usually" be conducted. *Id.* at 361. The district court and the panel correctly rejected Wal-Mart's theory that this language must be read to *require* individualized hearings in *every* case. *Dukes III*, 474 F.3d at 1238-39; *Dukes I*, 222 F.R.D. at 174. Wal-Mart's interpretation is squarely at odds with language in *Teamsters* that vested district courts with broad discretion to "fashion such relief as the particular circumstances of a case may require to effect restitution." *Teamsters*, 431 U.S. at 364 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

The Ninth Circuit and six other circuits have concluded that individual remedies hearings may be inappropriate when the employer's practices make

it "difficult to determine precisely which of the claimants would have been [in a more favorable position] absent discrimination, but it is clear that many should have." *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984).[9] Where the employer's system has been infected with subjective decision-making and the employer lacks records to justify employment decisions, as has occurred here, courts have concluded that allocating relief based upon statistical analyses is more appropriate than a "quagmire of hypothetical judgments." *Id.* at 1444 (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1975)).[10]

Wal-Mart's claim that sections of Title VII added in 1991 to *expand* the remedies available to victims of discrimination, in fact, overruled *sub silencio 25* years of Title VII class action jurisprudence is equally far-fetched. Nothing in the 1991 Civil Rights Act indicates that the new "mixed motive" provision or the "person aggrieved" punitive damages language was

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[9] *See Shipes v. Trinity Indus*., 987 F.2d 311, 318 (5th Cir. 1993); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274 (10th Cir. 1988); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506, 520 (8th Cir. 1980); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *Pettway v. Am. Cast Iron Pipe Co. (Pettway V)*, 681 F.2d 1259, 1266 (11th Cir. 1982); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984).

[10] The district court tailored its certification order to the unique facts presented by the evidence and, thus, denied certification for promotion monetary claims that could not be proven by reference to objective evidence. *Dukes III*, 474 F.3d at 1243-44.

intended to limit the use of class actions or require that remedies be determined on an individual basis. *Dukes III*, 474 F.3d at 1241; *cf. Califano v. Yamasaki*, 442 U.S. 682, 698-701 (1979). Wal-Mart cites no authority, either within or outside this Circuit, to support its request for *en banc* review on this basis.

Finally, Wal-Mart advances the novel proposition that an award of class punitive damages, without individualized hearings, would violate due process because it would punish legal conduct and award damages to non-victims. The Supreme Court cases upon which it relies involved punitive damages awarded to individuals based on defendants' conduct toward different victims not before the court and, in some cases, subject to different legal standards. *See Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Here, plaintiffs seek an award to the class based on Wal-Mart's conduct toward the class, whom Title VII uniformly protects. This Court has approved the award of punitive damages to a class. *See Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

Moreover, Wal-Mart ignores the most critical elements of the due process analysis endorsed by the district court and the panel. First, the

district court stated that it would limit any award of punitive damages to "evidence of conduct that was directed toward the class." *Dukes I*, 222 F.R.D. at 172; *see also Dukes III*, 474 F.3d at 1242. Second, only "those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant's conduct" will be eligible for a share of punitive damages. *Dukes I*, 222 F.R.D. at 172. Third, the allocation of punitive damages to individual class members will be "in reasonable proportion to individual lost pay awards." *Id.*[11] Finally, the district court ordered that notice and an opportunity to opt out will be provided to class members, should any of them wish to pursue a claim of punitive damages on their own. *Id.* at 173.

Not only do these safeguards fully protect the parties' rights to due process, they serve to highlight why it is inappropriate to address this issue at this juncture.[12] Without the benefit of a full trial record, this Court lacks the requisite information to evaluate whether a punitive damages award in this case—if there ever is such an award—comports with due process.

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[11] These safeguards directly address and satisfy the concerns raised in this Court's decision in *Beck v. Boeing*, 60 F. App'x 38 (9th Cir. 2003).

[12] Importantly, the Supreme Court opinions addressing due process and punitive damages have all followed trial and the *actual*, rather than *hypothetical*, award of a specific amount of damages. If plaintiffs prevail and are awarded punitive damages, Wal-Mart will have the opportunity to challenge such an award on a full record.

VI. Conclusion

Wal-Mart is not entitled to *en banc* review by virtue of its size, or its net worth, or the historic nature of this case. Like all litigants, Wal-Mart must meet this Court's exacting standards for *en banc* review. It has failed to identify a genuine intra-circuit conflict or any issue of exceptional national importance. Accordingly, its petition should be denied.

Respectfully submitted.

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March 15, 2007

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 opposition to petition for rehearing en banc is proportionally spaced, has a typeface of 14 points and contains 4,001 words.

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