No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,
Plaintiff-Appellants,

v.

SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. NATIONAL PARK SERVICE; and JONATHAN JARVIS, in his official capacity as Director, U.S. National Park Service,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

PETITION FOR REHEARING EN BANC

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I. INTRODUCTION AND RULE 35(B)(1) STATEMENT

Before it became obsessed with destroying the only oyster farm in Point Reyes National Seashore, the National Park Service had for many decades supported the oyster farm, as did local environmental groups and the community at large. The oyster farm and the surrounding cattle ranches provide the agricultural heritage the Seashore was created to protect. When Congress was considering legislation that became the 1976 Point Reyes Wilderness Act ("1976 Act"), wilderness proponents "stressed a common theme: that the oyster farm was a beneficial pre-existing use that should be allowed to continue notwithstanding the area's designation as wilderness." (Op. 40 (Watford, J., dissenting).) To this day, modern environmentalists and proponents of sustainable agriculture praise Drakes Bay as a superb example of how people can produce high-quality food in harmony with the environment.

Since 2005, for reasons that remain a mystery, the Park Service has changed position and sustained a vendetta against the oyster farm. The Park Service has been reprimanded by the National Academy of Sciences, which in 2009 found that the Park Service had "selectively presented, over-interpreted, and misrepresented the available scientific information", and by the Solicitor's Office of the Department of the Interior, which in 2011 found "bias" and "misconduct" in the evaluation of harbor-seal data. Despite these reprimands, the Park Service falsely asserted, in the final environmental impact statement ("EIS") made public in November 2012, that Drakes Bay had a "moderate adverse impact" on harbor

seals. It has since come to light that the Park Service's harbor-seal expert actually found "no evidence" of harm.

Although "all indications are that [in 1976] Congress viewed the oyster farm as a beneficial, pre-existing use whose continuation was fully compatible with wilderness status", a legal analysis provided by the Park Service in 2005 "bizarrely" concluded that the 1976 Act and its underlying intent had actually "'mandated' elimination of the oyster farm" when the farm's lease expired in 2012. (Op. 43-44 (dissent).) Because of this legal analysis, the Park Service refused to issue a permit that would allow the oyster farm to continue operations. In 2009 Congress responded by overriding the Park Service's legal analysis. Congress enacted a statute whose purpose was "[t]o extend a special use permit" for the oyster farm (SER 275), and which authorized the Secretary of the Interior to issue the permit "notwithstanding any other provision of law" (Op. 10). Nevertheless, when the Secretary denied the permit in November 2012, he relied on the same bizarre misinterpretation that Congress overrode. (Op. 48 (dissent).) The Park Service then ordered Drakes Bay to remove the oysters under cultivation, and evict the families of the resident employees from their homes.

Drakes Bay filed suit and moved for a preliminary injunction, but the district court denied the motion. Drakes Bay appealed to this Court, and moved for an injunction pending appeal. The motions panel unanimously granted the injunction. On the merits, however, a divided panel affirmed the district court. En banc rehearing is needed because the panel decision conflicts with several decisions of

the United States Supreme Court, and of this Court, on questions of exceptional importance:

First, the majority created a new rule in which a court has jurisdiction to review an agency's discretionary decision for everything *except* abuse of discretion: "a federal court lacks only jurisdiction to review an alleged abuse of discretion regarding the making of an informed judgment by the agency." (Op. 16 (quotation marks omitted).) The majority's holding effectively writes out part of the Administrative Procedure Act ("APA"): It gives a court jurisdiction to set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations" under 5 U.S.C. § 706(2)(C), but not agency action that is "arbitrary, capricious, [or] an abuse of discretion" under 5 U.S.C. § 706(2)(A). Because of this strange jurisdictional determination, the majority refused even to consider the dissent's conclusion that the Secretary's decision was based on a "legally erroneous interpretation of the controlling statute" (Op. 46, citing *Safe Air for Everyone v. EPA*, 488 F.3d 1088 (9th Cir. 2007)(agency action must be overturned when "flawed premise is fundamental" to determination).)

The decision conflicts with at least three lines of cases: (1) those cases holding that jurisdiction is precluded only by clear and convincing evidence of Congressional intent, including *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986)("[t]o preclude judicial review…a statute…must upon its face give clear and convincing evidence of an intent to withhold it") and *Kucana v. Holder*, 558 U.S. 233, 251-252 (2010)(it "takes 'clear and convincing evidence' to

dislodge the presumption" of judicial review), (2) those cases holding that agency action must be overturned when it is based on an error of law, including *SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943)(agency action "may not stand if the agency has misconceived the law") and *Negusie v. Holder*, 555 U.S. 511, 516 (2009)(when making a discretionary decision, agency "must confront the…question free of [its] mistaken legal premise"), and (3) those cases requiring an agency to provide a satisfactory explanation for its discretionary decisions, including *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513 (2009)("we insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action'", quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). The decision could potentially prohibit courts from considering whether agencies were arbitrary and capricious or abused their discretion in countless decisions granting or denying ordinary permits.

Second, the majority created a new rule for statutes incorporating the phrase "notwithstanding any other provision of law"—a rule that allows an agency to disobey Congress. Here the Park Service insisted that the 1976 Act and its underlying intent mandated that the oyster farm be removed and the area converted into wilderness. Congress overrode this misinterpretation by enacting a statute ("Section 124") that authorized the Secretary to issue a permit to Drakes Bay "notwithstanding any other provision of law". But the Secretary did not get the message. He refused to issue a permit, he said, because Section 124 "in no way overrides the intent of Congress as expressed in the 1976 to establish wilderness at

the estero", and because eliminating the oyster farm "effectuates that Congressional intent." (ER 123.)

The dissent concluded that the Secretary misinterpreted that Congressional intent—in 1976, Congress wanted to keep the oyster farm operating, not get rid of it—and that the Secretary did exactly what Congress, in 2009, told him *not* to do.

The majority held that a "notwithstanding" clause sweeps away only conflicting *statutes*, and not the *policies* underlying those statutes. This distinction-without-a-difference allowed the Secretary to implement the 1976 Act (as he misunderstood it) even though, in the words of the majority, Section 124 "trumps" the 1976 Act (Op. 17), and even though the majority did not disagree with the dissent's conclusion that the Park Service had misinterpreted the 1976 Act and its underlying intent (Op. 47-48).

The decision conflicts with *Motor Vehicle Manufacturers*, 463 U.S. at 43 (agency action invalid when it has "relied on factors which Congress has not intended it to consider"). The decision will encourage agencies to use the majority's supposed distinction between statutes and their underlying intent to nullify Congressional directives.

Third, the majority created a new rule limiting the applicability of the National Environmental Policy Act ("NEPA"). According to the majority, NEPA does not apply to an "environmental conservation effort" that takes "a step toward restoring the natural, untouched physical environment". (Op. 31 (quotation marks omitted).) But conservation efforts that restore the natural environment can have

significant *adverse* effects on the human environment, and thereby become subject to NEPA. Blowing up O'Shaughnessy Dam, for example, would wipe out the reservoir-adapted biota in the Hetch Hetchy Reservoir upstream of the dam, wash away people and homes downstream, and leave San Francisco thirsting for a supply of drinking water. Here, the agency decision would harm local water quality (farmed oysters filter the water, as native oysters did before they were overharvested long ago), the resident families (who would be kicked out of their homes), and California's shellfish market (Drakes Bay provides 16-35% of the oysters harvested in California). The decision therefore conflicts with the many cases holding that NEPA applies to projects that may cause significant harm to *any* aspect of the *human* environment, including *Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975)(EIS required when "project would materially degrade *any* aspect of environmental quality", emphasis added), and *Barnes v. United States DOT*, 655 F.3d 1124, 1136 (9th Cir. 2011)("EIS must be prepared if …project…may cause significant degradation of some *human* environmental factor", emphasis added).)[1]

Here a federal agency has behaved so badly that it has been reprimanded by the National Academy of Sciences and the Solicitor's Office for misconduct, and by Congress for misinterpreting the law. Despite these reprimands, the agency continued to make false scientific statements and insist on the very

[1] The majority acknowledged a circuit split about "whether significant *beneficial* effects alone would trigger an EIS". (Op. 31 n.11, emphasis in original.)

misinterpretation Congress overrode. Courts should provide a remedy whenever an agency bases its action on false statements and acts in disobedience of a Congressional directive.

And yet the majority held that courts lack jurisdiction to determine whether this type of agency action was arbitrary, capricious, or an abuse of discretion. This holding is wrong. Congress could not have intended to allow an agency to disobey a statute, or to base permit decisions on false statements, and yet be immune from judicial review. Nor could Congress have intended that a court would have jurisdiction to review an agency's discretionary decision for everything except abuse of discretion. En banc rehearing is needed.

II. A COURT HAS JURISDICTION TO REVIEW AN ORDINARY DISCRETIONARY DECISION FOR ABUSE OF DISCRETION

Decisions "committed to agency discretion by law" are exempt from judicial review. (5 U.S.C. § 701(a)(2).) This is "a very narrow exception" relevant only when "statutes are drawn in such broad terms that in a given case there is no law to apply". (*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).) The majority relied on an old decision of this Court for the proposition that a decision is committed to agency discretion—and that a court lacks jurisdiction—when there are "no statutory restrictions or definitions prescribing precise qualifications". (Op. 16, citing *Ness Investment Corp. v. Department of*

Agriculture, 512 F.2d 706, 715 (9th Cir. 1975).)[2] But this aspect of *Ness* was superseded long ago.

There is a "strong presumption" in favor of judicial review of agency decisions—"only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." (*Bowen*, 476 U.S. at 671, 681 (quotation marks and citations omitted).) Although "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" (*Webster v. Doe*, 486 U.S. 592, 600 (1988), quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)), there are meaningful standards that can be used to judge ordinary agency decisions (*Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718-720 (9th Cir. 2011)(applying *Bowen* and distinguishing *Webster* and *Heckler*)).[3]

[2] *Ness* has been limited by later decisions of this Court (*KOLA, Inc. v. United States*, 882 F.2d 361, 363-364 (9th Cir. 1989)(distinguishing *Ness*), and is in direct conflict with the Tenth Circuit (*Sabin v. Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975)).

[3] *Heckler* and *Webster* foreclosed review of two classes of agency decisions in which judicial intrusion is unwarranted: decisions not to take enforcement action, and CIA decisions to terminate agents.

Here, the Court plainly has jurisdiction. The majority cites no evidence of Congressional intent to preclude judicial review, and the Secretary's decision can be judged against four sets of meaningful standards:

(1) whether the Secretary properly interpreted Congressional intent underlying the 1976 Act (*see Chenery* and *Negusie*, cited above; *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 272 (1968)("courts…are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with…the congressional policy underlying a statute", citation and quotation marks omitted); *FEC v. Akins*, 524 U.S. 11, 25 (1998)("[i]f a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case"));

(2) whether the decision was arbitrary, capricious, or an abuse of discretion (*see Fox Television*, 556 U.S. at 513; *Judulang v. Holder*, 132 S.Ct. 476, 478 (2011)(although "a court is not to substitute its judgment for that of the agency", "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking"));

(3) whether the decision complied with statutes such as NEPA (*see* Op. 17 (holding that court has jurisdiction to review Secretary's decision for compliance with NEPA)); and

(4) whether the decision complied with the Park Service's permitting regulations (*see KOLA*, 882 F.2d at 363-364 (distinguishing *Ness* and

finding jurisdiction to review permitting decision for compliance with agency regulations); 36 C.F.R. § 1.6 (Park Service's permitting regulations)).

The majority relied on *Ness* for the dubious proposition that when there is "no law to apply", a court nevertheless has jurisdiction to review the decision for compliance with those laws that do apply. (Op. 15-16.)[4] The majority did not consider the logical inconsistency of its position. If there is *some* law to apply, there cannot be *no* law to apply. And if the Court has jurisdiction to consider violations of "legal mandates or restrictions" (Op. 5), then it must have jurisdiction to consider violations of the legal mandates and restrictions in the APA, as this Court has concluded:

> Indeed, although 5 U.S.C. § 701(a)(2) insulates from judicial review agency discretion where there is no law to apply, the APA itself commits final agency action to our review for "abuse of discretion." Those standards are adequate to allow a court to determine whether [an agency] is doing what it is supposed to be doing….

[4] The majority's holding goes well beyond *Ness*, which acted consistently with the concept that jurisdiction to review an agency decision is an all-or-nothing issue. *Ness* treated the complaint as challenging two separate decisions, and found that it had jurisdiction to review one but not the other. (*Ness*, 512 F.2d at 712.)

(*Pinnacle Armor*, 648 F.3d at 720.)[5]

Here the dissent reviewed the substance of the Secretary's decision and concluded that it was based on a "legally erroneous interpretation of the controlling statute". (Op. 46 (dissent); *see* Op. 20 n.6 (refusing to consider issue).) The majority had jurisdiction to consider this issue, and should have considered it.

The majority, in short, created a new rule of jurisdiction that is in conflict with several lines of cases from the Supreme Court, with previous decisions of this Court, and with a decision of the Tenth Circuit. The rule may be used to eliminate abuse-of-discretion review of countless everyday decisions to issue or deny permits.

En banc rehearing is needed.

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[5] The majority's refusal to apply 5 U.S.C. § 706(2)(A) also conflicts with *Overton Park*. The majority held that judicial review is limited:

> The narrow question that we have jurisdiction to review is whether the Secretary misinterpreted his authority under Section 124.

(Op. 23.) But *Overton Park* held that a court must go beyond that:

> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

(*Overton Park*, 401 U.S. at 416.)

III. AGENCIES SHOULD NOT BE ALLOWED TO DISOBEY A STATUTE INTENDED TO OVERRIDE AN AGENCY'S MISINTEPRETATION OF LAW

In 2004, Drakes Bay purchased the assets of the oyster farm. (ER 120.) Among the assets was a lease, in effect through November 2012, that contained a renewal clause allowing extension by permit. (ER 599.) In 2005, however, the company received a memo from the Park Service opining that the 1976 Act and Park Service policies "mandated" the conversion of Drakes Estero to wilderness, and the removal of "non-conforming" conditions including the oyster farm. (ER 120, 230.)[6]

The dissent carefully reviewed the legislative history of the 1976 Act, and concluded that the Park Service "simply misinterpreted the [1976] Act's provisions and misconstrued Congress's intent." (Op. 38.) Senator Tunney, who introduced the bill that became the 1976 Act, made clear that "aquacultural uses can continue." (Op. 40.) The concept that "the oyster farm was fully compatible

[6] Although, as the Secretary recognized, Drakes Bay received the Park Service's legal analysis only *after* it purchased the oyster farm (ER 120, *see* ER 180, ¶64), the majority mistakenly asserted that "Drakes Bay purchased the oyster farm with full disclosure" and that "the only reasonable expectation Drakes Bay could have had at the outset was that such a closure was very likely". (Op. 36-37.) This mistake controlled the majority's review of the equities. (*Id.*) But, as the dissent recognized, Drakes Bay's knowledge "is not the relevant consideration". (Op. 49-50.) The "equities strongly favor Drakes Bay" because the "government will suffer only modest harm if oyster farming's eighty-year history…continues a bit longer", whereas "if a preliminary injunction is erroneously denied, Drakes Bay's business will be destroyed." (*Id.*) The motions panel agreed that "the balance of hardships tips sharply in appellants' favor." (Dkt. 22.)

with…designation as wilderness" is "firmly grounded in the text of the [Wilderness] Act itself", which "generally bans commercial enterprise within wilderness areas…'subject to existing private rights'", which in Point Reyes included the oyster farm. (Op. 41-42 (dissent), citing 16 U.S.C. § 1133(c).)

The dissent characterized the Park Service's legal conclusions as "bizarre[], given the legislative history". (Op. 43.)[7] The majority did not disagree.[8]

In 2009, Congress passed Section 124, whose purpose was "[t]o extend a special use permit" for Drakes Bay (SER 275), and which authorized the Secretary of the Interior "to issue" the permit "notwithstanding any other provision of law" (Op. 10).[9] In enacting Section 124, Congress "sought to override the Secretary's misinterpretation of the [1976 Act]." (Op. 37 (dissent).)

And yet, the Secretary did exactly what Congress had directed him not to do. He "denied Drakes Bay's permit request based primarily on the very same misinterpretation of the [1976 Act] that Congress thought it had overridden". (Op. 38 (dissent).)

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[7] The government has not argued that any of its statutory interpretations are entitled to deference.

[8] "Most tellingly, the majority never attempts to argue that the [Park Service's] interpretation of the [1976 Act] was *correct*." (Op. 47-48 (dissent)(emphasis in original).)

[9] The majority characterizes as "wishful thinking" Drakes Bay's argument that "the statute was intended to 'make it easy' to issue the permit." (Op. 23.) But Drakes Bay's argument is squarely supported by the purpose of Section 124. (SER 275.)

The Secretary's decision begins with the assertion that granting the permit would "violate…specific wilderness legislation". (ER 118.) This assertion is so obviously contrary to Section 124 that the majority concluded he could not possibly have meant what he said. (Op. 24.) But the rest of the Secretary's decision leaves no doubt that this assertion was more than a slip of the pen. Although the Secretary wrote that he had discretion to issue the permit, his choice was to implement the 1976 Act as the Park Service had misinterpreted it:

> In enacting that provision [i.e. the 1976 Act], Congress clearly expressed its view that, but for the nonconforming uses, the estero…was worthy of wilderness designation. Congress also clearly expressed its intention that the estero become designated wilderness by operation of law when "all uses thereon prohibited by the Wilderness Act have ceased." [Drakes Bay's] commercial operations are the only use preventing the conversion of Drakes Estero to designated wilderness….
>
> …Sec. 124…in no way overrides the intent of Congress as expressed in the 1976 act to establish wilderness at the estero. With that in mind, my decision effectuates that Congressional intent.

(ER 122-123 quoting the 1976 Act.) Plainly, the Secretary did not use his independent judgment to balance the pros and cons of allowing oyster farming to continue. Instead, he made

> precisely the same errors of statutory interpretation the [Park Service] made back in 2005. They are precisely the same errors that prompted Congress to enact § 124 in the first place. And…they are precisely the same errors Congress attempted to supersede by inserting the notwithstanding clause.

(Op. 47 (dissent).) The Secretary "treat[ed] 'prior legislation'…as a 'legal barrier' to permit issuance"—which was "exactly what the notwithstanding clause was intended to prohibit." (Op. 48 (dissent).)

The majority acknowledges that Section 124 "trumps any law that purports to prohibit or preclude the Secretary from extending the permit" (Op. 17), and concedes that the Section 124 was enacted to override the Park Service's "opinions in 2005" and "convey that prior legislation [the 1976 Act] should not be deemed a legal barrier" (Op. 20). The 1976 Act was, therefore, trumped.

But the majority held that a notwithstanding clause sweeps away only the *statutes* that conflict with the notwithstanding clause, not the *policies* underlying those statutes. (Op. 26.) The effect of this holding is to allow an agency to thumb its nose at Congress, when Congress trumps a statute, by asserting that the agency is merely implementing the policies underlying the trumped statute.

Although the majority concluded that the Secretary "chose to give weight to the *policies* underlying wilderness legislation" (Op. 24, emphasis in original), the Secretary was plainly applying the trumped statute itself. He did not give weight to wilderness in an abstract or philosophical sense, but rather changed the designation of the estero from "potential wilderness" (a statutory term) to "wilderness" (another statutory term) consistent with "Congress's direction".

(ER 124.)[10] Because this re-designation has no meaning independent of the 1976 Act, he was in fact applying the trumped statute itself.

When Congress trumps a statute, it cannot intend to allow an agency to implement that same statute under the guise of relying on its underlying policies. The decision is therefore in conflict with *Motor Vehicle Manufacturers* (see Section I above). En banc rehearing is needed.

IV. NEPA APPLIES TO CONSERVATION EFFORTS THAT HARM THE HUMAN ENVIRONMENT

The majority concluded that the Secretary's "decision is essentially an environmental conservation effort, which has not triggered NEPA in the past", and that "[b]ecause removing the oyster farm is a step toward restoring the 'natural, untouched physical environment,' the reasoning of *Douglas County* is persuasive here." (Op. 31, citing *Douglas County v. Babbitt*, 48 F.3d 1495, 1505-1506 (9th Cir. 1995).) *Douglas County* held that NEPA does not apply "to federal actions that do *nothing* to alter the natural physical environment." (*Douglas County* at 1505-1506, emphasis added.) Plainly, decisions labeled as "environmental conservation" measures, and steps toward implementing an idealized "untouched" environment, can have adverse effects on the environment. (See Section I

[10] The Congressional "direction" the Secretary quoted (Op. 25, ER 124) is the very same sentence in the legislative history quoted (and misconstrued) by the Park Service's analysis (ER 229), which Section 124 swept away (Op. 43-44, 46, 48 (dissent)).

(blowing up dam).) NEPA applies to agency decisions that cause adverse effects, regardless of how the decision is labeled. (See cases cited in Section I.)

When agricultural operations maintain a high-quality environment, any change can be adverse. The majority pooh-poohed the environmental harm that would result here. It asserted that the decision's "relatively minor harms" do not implicate NEPA. (Op. 32.) But even the Park Service concedes that removing the oysters and evicting the resident families will have adverse effects on the environment. The EIS found that removal "could result in long-term major adverse impacts on California's shellfish market", and in adverse effects on water quality, eelgrass, fish, birds, harbor seals, and special status species. (SER 53-55, 57-58, 62-63, 66, 74.) Because of these adverse effects, NEPA applies.

More generally, the majority was wrong to extend *Douglas County* because it violates the plain language of NEPA, which requires an EIS whenever an agency proposes a "major federal action significantly affecting the quality of the human environment". (42 U.S.C. § 4332(2)(C).)[11]

[11] The majority also concluded, incorrectly, that the Secretary committed only harmless error when he violated NEPA. (*See* Op. 32-34.) This conclusion depended on the incorrect assertions that "[t]he Secretary was well aware of the controversies on the specific topics that Drakes Bay criticizes" and that "impact assessments for…harbor seals were 'considered to have a high level of uncertainty'". (Op. 34.) In fact, there was no uncertainty. The Park Service's expert concluded that there was no evidence that the oyster farm was disturbing the seals—which means that the assertion in the EIS of a "moderate adverse impact" is simply not true. (Dkt. 64-1 at 1-4.) And the Secretary could not have been "well aware" of this "controversy" because it did not come to light until after the Secretary made his decision. (*Id*.)

V. CONCLUSION

The petition for en banc rehearing should be granted.

DATED: October 18, 2013

Respectfully submitted,

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