Case No. 03-71883

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEADWATERS FOREST DEFENSE

(*Ex. rel*. Vernell "Spring" Lundberg, Noel Tendick, Terri Slanetz, Eric Samuel Neuwirth, Lisa Sanderson-Fox, Maya Portugal, Jennifer Schneider, and Michael McCurdy)

Petitioners,

vs.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

(Real Parties in Interest: County of Humboldt, Calif., City of Eureka, Calif., Sheriff Dennis Lewis, and Chief Deputy Gary Philp)

Respondent.

REPLY BRIEF OF PLAINTIFF-PETITIONERS IN SUPPORT OF THEIR PETITION FOR WRIT OF MANDAMUS AND EXERCISE OF SUPERVISORY AUTHORITY

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I. OVERVIEW

In their Answer, defendants attack plaintiff-petitioners for "perverting the judicial system" — with our nefarious "goal of staging a 'political' and 'international' trial in San Francisco" — as if plaintiffs didn't have every right, and the humane obligation, to reveal defendants' wanton pepper spray torture methods and policy, and the arrogance of police power behind it, to the widest possible world.[1] For plaintiffs' part, we take it that this Court's supervision of the district court has already begun, by way of the remand order(s), and that this Court's memory of the need for earlier reversals of the district court remains strong. Nothing defendants have to say meets the plain truth that trial of this case in Eureka would itself be a perversion, and wholly unfair, and that the district judge's bias has risen to a degree that it should disqualify him from conducting the trial at any place.

Plaintiffs have invoked and relied upon the district court's 1998 decision twice reversed by this Court as the foundation for the claim of bias — amounting to "deep-seated favoritism and antagonism" on the part of the district judge — notwithstanding the general rule that bias shown in actions

[1] Two of the three statements which defendants cite were made by one of the plaintiffs *after this Petition was filed*. Regardless, plaintiffs confess that they want the world to know that the defendants inflicted excruciating pain upon young people who engaged in civil disobedience to try to preserve ancient forests, and the water we drink and the air we breathe, and that defendants want to be allowed to inflict such pain whenever they see fit.

on the merits is not actionable, under *Liteky v United States*, 510 U.S. 540 (1994). We do so, firm in the faith that sometimes such bias *is* actionable, as *Liteky* allows, and this is such a case.

We have argued beyond *Liteky* that the district court's bias continues, and is evident in a series of decisions so outlandish that they must emanate from some source of antagonism outside the merits of the case. Chief among these is the court's *sua sponte* decision to transfer the case from San Francisco for retrial in Eureka, a hotbed of anti-environmentalist sentiment, where there is no regular court session. In addition, the district court is straining to present the question of qualified immunity to the jury, despite the fact that it has thrice been decided *against* defendants (including twice by this Court), and there is no legal basis for resurrecting it, much less for the jury's consideration. (See below.)

Defendants have not met plaintiffs' arguments. Instead, they rail at us for planning to stage "a political and international trial in San Francisco," and insist that *no* mandamus relief can possibly be granted, especially to recuse the judge. The say the matter was conclusively disposed of by Judge Hamilton's denial of plaintiffs' motion to recuse, and that trial in Eureka is absolutely the unfettered right of the district judge to ordain — and perfectly suitable in any case.

Plaintiffs accept, as we must, the legal requirement under the *Bauman* case that Clear Error must be shown as to the transfer as a basis for Mandamus relief. We likewise accept that disqualification of the judge must be premised on a showing of "deep-seated favoritism or antagonism", under the rule of *Liteky*. But we believe the burden is met by a manifest threat to the right of fair (re-)trial arising from the malign intention shown by the combined, compounded prejudicial actions of the district court. If we're wrong, it was still clear error to move the trial to Eureka; the case should not be tried there under any circumstances. Likewise, this Court should not tolerate a flaunting of its decision on qualified immunity in the court below, by having it submitted to a jury after it has been thrice decided against defendants. Supervision in these matters is imperative, and only right, given the already long history of this case.

II. PLACE OF TRIAL

In answering plaintiffs' Petition, defendants quibble with the niceties of whether Judge Walker's decision to move the trial to Eureka is or is not technically a "change of venue", rely upon materials that are filed as an Appendix which in fact support plaintiffs' position that Eureka is not an appropriate situs for the retrial because it is the epicenter of the heated controversy that is at the core of this case, and generally attempt to divert the

focus away from the central point — i.e., that it is grossly unfair to plaintiffs to try this case in Eureka.

A. Eureka is a hotbed of hostility toward plaintiffs' and their cause.

Defendants strongly contest the hotbed issue, and, unsurprisingly, skew it substantially in their arguments. Petitioners never said that Humboldt County, 'seething' with prejudice against them, does not also hold folk who support the protests against destruction of the forest eco-system, etc. — to say nothing of the massive, monstrous illegal logging, winked at by state authorities and the Sheriff's Department, exposed, finally, in the huge civil enforcement action started by the District Attorney against Pacific Lumber — or, indeed, people who were righteously horrified by the pepper spray swabbing and spraying shown on TV. As defendants argue and their Appendix shows, there are strong feelings on all sides; but here, the point is the breadth and intensity of feeling against plaintiffs, and especially the threat and aura and past reality of violence by the *contras* — fueled by an ongoing virulent ad blitz by Pacific Lumber equating environmental activists with terrorists (Exhibits 9 & 11) — and the certainty that those feelings will not seep but flood into a trial in Eureka of Fourth Amendment claims by these plaintiffs against the local cops. As noted, the evidence showing controversy and hostility might need parsing if the issue was moving the

trial *away* from Eureka; the case against moving it *into* such a place is open and shut.

Defendants' own exhibits demonstrate, just as plaintiffs claim, that the hostility between environmental activists and the timber companies, (particularly Pacific Lumber, the object of two of the three protests at which the defendants caused the plaintiffs herein to be tortured), is the basis of intense feelings regarding the issues and the parties involved in the Timber Wars. When defendants' documents are considered along with the clippings and videotape and declarations submitted by the plaintiffs, the inescapable conclusion is that a jury in Eureka will be the antithesis of the indifferent jury that plaintiffs are entitled to.

B. Defendants' census figures are a diversion.

Defendants also present raw and unexplained census data, purporting to demonstrate that less than 4.9% of the population is involved in the "forestry" industry. Needless to say, these census data do not provide information about the number of industries or individuals who depend indirectly on the logging economy, or the number of residents (i.e. prospective jurors) whose close friends or relatives depend on the logging

industry, even if they themselves do not.[2] It stands uncontested that Pacific Lumber is the second largest employer in the county, second only to governmental agencies, as noted in plaintiffs' Motion in the District Court. (Ex. 1).

C. The protest context of the case *is* relevant.

Of course it is true that the case is about the police policy and practice with pepper spray, not the merits of liquidation logging, as defendants say repeatedly.[3] But that hardly makes it "irrelevant" to the 'situs' issue that the trial will occur in a place boiling over with controversy regarding logging practices, and especially regarding protests against them of the type that took place here. Passionate feelings about those issues, and about people who force those issues with civil disobedience, obviously will obtrude upon fair

[2] Even defendants' law firm, Mitchel, Brisso, Delaney & Vrieze, derives part of its bread and butter from its major client, the Pacific Lumber company, and currently represents PL in various protest related cases, including its many civil claims against tree-sitters and their supporters. It is conceivable that defendants' rejection of plaintiffs' settlement offer was in part driven by their attorney's work on behalf of the aggressive and litigious logging company, which is pitted against plaintiffs and their friends in a greater political and public relations battle.

[3] Similarly, defendants are not wrong in the various points they make about the burdens of trial in either place — although an estimate of "tens of thousands of dollars" for hotel bills here in the big city seems like a bit much, and they submit not declaration substantiating this figure — but such concerns are obviously overshadowed when the right to impartial jury and fair trial are at stake.

and sober consideration of the Fourth Amendment pepper spray torture claims.

In each of the cases concerning community hostility against a particular side which plaintiffs cite, there is, of course, a particular context. In *Groppi*, it was civil disobedience. In *Rideau* and other cases, the context was a murder prosecution. In the instant case, it is civil disobedience and the response by the police. But the salient fact in all the cases involving location of the trial is hostility of the community toward one of the parties. It is this issue that defendants studiously avoid. [4]

D. Defendants' claim that plaintiffs are engaged in forum-shopping is a perversion of the term.

Defendants say that "Plaintiffs are clearly engaging in last-minute shopping for a forum..." (Answer, p2). Of course, plaintiffs are not seeking to move the case anywhere except back to where they filed it, where the regular court session is, where the assigned judge has his courtroom, where all the papers have been filed, and where the first trial occurred. Plaintiffs' motion re situs of trial, and the instant Petition, are not some recently conceived scheme. The fact is that plaintiffs chose to file this case in federal

[4] Defendants have not addressed any of the cases cited by plaintiffs in the Petition which deal with the key issue: the unfairness of conducting a trial in a location/venue/situs where there is significant hostility toward one of the parties to the litigation.

court, rather than state court in Humboldt County, in order to avoid the hostility they now face. Defendants' forum-shopping charge turns that concept on its head, given the facts of this case.

In sum, defendants have failed to show why transfer of the case into a community seething with controversy — substantially revolving around local hostility to the plaintiffs' movement, and especially its predilection for the type of civil disobedience they were involved in when the challenged police conduct occurred — does not constitute an abuse of discretion and clear error by the district court. We have approached this Court with great confidence in the transfer claim, because the notion of thus moving the trial *into* such a hotbed is so outlandish, and the rationale attempted in the district court's Order so wrongheaded.

III. RECUSAL

This case presents the "almost never" exception to the general rule that judicial bias occasioning recusal should be based on extrinsic evidence of "deep-seated favoritism or antagonism," rather than on opinions and decisions formed in the case. *Liteky v United States*, 510 U.S. 540 (1994). Plaintiffs do not have the offhand comment in the elevator, but we do have a series of rulings and actions which cannot be rooted in anything but "deep-seated favoritism or antagonism."

Petitioners understand that Judge Hamilton's independent Order denying the recusal motion is very important to the defense's position. Judge Hamilton was randomly assigned, and no doubt called the matter as she saw it. However, Judge Hamilton applied the *Liteky* rule peremptorily, as an absolute, just where plaintiffs' claim was directed to the crucial exception it contains.[5] Issuing an Order without a hearing, Judge Hamilton largely ignored or misapprehended plaintiffs' arguments about bias and the appearance of bias.[6]

Judge Hamilton wrote (Ex. 7, p3:3-6, 23):

> Plaintiffs claim, *based solely on the fact that Judge Walker was reversed by the Ninth Circuit*, that his decision in finding for the plaintiffs can be explained only as the product of bias or prejudice against the plaintiffs…Accordingly, the motion to disqualify based on the adverse post-trial rulings must be denied. (Emphasis added.)

On the contrary, plaintiffs argued (with regard to Judge Walker's 1998 Order dismissing the case) that he supported his Order with egregious misstatements of fact, as found by this Court. What we said was that the

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[5] The operative language in the *Liteky* opinion is that "judicial rulings alone *almost* never constitute a valid basis for a bias or partiality motion… *Almost* invariably they are proper grounds for appeal, not recusal." *Liteky* 510 U.S. at 555 (emphasis added). Plaintiffs believe this case is the exception implied by the double use of "almost" in the quoted sentence, which proves that the rule is not absolute.

[6] Moreover, as the Court can read (Ex. 7), Judge Hamilton's tone in her Order is testy, and dismissive — perhaps in reaction to the effrontery of such an accusation against her bench-mate.

decision to move the trial to Eureka, more than being wrong (clear error) in itself, confirmed the continuing existence of overweening bias shown mainly in the 1998 ruling; that is, these were not two separate (or severable) grounds for disqualification, but one consolidated circumstance showing bias and the appearance of bias. Judge Hamilton simply did not address this argument. (Exhibit 7).

To recall it, the trial judge — just after four of eight members of a jury he impaneled had voted for liability — held that no reasonable juror could find the defendants liable! He went on to deny the very existence of much of the evidence which had just been entered before him and that jury, and to misrepresent much more. He had clearly reached his own, gut conclusion that the protesters deserved what they got and the police should be off the hook – and the torture-lite pepper spray practice judicially approved. And so, showing that his mind was indeed infected with deep-seated favoritism and antagonism – and, quite improperly, making up evidence as well as weighing it in his own lights — he concretely engineered the result he wanted; this was a species of judicial fraud, as this Court saw.

Petitioners feel there is a vital distinction between the judge showing he has formed deprecatory opinions based on what he learned in the trial, which are not actionable under *Liteky*, and his taking concrete, purposeful

actions creating great prejudice such as the (fraudulent) dismissal – and the transfer. While it might not be wrong in principle for him to have come to such feelings after the trial, it was certainly wrong, as he undoubtedly knew and as this Court found, to implement those feelings by falsifying the record in support of a fundamentally corrupt decision to throw the case out. If "corrupt" is a harsh word, like fraud, plaintiffs argue that both are suitable here, given the way the judge turned reality on its head in characterizing facts and evidence. How could such an untoward, telling, elaborately articulated decision be rendered, so replete with plainly wrong, findings, without such an impermissible motive behind it? It was bad enough that the judge would think it proper to dismiss claims his own jury had just deadlocked over. The supporting holdings about the evidence revealed a much deeper partisanship, especially since it constituted a full endorsement of the bogus, misrepresented rationale offered by the police for this egregious use of unnecessary force.[7]

[7] Only recall that the district judge held (1) that the pain ("intrusion") from the repeated swabbed pepper spray was "minimal" and the risk of injury "negligible"; (2) that there was danger to the officers from other 'lawless' protesters, assembled outside the sit-in sites (a *complete* fabrication); (3) that the evidence showed the officers made no attempt to pry open the eyes of the plaintiffs, when the opposite was demonstrably true from the video; and (4) that there was *no evidence* that the officers had any "viable alternative" means of removing the "black bears" and taking the plaintiffs into custody — after repeated testimony by officers that they had

With all due respect, Judge Hamilton was oblivious to this history, and did not conduct a hearing, so plaintiffs' could not correct her misassumptions.

A. Plaintiffs' Motion was Timely.

Instead, Judge Hamilton worried that the motion was untimely (Ex. 7, p4:7-21), apparently unaware of the actual sequence of events. Plaintiffs raised the issue as expeditiously as possible — even if delicately, at first, given its awkward nature. Plaintiffs, believing (hoping) that Judge Walker had been chastened by this Court's strongly-worded reversal, were not alerted to his deep-seated antagonism until he announced, *sua sponte* on January 23, 2003 that he was transferring the retrial to Eureka. Thus, it was this event, not his 1998 order of dismissal, which triggered plaintiffs' awareness. At the very next appearance, on March 27, 2003, plaintiffs raised the issue informally, hoping that Judge Walker would relent when confronted with the obvious absurdity of such a decision. He did not, and plaintiffs filed their motions re location of trial and recusal on April 14, 2003, to be heard on April 24, 2003. Timeliness is simply not an issue. Plaintiffs acted with appropriate dispatch.

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removed the devices with grinders literally "hundreds" of times, without mishap. The court also knew grinders had been used on plaintiffs also, when the pepper spray torture did not succeed. (See Petition, note 3.)

B. In announcing his decision to transfer the case *sua sponte*, the district court did not give plaintiffs a fair opportunity to respond.

Defendants insist that the court's action was not *sua sponte*, because it had contemplated transferring the case for the first trial, but did not do so. Plaintiffs know no other word for it. To the extent defendants are correct, the court's action was *sua sponte* then, just as it is *sua sponte* now. The difference is, that by January 2003, long after the first trial had already occurred in San Francisco, the question was far off anyone's radar (especially plaintiffs' newly constituted trial team) when the district judge announced his plan, out of the blue, at the status conference on January 23, 2003. Neither party asked him to do so. That is the definition of *sua sponte* action, and is further evidence of the court's agenda and bias.

Had Judge Walker desired to be fair, he would have sought input from plaintiffs (and, of course, from defendants) before issuing his order. Indeed, Judge Walker was required to solicit input from the parties as to this very significant issue, rather than rule *sua sponte*. "An opportunity to respond in the form of a motion to the district judge to stay transfer [under 28 U.S.C. § 1404(a)] should not be deemed an adequate substitute for notice and an opportunity to respond before entry of the order." *Starnes v. Small*, 512 F.2d 918, 933 n 19 (D.C. Cir. 1974). "[A]s a matter of fundamental fairness the

judge must accord an opportunity to be heard at least whenever there is a possibility that the hearing may develop facts bearing on the decision to be made." *Id*. at 933, quoting *Fine v. McGuire*, 433 F.2d 499 (1970). "If the matter is raised *sua sponte*, the parties deserve an opportunity to be heard before a decision is rendered." *Feller v. Brock*, 802 F.2d 722, 729 n. 7 (4th Cir. 1986), citing 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3844 at 329-30 (1986). Although these cases involved 28 U.S.C. § 1404(a), the principles involved apply with equal force to § 1404(c), or any potentially outcome determinative action by the court.

C. That the district court seeks to resurrect the question of qualified immunity, without any legal basis for doing so, is further evidence of bias.

Then, at the pretrial conference on April 24, 2003, when the district court heard plaintiffs' motion re location of trial, he reconfirmed his bias and apparent bias by announcing, out of left field, his intention to submit the question of qualified immunity, thrice decided against defendants (including twice by this Court), to the jury. In their answer to our Petition, defendants circumvent this issue, stating in a footnote (#32) that the court has merely "directed further briefing" in response to defendants' proposed jury instruction on qualified immunity. In fact, the court was very clear that it intends to submit the question of qualified immunity to the jury — in

essence, giving defendants a fourth bite at the apple and plaintiffs a razor blade — and circulated a draft verdict form replete with qualified immunity traps (Ex. 12, this Appendix), along with a subsequent order directing further briefing (Ex. 10), as defendants' call it, after plaintiffs pointed out in response to the verdict form that not only has qualified immunity been disposed of, but the form of the qualified immunity question which the court proposed applied only to the line officers who *have been dismissed from the case*, not the two policymaking defendants who remain. Thus, the district court not only has made his intention clear, but is straining to indulge defendants in asking for this unwarranted trap.

There is simply no legal authority whatsoever for re-submitting the qualified immunity question to the jury, now that two courts (this Court, and the district court) have firmly decided the question against defendants. *ActUp!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993), and its progeny, contemplated (abstractly) a case in which the existence of a particular factual dispute *precludes the court from deciding* qualified immunity until the dispute can be submitted to the jury. 988 F.2d at 873-74. Here, two Courts *have decided and denied* qualified immunity. No case is found where the Court has first denied qualified immunity, and then re-submitted the issue to the Jury, or where such a procedure has been upheld. And, of course, this

Court's Model Civil Jury Instruction No. 11.3 (Comment Only) refrains from offering any suggested form of instruction, noting that qualified immunity "is ordinarily a question of law for the court and should be decided at the earliest possible time."

The only reason why plaintiffs have not yet sought to take a writ on this action by the district court is that the court has not yet issued a stark order. The court's clear intention, however, is further evidence of bias, and plaintiffs respectfully request that this Court "nip this problem in the bud" by admonishing the district court that qualified immunity is kaput. (See plaintiffs' two short but complete responses re qualified immunity — to defendants' requested instruction and to the district court's order for further briefing — at Ex. 10.)

D. The district court has dodged the question of appearance of bias under 28 U.S.C. § 455, occasioning de novo review or remand by this Court.

Neither district judge has properly decided the appearance of bias question under 28 U.S.C. § 455, making it legitimate for this court to review the question de novo. Whereas Judge Walker was obligated to decide the § 455 question "himself" (as the statute reads), Judge Hamilton inadvertently

provided him a shield by deciding it for him, in conclusory form, which decision he conclusorily adopted.[8]

> Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge…It makes no provision for the transfer of the issue to another judge. We think that appellate review of a judge's decision not to disqualify himself, when he is asked to do so by a proper and timely motion supported by affidavits and perhaps other evidence, should not be deferential…Accordingly, we will review decisions against disqualification under § 455(b)(1) de novo. We will evaluate the evidence for ourselves, applying the same standard as the district court.

United States v. Balistrieri, 779 F.2d 1191, 1202-1203 (7th Cir.1985), *cert. denied* 475 U.S. 1095 (1986). See also, *In re Bernard*, 31 F.3d 842 (9th Cir. 1994), *cert. denied* 514 U.S. 1065 (1995), oft-cited for the same principle.

Judge Walker has thus excused himself from having to explain on the record his reasons for refusing to recuse himself, thereby depriving plaintiffs of any meaningful opportunity to appeal the question later, and making

[8] Judge Walker in fact signaled Judge Hamilton, in his order reassigning the recusal motion, that he should be the one to decide the appearance of bias question, by citing *In re Bernard*, 31 F3d 842 (9th Cir 1994) for the proposition that the judge who is the subject of the recusal motion must decide the appearance of bias question under § 455 "himself". (Ex. 6, p2:1-5). But after Judge Hamilton went ahead and decided the question anyway, Judge Walker simply adopted her decision without any analysis by stating: "Even if the section 455 motion should have been decided by the undersigned, it is clear based on Judge Hamilton's ruling that plaintiffs have failed to meet that objective burden." (Ex. 8, p16:1-4). But all Judge Hamilton really wrote was "The court finds that plaintiffs have not established the appearance of bias, let alone actual bias." (Ex. 7, p3:16-17).

mandamus or other exercise of supervisory power by this Court appropriate. If the Court declines to exercise de novo review and to decide the matter , it should at least remand it to Judge Walker to make a record.

Plaintiffs point out that this Court has recently, in the case of *U.S. v Reyes*, 313 F.3d 1152, 1159-1160 (9th Cir. 2002), ordered that a case be reassigned upon remand to a different judge — and based on decisions within the case — notwithstanding defendants' statement in their Answer Brief (p12) that no writ of recusal has been issued since 1951.[9]

In sum, defendants' reliance on Judge Hamilton's decision denying recusal is misplaced, because:

(1) the Judge misunderstood and failed to address plaintiffs' arguments;

(2) the Judge had no authority to determine the appearance of bias aspect (§ 455); and

(3) This Court's review of the appearance of bias aspect is de novo, in the circumstances.

[9] Needless to say, defendants' canvass of "the entire Ninth Circuit decisional history" (p12) did not uncover the many cases in which the district court properly acted to recuse itself or one of its bench-mates, saving everyone the trouble of a petition.

IV. DISTRICT COURT GENERAL ORDER 44(E)

The District Court's General Order 44(E) requires that: "Whenever a civil or criminal case is transferred from one Courthouse of the Court to another, the Clerk shall randomly reassign the case to a Judge designated to hold court at the receiving Courthouse." Neither the district judge nor the defendants have had a word to say about this. Why is the district judge apparently free to simply ignore this rule? It appears to make for a straightforward "writtable" point. If for any reason this Court permits the case to be transferred to Eureka for trial, it should simultaneously direct the district court to comply with its own order and reassign the case to a different judge.

Needless to say, plaintiffs pray that the Court will order that the case be restored to San Francisco for trial. Even so, the district court's refusal to follow General Order 44(E) is yet another example of its bias and determination to stay on board and steer plaintiffs aground.

V. CONCLUSION

For all the foregoing reasons, and the reasons stated in their Petition and Appendix, plaintiff-petitioners ask the Court to Order that the case be returned to San Francesco for trial, that it be re-assigned to a different judge,

and that the court below be instructed that qualified immunity has been decided, and grant such further relief as the Court deems just and proper.

Respectfully Submitted,

DATED: June 2, 2003:

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Ben Rosenfeld
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Attorneys for Plaintiff-Petitioners

CERTIFICATE OF SERVICE

I certify that I served the within Reply Brief on the respondent, Honorable Vaughn R. Walker, U.S. District Court Judge, Northern District of California, and on the defendant real parties in interest, by depositing true copies in the U.S. mail, first class postage pre-paid, addressed to Judge Walker, and to Attorneys Nancy Delaney and William Mitchell, respectively, on June 2, 2003.

_____

Ben Rosenfeld

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

I certify that the within Petition is proportionately spaced, has a typeface of 14 points, and contains 4,606 words.

_____

Ben Rosenfeld