No. 15-56460

In the United States Court of Appeals for the Ninth Circuit

MARLYN SALI and DEBORAH SPRIGGS,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

UHS OF DELAWARE, INC., and UHS-CORONA, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

BRIAN D. CHASE
JERUSALEM F. BELIGAN
BISNAR | CHASE LLP
1301 Dove Street, Suite 120
Newport Beach, CA 92660
(949) 752-2999

DEEPAK GUPTA
RACHEL BLOOMEKATZ
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Plaintiffs-Appellants

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INTRODUCTION

This rehearing petition centers on a dispute over the declaration of a paralegal, Javier Ruiz, that the plaintiffs submitted to support class certification in this wage-and-hour case. The district court ruled that Ruiz's declaration would be inadmissible at trial and, on that basis, declined to consider it for the purpose for which it was introduced: to satisfy the typicality requirement of Federal Rule of Civil Procedure 23(a). On appeal, a panel of this Court held that, regardless of its admissibility, Ruiz's testimony should have been considered.

But nothing actually hinges on Ruiz's testimony. There is no dispute about any relevant fact in his declaration. No one disputes that the named plaintiff, Marilyn Sali, worked for the defendants; no one disputes the authenticity of her time and payroll records; no one disputes that she was not paid for all the hours she spent at work. More importantly, the relevant parts of Ruiz's testimony are already in the record in admissible form. Sali herself submitted a declaration nearly identical to that of Ruiz, attesting to the same facts and mustering the same evidence. Although the district court initially ignored her declaration because it accompanied a reply brief, the panel correctly rejected that bit of "evidentiary formalism"—which the rehearing petition does not even try to resurrect. App. 17a. Ultimately, then, the issue presented by the petition has no practical effect on the disposition of this case. This Court need not devote its en banc resources to refereeing an academic quarrel over a single piece of cumulative evidence.

Nor is the legal issue itself worthy of this Court's time. The panel's holding produces no "irreconcilable conflict[s]" with the decisions of this or other circuits, as

the petition claims. Pet. 10. The panel held that, in evaluating a motion for class certification, a "court's consideration should not be limited to only admissible evidence." App. 15a. Not a single court, in this or other circuits, disagrees. To the extent that the petition identifies variance among the circuits, it concerns what evidentiary standards apply to testimony proffered by *experts*. But the dispute here is about the testimony of a *lay* witness and his Excel spreadsheet—regarding undisputed facts already before the Court in admissible form. This Court should thus decline to take up a legal issue that isn't even presented by the facts of this case.

Finally, the petition contends—for the first time in this litigation—that the panel erred in applying the very standard that the petitioners themselves urged for measuring "hour[s] worked" in wage cases under California law. The argument is waived. Under this Court's precedent, a party may not "study and reargue his case anew" in a rehearing petition. *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962). Nor are there any "extraordinary circumstances" that would warrant overlooking the waiver, *United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015), particularly not for a seldom-litigated state-law issue best left to California's state courts.

STATEMENT

1. This case. Marlyn Sali worked as a registered nurse for UHS of Delaware, Inc. and UHS-Corona, Inc. (collectively referred to here as UHS). App. 5a. She brought a putative class-action lawsuit against UHS on behalf of herself and other nurses who worked for UHS, alleging numerous violations of state wage-and-hour law. *Id.* Among other things, Sali challenged UHS's policy of only compensating its nurses based on "rounded time." App. 11a. UHS rounds the time punches of its

employees to the nearest quarter hour. *Id.* For example, if a nurse punches in at 6:53 a.m., she is only paid for the time beginning at 7:00am. *Id.* Sali alleges that, overall, this policy results in the systematic underpayment of wages. *Id.*

The effects of UHS's "rounding policy" are illustrated by time and payroll sheets, which simultaneously record an employee's punched and rounded times. *Id.* A paralegal, Javier Ruiz, transferred the timestamps from Sali's records into an Excel spreadsheet. ER 978–1053. Ruiz then calculated the difference between the punched and rounded times for each clock-in or clock-out reported. *Id.* Each row of the spreadsheet corresponds to a day of work and displays Sali's clocked-in or clocked-out times, the corresponding rounded times, and the differences between the two. *Id.* After adding up all the time differentials, Ruiz concluded that UHS's rounding policy resulted in a loss of eight minutes per shift on average. ER 952–53.

2. The Ruiz and Sali declarations. In support of their motion for class certification, the plaintiffs submitted a declaration from Ruiz with the spreadsheet attached. App. 11a. The declaration described Ruiz's process in preparing the spreadsheet and included the results of his calculations. ER 951–53. UHS objected to the declaration's admissibility. App. 11a.

On reply, Sali submitted her own declaration. App. 11a–12a. Based on her own personal knowledge, she attested to the same conclusion as Ruiz: she had lost approximately eight minutes of clocked-in time per shift because of UHS's rounding policy. ER 320. Sali also submitted a copy of the same Excel spreadsheet (attached to the declaration of her co-plaintiff, Deborah Spriggs), and confirmed the authenticity of the information therein. ER 243–58, 396–98.

3. The district court's decision. The district court denied class certification. App. 8a. Among other things, the court held that Sali could not demonstrate that her injuries were typical of the class because she had "failed to submit admissible evidence of [her] injuries." *Id.* The court also ruled Ruiz's testimony inadmissible. App. 12a. First, the court reasoned that Ruiz lacked the "personal knowledge" necessary to authenticate the records reflected in his Excel spreadsheet. *Id.* Second, "as a lay witness," Ruiz was not permitted to offer opinion testimony, because, in the court's opinion, Ruiz's analysis required "special qualifications in computer manipulation and analysis of time and pay data" that he did not possess. ER 17.

As for Sali's subsequent declaration, the court acknowledged that it "attest[s] to the truth and accuracy of the conclusions and exhibits contained in the Ruiz Declaration." *Id.* Yet the court "decline[d] to consider this new evidence submitted on reply." *Id.*

The district court also held that Sali had failed to meet Rule 23(b)(3)'s predominance requirement for the proposed "rounding time" subclass. App. 10a. The court held that determining "hours actually worked" would require individualized inquiries into whether a nurse was "working and under the control of their employer" when punched-in before or after a scheduled shift. ER 7.

4. The panel opinion. On appeal, the panel reversed the district court's typicality determination. App. 10a. The panel specifically rebuked the district court's decision to ignore Sali's declaration simply because it was submitted with a reply brief, emphasizing that it "should have considered [her declaration] in determining

whether the typicality prerequisite was satisfied." App. 17a–18a. The panel also directed the district court to consider Ruiz's testimony. *Id.*

The panel rejected a categorical rule that district courts considering class certification must "be limited to only admissible evidence." App. 15a. Although the panel found that the court had never "squarely addressed" the issue, it aligned itself with *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011), where the Court held that "a district court [could not] limit[] its analysis of whether class plaintiffs satisfied a Rule 23 requirement to a determination of whether . . . evidence on that point was admissible." App. 14a (quotation marks omitted).

The panel lamented the district court's "formalistic evidentiary" approach, noting that no one disputed "the authenticity of the payroll data underlying Ruiz's calculations," nor "the accuracy of his calculations." App. 17a. Ruiz's testimony, the panel continued, "could have been presented in an admissible form at trial." *Id.* And by ignoring Sali's declaration, the district court "unnecessarily excluded proof that tended to support class certification." *Id.*

The panel also held that Sali's proposed "rounded time" subclass satisfied Rule 23(b)(3)'s predominance requirement. App. 22a. In reaching this holding, the panel applied the standard for "hours worked" under California law presented by both parties: "the time during which the employee is subject to the control of an employer, [including] all the time the employee is suffered or permitted to work, whether or not required to do so." App. 24a (internal quotation omitted).

ARGUMENT

I. UHS's first issue is non-dispositive and implicates no conflicts with the decisions of this or other circuits.

A. Because cumulative, admissible evidence establishes Sali's typicality, UHS's argument regarding admissible evidence at class certification is unnecessary to the resolution of the case.

UHS's petition centers on its contention that, in evaluating Rule 23 requirements, a district court is obliged to categorically exclude evidence—regardless of its content—if it is not presented in a form that would be admissible at trial. But this issue is not dispositive of the appeal, obviating any need for en banc review. Because other admissible evidence was presented in the district court that suffices to prove typicality, UHS raises a purely academic debate.

Nothing relevant in Ruiz's testimony is not otherwise contained in Sali's own declaration. Both declarations testify that, as a result of UHS's rounding-time policy, Sali lost approximately eight minutes of clocked-in time per shift. Both declarations attach an Excel spreadsheet that compares Sali's punched and rounded times. In short, Sali's declaration renders Ruiz's testimony superfluous. And whereas the district court ruled Ruiz's testimony inadmissible, Sali's declaration presents no evidentiary problems. Sali's motion can thus be evaluated on admissible testimony alone.

The district court acknowledged that Sali's declaration "attests to the truth and accuracy of the conclusions and exhibits contained in the Ruiz declaration." ER 17. But the court nevertheless ignored Sali's testimony because it was submitted with a reply brief. App. 17a. The panel rightly rejected this "narrow" and "formalistic"

approach, concluding that Sali's declaration "should have [been] considered." App. 17a–18a. UHS does not ask this Court to assess the propriety of excluding indisputably admissible evidence submitted with a reply brief.

Instead, UHS doubles down on the district court's "formalistic evidentiary objections" to Ruiz's testimony. App. 17a. UHS seeks to exclude Ruiz's declaration despite there being no underlying facts in dispute. No one contests the authenticity of the payroll and timesheet records on which Ruiz based his testimony, nor the accuracy of the arithmetic he used. No one even disputes Ruiz's takeaway conclusion: that UHS's rounding policy undercounted the time Sali spent clocked-in at work. UHS complains only that Ruiz (and not Sali) testified to these facts—and with an Excel spreadsheet.

Regardless of Ruiz's testimony, the uncontested facts in Sali's declaration suffice to establish that Sali meets Rule 23(a)'s typicality requirement, a low hurdle. Typicality seeks to ensure that a party's claims are "reasonably coextensive with those of absent class members." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016). Sali, "like the other class members, worked for [UHS] during the class period and was subjected to the same wage-and-hour policies and procedures at issue in this litigation." *Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 617 (N.D. Cal. 2014). She easily satisfies this "permissive standard[]." *Torres*, 835 F.3d at 1141. Indeed, the district court suggested as much, calling Sali's failure to submit her declaration earlier "an error with significant consequences for the disposition of the motion." ER 22.

This controversy thus boils down to whether a district court properly disregarded the contents of an indisputably admissible declaration submitted with a reply

brief—a question UHS, unsurprisingly, does not identify as enbancworthy. Convening an en banc panel to address UHS's argument that Ruiz's testimony had to be authenticated and admissible would therefore make no difference in this case.

B. The panel's holding on this non-dispositive issue is consistent with this Court's precedent.

Even if this case were an appropriate vehicle, there is no intracircuit conflict meriting en banc review. No Ninth Circuit case holds that a court must categorically limit certification inquiries to admissible evidence.

UHS mischaracterizes the holding in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), claiming that it "cannot be reconciled" with the panel's decision. Pet. 1. But *Ellis*, like the panel here, held that a district court should evaluate the "persuasiveness of the evidence presented," not whether the evidence was "merely admissible," during Rule 23 analysis. 657 F.3d at 982; *cf.* App. 18a. The Court there found that "to the extent the district court limited its analysis of whether there was commonality to a determination of whether Plaintiffs' evidence on that point was admissible, it did so in error." 657 F.3d at 982. Far from conflicting with the panel's decision here, *Ellis* provides crucial support for it, clarifying that evaluation of Rule 23 requirements is distinct from determinations regarding admissibility. App. 14a.

The two-step "framework" that UHS invents for assessing admissibility at the class-certification stage has no basis in the *Ellis* opinion. Pet. 9. To be sure, *Ellis* did speak approvingly of the district court's "correct[]" application of the "evidentiary standard set forth in *Daubert v. Merrell Dow*, 509 U.S. 579, 597 (1993)" to the expert testimony at issue in that case, which involved a "battle of the experts." 657 F.3d at

982. But UHS makes too much of this passing remark. Indeed, *Ellis* explicitly chided the district court for "confus[ing] the *Daubert* standard" governing the admissibility of expert testimony with the "rigorous analysis standard" governing Rule 23 requirements—a mistake UHS repeats. *Id.* Like the panel here, *Ellis* took pains to ensure that inquiries into admissibility would not foreclose thorough Rule 23 analysis. *Id.*; *cf.* App. 14a–15a.

C. No other circuit disagrees with the panel's holding.

UHS next fabricates an inter-circuit "split" that proves just as illusory. Pet. 12. The panel held that, in evaluating a motion for class certification, a "court's consideration should not be limited to only admissible evidence." App. 15a. UHS claims that "[o]ther circuits . . . have rejected that rule." Pet. 12. This is false. Not a single circuit follows a contrary holding.

UHS builds its alleged split on a handful of cases and two unpublished opinions that address a completely different question: whether testimony proffered by experts needs to withstand a full *Daubert* analysis at the certification stage. *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010) (holding that a full *Daubert* analysis is required); *Messen v. Northshore Univ. HealthSystem*, 669 F.3d. 802, 813 (7th Cir. 2012) (same); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (same); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (same); *see also In re Carpenter Co.*, No. 14-0302, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014) (declining to overturn a district court's decision to conduct a *Daubert* analysis before considering expert testimony at the certification stage).

But these opinions do not, as UHS claims, "require[] rigorous scrutiny of the admissibility of *lay* . . . evidence" during Rule 23 analysis. Pet. 12 (emphasis added). They solely concern testimony proffered by *experts*. The non-expert, "lay witness" testimony at issue in this case does not implicate these decisions. ER 17. In fact, not one of them remotely faces the issue that UHS asks this Court to review.

The remaining two decisions UHS cites also do not address whether, at the certification stage, courts are required to categorically exclude evidence not presented in a form that would be admissible at trial. In *Unger v. Amedisys Inc.*, the Fifth Circuit addressed the degree of proof required to establish an "efficient market" in a securities-fraud action. 401 F.3d 316, 324 (5th Cir. 2005). *Unger* did state that "class certification based on the fraud on the market theory. . . [must be based] on admissible evidence." *Id.* at 325. But it never addressed standards of proof for class certification writ large. Insofar as *Unger* discussed admissibility at any length, it was in a footnote and related to expert testimony: "Although courts are not to insist upon a 'battle of the experts' at the certification stage . . . [i]n many cases, it makes sense to consider the admissibility of the testimony of an expert proffered to establish one of the Rule 23 elements." *Id.* at 323 n.6 (internal quotation marks and citations omitted).

Next, UHS seizes on the bare use of the term "admitted" in a Second Circuit opinion to position it in conflict with the panel's decision. Pet. 14. In *In re IPO Securities Litigation,* the court heightened the evidentiary standards for expert testimony during Rule 23 analysis—but only to overturn the permissive, "not fatally flawed" standard previously applied. 471 F.3d 24, 41 (2d Cir. 2006). The opinion never once hinted that

a court's consideration at the certification stage must be limited to only admissible evidence. A subsequent decision reveals that, even with regard to expert testimony, the Second Circuit has taken no position on admissibility requirements during Rule 23 analysis. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129–30 (2d Cir. 2013) (declining to overturn a district court's decision to rely on expert testimony at the certification stage despite not conducting a full *Daubert* hearing).

To be sure, the panel here did say that "[o]ther circuits have reached varying conclusions on the extent to which admissible evidence is required at the class certification stage," even characterizing *Unger* as having "directly held that admissible evidence is required." App. 15a. But these cases are best understood as requiring admissibility in only a narrow set of circumstances: in the Fifth Circuit, with regard to "efficient market" determinations; and in the Third and Seventh Circuits, with regard to testimony proffered by experts. *Am. Honda Motor Co.*, 600 F.3d at 814 (motorcycle engineering expert in a products liability case); *Messen*, 669 F.3d. at 810 (economist expert in an antitrust case); *In re Blood Reagents Antitrust Litig.*, 783 F.3d at 186 (industry and economist experts in an antitrust case). These circumstances are a far cry from this routine wage-and-hour case, which involves the simple sums of a paralegal and an Excel spreadsheet otherwise available in admissible form.

D. The panel correctly concluded that the district court may consider the uncontested facts in Ruiz's declaration in making its typicality determination.

On the merits, the panel's opinion was correct: It held that the district court erred when it refused to consider the uncontested facts established by Ruiz's decla-

ration solely because they were not presented in a form that would be admissible at trial. Judges are competent to consider such facts in conducting a rigorous Rule 23 analysis—especially where, as here, there are no factual disputes.

UHS would have district courts shield themselves from probative testimony on the basis of "formalistic evidentiary objections" alone. App. 17a. But particularly where facts go undisputed, it makes little sense to have an evidentiary "gatekeeper [who] keep[s] the gate only for himself." *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005). Rules governing the admissibility of evidence at trial are "intended primarily for the purpose of withdrawing [evidence from] the jury . . . and not for the trial judge." *United States v. Norman T.*, 129 F.3d 1099, 1107 (10th Cir. 1997). For this reason, bench trials permit relaxed evidentiary standards. *See Brown*, 415 F.3d at 1270; *Schultz v. Butcher*, 24 F.3d 626, 631 (4th Cir. 1994); *see also EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994) ("[I]n a bench trial, the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial.").

The preliminary decision to certify a class is even less suited to the mechanical application of evidentiary rules designed for juries. The job of a court deciding a class-certification motion is merely to determine the method best suited to a fair and efficient adjudication of the case, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013), not to "turn class certification into a mini-trial," *Ellis*, 657 F.3d at 983 n.8. Strict adherence to rules governing admissibility at this early stage "inhibit[s] determination of the best manner to conduct [an] action." App. 14a. In this case,

"evidentiary formalism" led the district court to "unnecessarily exclude[] proof that tended to support" Sali's typicality. App. 17a.

A recent class action in this circuit illustrates how the categorical exclusion of inadmissible evidence might needlessly constrain Rule 23 analysis. *See Brooks v. Darling Int'l, Inc.*, No. 1:14–cv–01128–DAD–EPG, 2017 WL 1198542 (E.D. Cal. Mar. 31, 2017). In support of their class-certification motion, the plaintiffs there submitted surveys from seventy-two residents that testified to the presence of noxious odors surrounding an industrial plant. *Id.* at *2. Class plaintiffs often resort to surveys or questionnaires like these in order to gauge the extent to which injuries are shared among putative class members. *See id.* at *3 (collecting cases). In *Brooks,* each respondent signed and dated his or her completed survey under a statement that read: "I swear that the above answers are true and accurate to the best of my knowledge." *Id.* But because the surveys hadn't been notarized or signed under penalty of perjury, the defendants claimed that they were inadmissible and could not be considered. *Id.*

The *Brooks* plaintiffs clearly presented "material sufficient to form a reasonable judgment on [Rule 23] requirements." *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Much like Ruiz's testimony in this case, the evidence could have easily been "presented in admissible form at trial." App. 17a. Despite the lack of notarization or attestation, the judge in *Brooks* was competent to find sufficient "indicia of reliability" to weigh the surveys in his Rule 23 analysis. 2017 WL 1198542 at *3. The contrary rule urged by UHS—a categorical rule obliging courts to exclude all inadmissible evidence at this stage, regardless of its contents—would undermine "rigorous" inquiry into whether plaintiffs meet Rule 23 requirements. *Wal-Mart Stores Inc. v.*

Dukes, 564 U.S. 338, 351 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)).

II. UHS's second issue, concerning a narrow and non-recurring question of state law, is waived.

UHS next asks this Court to go en banc to review a narrow question of state law: the standard for "hours worked" under a wage order issued by the California Industrial Welfare Commission, as applied to determining whether the pre- and post-shift clocked-in time of registered nurses must be compensated by their employers. But as UHS acknowledges, it raises this issue "for the first time in connection with this petition." Pet. 16. This Court "consider[s] any such argument waived." *Talk of the Town v. Dep't of Fin. and Bus. Servs.*, 343 F.3d. 1063, 1070 n.14 (9th Cir. 2003), *amended by* 353 F.3d 650 (Dec. 22, 2003). A petition for rehearing "is not a vehicle for a party to study and reargue his case anew." *United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015).

Although this Court has occasionally found "extraordinary circumstances" justifying an exception to this rule, here there is nothing of the sort. *Id.* First, waiver notwithstanding, this narrow state-law issue does not warrant rehearing. This issue arises infrequently in litigation. Indeed, there is not a single published opinion, in state or federal court, that applies the standard for "hours worked" under California's wage orders to calculating nurses' compensable time. And the ultimate authority for deciding this interpretive question resides with California's highest court. *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1154 (9th Cir. 2003). The most this

Court could do on rehearing would be "predict how the [the California Supreme Court] would decide the issue." *Id.*

Second, the panel's state-law ruling on this issue—however sound—does not establish precedent for future courts because the issue was not contested here. "Judicial assumptions concerning . . . issues that are not contested are not holdings" that bind future courts. *FDIC v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992) (quoting *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990)). From the outset of this case, UHS has argued that time spent under the "control" of an employer counts as "hours worked" under California law. Appellee Br. 21 n.8. Likewise, in briefing before the panel, UHS stated that, "[u]nder California law, employees must be compensated for all time during which an employee is subject to the control of an employer." Appellee Br. 20. Sali agreed, and this is the standard adopted by the panel. App. 24a. Hence, there is no reason to fear "irreconcilable conflicts" between the decisions of this and other courts. Pet. 18. Future courts will be free to address the issue on the basis of adversarial presentation.

* * *

At bottom, UHS's petition seeks (1) the exclusion of evidence that establishes undisputed facts and that is unnecessary to the disposition of this case and (2) review of a waived and seldom-litigated question of state wage law that can only be definitively resolved by the California Supreme Court. Neither is a sound basis for rehearing.

CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted,

/s/ Deepak Gupta
DEEPAK GUPTA
RACHEL BLOOMEKATZ
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

BRIAN D. CHASE
JERUSALEM F. BELIGAN
BISNAR | CHASE LLP
1301 Dove Street, Suite 120
Newport Beach, CA 92660
(949) 752-2999

Counsel for Plaintiffs-Appellants

June 26, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,178 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Baskerville font.

/s/ Deepak Gupta
Deepak Gupta

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I hereby certify that on June 26, 2018, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta