CA No. 07-56564
DC No. 06-5094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES, ET AL.,
Plaintiffs and Appellees,

v.

COUNTY OF KERN, ET AL.,
Defendants and Appellants.

On Appeal From Judgment Of The United States District Court
For The Central District Of California
(Hon. Gary A. Feess, Presiding)

ANSWER TO PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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INTRODUCTION

In June 2006, the voters of Kern County, California, adopted Measure E ("the Ordinance"). The Ordinance prohibits all land application of biosolids in the County's unincorporated areas, regardless of whether the biosolids were generated inside or outside the County. The National Research Council of the National Academy of Sciences has found that "land application raises "'nuisance' risks to community quality of life and property values, such as odors, traffic, and the attraction of vermin to sludge application sites." 4ER820.

The Panel correctly found that Plaintiffs—who generate biosolids elsewhere in California and want to land apply them in Kern County—lack prudential standing to assert a dormant Commerce Clause challenge to the Ordinance. This holding breaks no new ground.

This Court has repeatedly held that the "'chief purpose underlying [the dormant Commerce] Clause is to limit the power of States to erect barriers against interstate trade.'" Panel Opinion 12869 (citation omitted). No Plaintiff in this case seeks to protect that interest. As the Panel recognized:

> Nothing in Measure E hampers the [Plaintiffs'] ability to ship waste out of state. Likewise, no [Plaintiff] claims to apply out-of-state waste to land in Kern County. In short, Measure E in no way burdens [Plaintiffs'] protected interest in the interstate waste market. (*Id.* at 12871)

This common-sense holding neither conflicts with precedent nor involves an issue of exceptional importance. Accordingly, the Court should deny Plaintiffs' petition for rehearing and rehearing en banc ("Petition").

ARGUMENT

I.

PLAINTIFFS FAIL TO SATISFY THE EXACTING STANDARDS FOR EN BANC REVIEW.

Under Rule 35(b) of the Federal Rules of Appellate Procedure, a party seeking en banc review must demonstrate either that "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed . . . or the proceeding involves one or more questions of exceptional importance . . . ." FED. R. APP. P. 35(b). None of these conditions is satisfied here.

Plaintiffs' primary claim is that the Panel's decision conflicts with decisions from this Court and other circuits. But the cases on which it primarily relies all involve "flow control" ordinances that actually impose barriers to interstate commerce. These cases are inapposite because Measure E is not a "flow control" ordinance and imposes no barrier to *any* interstate commerce—on the part of Plaintiffs or anyone else.

A. The Panel's Decision Does Not Conflict With Any Decision Of The Supreme Court.

Contrary to Plaintiffs' arguments (Petition 6-12), the panel's decision does not conflict with the Supreme Court's Commerce Clause jurisprudence. Plaintiffs make much of the fact that intra-state transportation of biosolids could be regulated by Congress pursuant to the Commerce Clause. This is true but irrelevant. Because biosolids are an article of interstate commerce, Congress has the power to regulate that commerce. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2006); *Wickard v. Filburn*, 317 U.S. 111 (1942). But that does not displace state regulation of the same commerce. *Grant's Dairy-Maine, LLC v. Comm'r of Maine Dep't of Agric.*, 232 F.3d 8, 19 (1st Cir. 2000) ("Nothing in the Court's opinion intimates that a State may not regulate in areas that touch upon interstate commerce"). *Raich* and *Wickard* are thus irrelevant. Indeed, neither case so much as mentions prudential standing.

Moreover, none of the Supreme Court cases cited by Plaintiffs holds—or even suggests—that a local ordinance can be challenged under the Commerce Clause by plaintiffs who have failed to show that the measure burdens interstate commerce. Plaintiffs claim that the panel's decision conflicts with *Hughes v. Oklahoma*, 441 U.S. 322 (1979), and *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997). Petition 7-12. However, like *Raich* and *Wickard*, neither of these cases

involves—or even mentions—prudential standing under the dormant Commerce Clause. Instead, both cases address the merits of a dormant Commerce Clause challenge.[1] At most, therefore, these cases indicate that, given a different set of facts, some other plaintiff (with proper standing) might be able to argue that Measure E implicates the dormant Commerce Clause. For example, if an out-of-state hauler or generator of biosolids had previously land-applied biosolids in Kern County, and was prevented from continuing to do so by Measure E, that entity could rely on these cases to argue that Measure E implicated the dormant Commerce Clause. But no such entity is involved in this case. Consequently, the issue raised by the Petition is whether *these Plaintiffs* have prudential standing to claim that Measure E violates the Commerce Clause even though the Ordinance imposes no barrier to their ability to engage in interstate commerce. The Supreme Court cases Plaintiffs cite are irrelevant to that issue.[2]

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[1]The same is true of *Conservation Force, Inc. v. Manning*, 301 F.3d 985 (9th Cir. 2002), which similarly has nothing to do with prudential standing.

[2]Plaintiffs also cite *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992), for the proposition that local ordinances burdening interstate commerce are not immune from Commerce Clause scrutiny. Petition 4. In that case, however, the local ordinance constituted a "total ban on out of-state waste." 504 U.S. at 363. In contrast, Measure E does not affect *any* interstate commerce, because no one from outside California wants to land apply biosolids within the County.

B. The Panel's Decision Does Not Conflict With Any Decision Of This Court Or Of Any Other Court Of Appeals.

Each of the three Court of Appeals cases that Plaintiffs claim conflict with the Panel's decision involve "flow control" ordinances.[3] Such ordinances typically require all locally generated waste to be handled by local haulers and/or deposited in local landfills. *See* Jason M. King, *Standing in Garbage: Flow Control and the Problem of Consumer Standing*, 32 GA. L. REV. 1227, 1227 (1998). Accordingly, such ordinances impair interstate commerce in two distinct ways: they prevent locally generated garbage from being transferred across state lines and they deprive interstate waste haulers of access to the local market. *See C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) ("The flow control ordinance . . . hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility"). These burdens on interstate commerce are not accidental, for the very purpose of such "flow control" ordinances is to preserve the economic benefits of the valuable in-state market in waste disposal exclusively for local businesses, to the detriment of excluded out-of-state competitors. *See id.* at 386 ("The avowed purpose of the ordinance is to retain the processing fees charged at the transfer station to amortize the cost

[3] *See On the Green Apts. L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997).

of the facility"). Consequently, plaintiffs challenging a "flow control" ordinance can usually assert an interest in maintaining the free flow of garbage in interstate commerce. Such an interest is within the "zone of interests" protected by the dormant Commerce Clause. *See On the Green Apts. L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1241 (9th Cir. 2001) (plaintiff's "injury [was] . . . related to the purposes underlying the Commerce Clause" because it sought to protect its right to "take its garbage outside the city").

Unlike the ordinances in the cases cited by Plaintiffs, Measure E is not a flow control ordinance that seeks to capture a local market for the benefit of local businesses. Instead, it is a "flow diversion" ordinance, pursuant to which the County seeks to surrender the economic benefits caused by the local market in recycling in order to serve other, primarily non-economic values (such as eliminating the flies and odors caused by land application).[4] As a result, the "flow control" cases cited by Plaintiffs are easily distinguishable from this case.

[4]Of course, a "flow diversion" ordinance that facially discriminated against out-of-state interests by permitting only in-state waste to be deposited in a dump site could be challenged by an out-of-state plaintiff who suffered an injury as a result of this facial barrier to interstate commerce. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). But since no one outside California wants to dump their waste in the County, there is no out-of-state plaintiff here.

1. The Panel's Decision Is Consistent With This Court's Precedent.

Plaintiffs suggest that the panel's decision conflicts with *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001) ("*OTG*"). This is incorrect. This Court's decisions in *OTG* and *Individuals for Responsible Government v. Washoe County*, 110 F.3d 699 (9th Cir. 1997) ("*IRG*"), established a consistent framework for determining whether a plaintiff has prudential standing to assert a dormant Commerce Clause claim. The Panel correctly applied this framework to the facts of this case.

In *IRG*, this Court explained that to fall within the "zone of interests" of the dormant Commerce Clause, a plaintiff's interests must be more than "marginally related to the purposes underlying the dormant Commerce Clause." *IRG*, 110 F.3d at 703. The Court also stated that "[t]he chief purpose underlying that Clause is to limit 'the power of the States to erect barriers against interstate trade.'" *Id.* (quoting *Dennis v. Higgins*, 498 U.S. 439, 446 (1991)). Accordingly, the Court in *IRG* (and in *OTG*, too) asked precisely the same question as the Panel in this case: whether the plaintiffs' claims bear more than a marginal relationship to an interest in limiting a state or county's ability to erect barriers to interstate commerce. *Compare* Panel Opinion 12869 *with IRG*, 110 F.3d at 703, *and OTG*, 241 F.3d at 1240, 1241.

In *IRG*, county residents challenged a local Nevada county ordinance that required them to employ a garbage collection service selected by the County

that utilized local dump sites. *IRG*, 110 F.3d at 701. Accordingly, the ordinance required residents to pay for unwanted garbage services they had previously taken care of themselves. The Court held that this financial injury satisfied the "injury-in-fact" requirement (*id.* at 702), but that the residents nonetheless lacked prudential standing to challenge the ordinance under the dormant Commerce Clause. *Id.* at 703. The Court acknowledged that the challenged ordinance adversely affected interstate commerce, because it "had the effect of reducing the flow of garbage from Nevada to California." *Id.*[5] However, the Court held that plaintiffs lacked prudential standing to challenge the ordinance because "[t]heir injury (being forced to pay for services they do not want) would exist even if [the County's selected hauler] were to dump all the garbage it collects from Nevada across the state line in California." *Id.* 703-04. In other words, even though the plaintiffs suffered an injury-in-fact as a result of the ordinance, and the ordinance imposed a barrier to interstate commerce, the Court concluded that the claim was not within the relevant "zone of interests" because the plaintiffs' injury was not caused by the barrier to interstate commerce imposed by the ordinance and would continue even if that barrier were removed.

In *OTG*, the City of Tacoma ordinance at issue had two relevant aspects: (1) it restricted the ability of residents and businesses to haul their own

[5]Prior to enactment of the ordinance, many residents had self-hauled their garbage to out-of-state dumps. *Id.* at 701.

garbage and (2) it required all residents and businesses to use a city owned and operated landfill. 241 F.3d at 1237. On the Green Apartments L.L.C., which operated a multi-unit residential complex in the City of Tacoma, challenged the constitutionality of both aspects of the ordinance.

With respect to the first restriction, the Court found that "On the Green lacks standing to challenge that aspect of the Tacoma Ordinance prohibiting it from hauling its own garbage." *Id.* at 1240. It reached this conclusion because, as in *IRG*, the plaintiff's financial injury—being forced to pay for waste disposal services it preferred to provide for itself—was "unrelated to the purposes animating the dormant Commerce Clause." *Id.* In other words, the claim was not within the relevant "zone of interests" because the injury would exist even if the ordinance imposed no barrier at all to interstate commerce. *See id.* ("On the Green would be forced to pay for garbage services it did not want 'even if [Tacoma] were to dump all the garbage it collects from [the city] across the state line . . . . Under those circumstances, the [Ordinance] would impose no barrier to interstate commerce'") (quoting *IRG*, 110 F.3d at 703-04) (bracketed language in *OTG*).

In contrast, the Court found that On the Green had prudential standing to challenge the second restriction in the ordinance: that all garbage be deposited at a city owned and operated landfill. 241 F.3d at 1241. This holding is unsurprising since this aspect of the ordinance imposed a facial barrier to interstate commerce (by prohibiting the removal of garbage from the state)

and that barrier caused the plaintiff's injury (paying more at city landfills than it would have to pay at other landfills). *Id.* Accordingly, On the Green could assert an interest in maintaining the free flow of garbage in interstate commerce, and thus satisfy the "zone of interests" test. Thus, although the results in *OTG* and *IRG* differed, both cases apply the same principle: a claim bears more than a marginal relationship to the interests underlying the dormant Commerce Clause (and the plaintiff has prudential standing) if—and only if—the ordinance being challenged imposes a barrier to interstate commerce and that barrier causes the alleged injury.

The situation here could not be more different. Unlike the "flow control" ordinance at issue in *OTG*, "[n]othing in Measure E hampers the [Plaintiffs'] ability to ship waste out of state." Panel Opinion 12871. Nor does it impede Plaintiffs' ability to recycle out-of-state biosolids in Kern County. *See id.* Accordingly, the financial injury Plaintiffs claim they will suffer if Measure E is enforced cannot possibly be related to a barrier to interstate commerce imposed by the Ordinance, because no such barrier exists. The panel therefore properly distinguished *OTG* from this case on the ground that "the ordinance in *On the Green* barred the plaintiff from engaging in inter-state commerce [while] Measure E creates no such prohibition." *Id.* at 12872 n.7.[6]

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[6]Plaintiffs claim that *OTG* held that prudential standing exists whenever a plaintiff suffers a financial injury as a result of an ordinance that requires the (continued . . .)

2. The Panel's Decision Does Not Conflict With Decisions Of Other Courts Of Appeals.

In addition to contending that the Panel's decision conflicts with this Court's precedent, Plaintiffs argue that the decision conflicts with decisions by the First and Eighth Circuits. Petition 12-16. This, too, is incorrect. *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), and *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), are easily distinguishable from this case. As in *OTG*, the "flow control" ordinances at issue in both *Houlton* and *Ben Oehrleins* burdened interstate commerce either by restricting the ability of waste generators or haulers to deposit their waste in another state or by restricting

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(. . . continued)
"diversion of commerce from one location to another." Petition 17; *see also id.* at 20 (asserting that the test set forth in *OTG* and *IRG* turns on "whether the plaintiff's injury is causally related to a forced relocation of commerce"). Besides being inaccurate, this claim proves only that accepting Plaintiffs' standing argument would lead to untenable results. To give just one example, every zoning ordinance that limits permissible land uses in a defined area arguably relocates interstate commerce from one place to another. But to our knowledge, no court has ever held that every non-conforming use that has to relocate due to a new zoning ordinance with no significant effect on interstate commerce has a claim under the Commerce Clause. *Georgia Manufactured Housing Ass'n, Inc. v. Spalding County*, 148 F.3d 1304, 1307-08 (11th Cir. 1998) (rejecting a dormant Commerce Clause challenge to a zoning ordinance with a "negligible" burden on interstate commerce).

Plaintiffs' contention that *IRG* and *OTG* are distinguishable because they are "not merely individual households or a single apartment complex, as in *Washoe* or *On the Green*" (Petition 19) is similarly erroneous. A large group of people whose financial injury is "unrelated to the purposes animating the dormant Commerce Clause jurisprudence" (*OTG*, 241 F.3d at 1240) does not have a stronger claim of prudential standing just because of their numbers.

the ability of out-of-state waste operators to participate in the local market. The amended ordinance in *Ben Oehrleins* required all waste destined for in-state disposal be deposited at one or more designated transfer stations or processing facilities (*see* 115 F.3d at 1377) and therefore prohibited out-of-state landfills (including one of the plaintiffs) from "participat[ing] in the market for Hennepin County waste." *Id.* at 1379; *see id.* at 1378 (*Ben Oehrleins* plaintiffs included Iowa landfill). Similarly, the ordinance at issue in *Houlton* required all residential waste to be collected by a single designated firm or brought directly to the Town's transfer station. 175 F.3d at 181. Consequently, in both of these cases, the plaintiff could assert an interest in maintaining the free flow of garbage in interstate commerce as a basis for challenging the ordinance, and thus satisfy the "zone of interests" test. *See* pp.6-7, *supra*.[7]

[7]Plaintiffs make much of the fact that the plaintiffs in *Houlton*, like the plaintiff in *OTG*, did not allege that they had any intention of shipping waste out of state, yet still had standing to challenge the respective ordinances under the dormant Commerce Clause. *OTG*, 241 F.3d at 1241; *Houlton*, 175 F.3d at 183; Petition 15. But this result is unsurprising and entirely consistent with the panel's decision. Unlike Plaintiffs here, the plaintiffs in *OTG* and *Houlton* were subject to (and injured by) ordinances that imposed barriers to interstate commerce. As such, their claims challenging the ordinances advanced interests congruent with the goal of the dormant Commerce Clause—*i.e.*, limiting the state's ability to erect barriers to interstate commerce—regardless of whether the plaintiffs themselves intended to ship waste out-of-state. Because "the zone of interests test turns on the *interests* sought to be protected by the lawsuit, not the *harm* suffered by the plaintiff" (King, *supra*, at 1251 (emphases in original)), this congruence is sufficient to satisfy the "zone of interests" test.

As discussed above, the "flow diversion" ordinance at issue here is different in kind from the "flow control" ordinances challenged in these cases. Unlike those ordinances, Measure E imposes no barrier to *any* existing interstate commerce because, as the Panel noted, "no recycler claims to apply out-of-state waste to land in Kern County." Panel Opinion 12871. Consequently, Plaintiffs in this case, unlike the plaintiffs in *Houlton* or *Ben Oehrleins*, cannot invoke an interest in protecting the free flow of interstate commerce as a basis for prudential standing.[8]

Moreover, under Ninth Circuit rules, an inter-circuit conflict is insufficient 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. Plaintiffs do not even attempt to make this exacting showing.[9] Nor could they. As

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[8]Plaintiffs' inability to distinguish between intrastate and interstate commerce leads to their assertion that an ordinance banning land application of only out-of-county but in-state biosolids would violate the Commerce Clause. Petition 20. No case supports this proposition and several cases contradict it. *See IESI AR Corp. v. Nw. Arkansas Reg'l Solid Waste Mgmt. Dist.*, 433 F.3d 600, 605 (8th Cir. 2006) (flow control ordinance requiring that waste be disposed of at either in-district or out-of-state landfills did not violate Commerce Clause); *Ben Oehrleins*, 115 F.3d at 1385-86 (county may enforce flow control restrictions on in-state waste).

[9]Plaintiffs do argue that this alleged split has a particular impact on the state of California since the size of the state means that a significant amount of economic activity does not literally cross a state border. Petition 16. Even if true, this is irrelevant to the issue of national uniformity.

explained below, the narrow question presented by this case raises no important legal or practical issue. *See* Part I(C), *infra*.

C. This Case Does Not Involve A Question Of Exceptional Importance.

The Panel has held that a plaintiff lacks standing under the dormant Commerce Clause unless its alleged injury results from an ordinance that adversely affects interstate commerce. This unexceptionable holding raises no issue of extraordinary importance. Nor can Plaintiffs or their amici curiae demonstrate that the issue has any practical significance.

(1) Measure E Is Unique. The National Association of Clean Water Agencies **(**NACWA) contends in its amicus brief that land application is a national business. NACWA Br. 6-15. Yet neither NACWA nor Plaintiffs have identified a single regulation other than Measure E that prohibits land application of biosolids. NACWA claims in its amicus curiae brief that it is "likely" other communities will institute such bans in the future if Measure E is upheld. *Id.* at 12-13. This unfounded speculation does not transform a unique local situation into a national issue of exceptional importance.

(2) The Wisdom Of Measure E Is Irrelevant. The National Solid Wastes Management Association ("NSWMA") argues in its amicus curiae brief that Measure E is unwise because it will hinder efforts to reduce green-house gases. NSWMA Br. 12-14. But the advisability of a ban on land application of biosolids is a political question, not a legal one.

(3) The Issue Presented By The Petition Has No Practical Significance. Like the plaintiff in *OTG*, Plaintiffs cannot show that the Ordinance they challenge imposes *any* burden on interstate commerce. *See* Panel Opinion 12872 (Plaintiffs argued only that "Measure E prevents them from shipping their waste *intra*state, or that they are denied the benefits of such shipments") (emphasis added). Hence, even if Plaintiffs had standing, their Commerce Clause challenge would fail on the merits, as it did in *OTG*. *See* 241 F.3d at 1242 ("[W]here a complaint alleges only an intrastate burden, then the Commerce Clause is not at all implicated"). Thus, far from being "exceptionally important," the standing question addressed in the Petition has no practical significance even for the outcome of this case.

II.

PLAINTIFFS FAIL TO SATISFY THE REQUIREMENTS FOR PANEL REHEARING.

Panel rehearing is warranted only if "[a] material point of fact or law was overlooked in the decision; [a] change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or [a]n apparent conflict with another decision of the court was not addressed in the opinion." U.S. Court of Appeals for the Ninth Circuit, *General Information, Judgment and Post-Judgment Proceedings* (rev. Jan. 2009) 1-2. Not one of these conditions is met here. *See also* FED. R. APP. P. 40.

Plaintiffs do not point to a single fact that the Panel allegedly overlooked. Nor do they claim that a change in the law occurred after the case was submitted. And, as discussed above there is no point of law or conflict with another decision of this Court that was overlooked by the panel. *See* Part I(B)(1), *supra*. Panel rehearing is therefore unwarranted.

CONCLUSION

If Plaintiffs had standing to litigate this case without any showing that their alleged injury is traceable to a barrier against interstate commerce, every generator or hauler of biosolids would have standing to challenge local biosolids regulations regardless of whether the regulation actually burdened interstate commerce, as long as they could show some injury-in-fact. Moreover, the same would also be true for any other state or local environmental regulation. Thus, under Plaintiffs' standing theory, *every* local environmental regulation could be challenged under the Commerce Clause, *even if the plaintiffs in that case (like Plaintiffs in this case) could not show any injury attributable to the local ordinance's effect on interstate commerce*. Plaintiffs' standing theory would thus open the floodgates to federal court challenges to state and local environmental laws. For this reason, Plaintiffs' attempt to expand federal jurisdiction poses a serious threat to the federalism and separation of powers concerns that underlie the "zone of interests" test that the Panel enforced. *See O'Sullivan v. City of Chicago*, 396 F.3d 843,

854 (7th Cir. 2005) (noting that when "individuals come to the federal courts to challenge the actions of a State[] . . . federal courts have the added responsibility to ensure that their actions do not strain unnecessarily the principles of federalism"); *Branch Bank & Trust Co. v. Nat'l Credit Union Admin. Bd.*, 786 F.2d 621, 624 (4th Cir. 1986) ("The zone test serves primarily to advance the separation of powers values that constitute a central concern of standing principles in general"). Plaintiffs' petition for rehearing and for rehearing en banc should therefore be denied.

DATED: October 21, 2009.

Respectfully,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32 AND NINTH CIRCUIT RULES 35-4 AND 40-1(A).

1. This brief complies with the type-volume limitation of Circuit Rules 35-4 and 40-1 because:

- ☑ this brief contains 4,134 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*
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DATE: October 21, 2009.

/s/ Steven L. Mayer
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PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing **ANSWER TO PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 21, 2009.

Participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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