No. 20-___

In the Supreme Court of the United States

D.C., A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM, HELEN GARTER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

COUNTY OF SAN DIEGO, A.B. AND JESSIE POLINSKY CHILDREN'S CENTER, SAN DIEGO HEALTH AND HUMAN SERVICES AGENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIOARI

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QUESTIONS PRESENTED

1. Does rule 23(c)(4) of the Federal Rules of Civil Procedure ("Rule 23(c)(4)") require only that common questions predominate over individual ones within the specific issues that are certified (*i.e.*, liability) rather than in the entire cause of action (*i.e.*, liability and damages)?
2. When determining whether certification of a liability issue class is superior to individualized determinations of liability, is it an abuse of discretion for the court to consider individualized damages issues?
3. Does collateral estoppel apply to a governmental entity such as the County of San Diego?
4. Is it an abuse of discretion for the court, when conducting its superiority analysis, to disregard factors such as whether the case has "negative value" and whether, therefore, absent certification class members will be unable to feasibly bring individual suits?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision below is unpublished. *D.C. v. County of San Diego*, 783 F. App'x 766 (9th Cir. 2019); Pet. App. 10a. The order denying rehearing and rehearing *en banc* is also unpublished. *D.C. v. County of San Diego*, No. 18-55853, 2020 U.S. App. LEXIS 1205 (9th Cir. Jan. 14, 2020); Pet. App. 13a. The District Court's decision denying Petitioner's motion to certify a liability issue class is also unpublished. *D.C. v. County of San Diego*, No. 15cv1868-MMA (NLS), 2018 U.S. Dist. LEXIS 17764 (S.D. Cal. Feb. 2, 2018); Pet. App. 1a.

JURISDICTION

The court below entered judgment on November 5, 2019 (Pet. App. 10a) and denied a timely rehearing petition on January 14, 2020 (*id*. at 13a). Pursuant to this Court's March 19, 2020 Order (589 U.S.), this Petition is timely because it is filed within 150 days from the date the rehearing petition was denied. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 23(c)(4) of the Federal Rules of Civil Procedure provides: "*Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues."

I. INTRODUCTION

Plaintiff filed this class action to seek redress for the abuse of citizens by the hands of government officials and their policies that ignore the rights of families to live without unnecessary government interference.

For more than 20 years, Defendant County of San Diego (the "County" or "Defendant") conducted unconstitutional and invasive medical evidentiary examinations at Polinsky Children's Center on more than 37,000 children pursuant to a single policy, where these children were stripped naked and subjected to head-to-toe investigatory physical examinations and other testing. The examinations included manually manipulating the genitals of these children and subjecting them to drug screens and other testing without the clearly constitutionally required consent or presence of their parent(s) or legal guardian(s), individualized court order or warrant, or exigent circumstances. This practice has been repeatedly held by the Ninth Circuit and other circuits to be unconstitutional. *Mann v. County of San Diego*, 907 F.3d 1154, 1167 (9th Cir. 2018), *reh'g denied*, 2019 U.S. App. LEXIS 5103 (9th Cir. Feb. 21, 2019), *cert. denied*, 140 S. Ct. 143 (2019), "The County's continued failure to provide parental notice and obtain consent for the Polinsky medical examinations has harmed families in Southern California for too long."[1]

Certification of a liability class is *essential* because without a classwide finding of liability and notice procedures, most of these children, and their parents or guardians, will not know that these exams were unconstitutional and that their

[1] The physical examinations at issue in this case are identical to those conducted in *Mann*.

rights were violated. Indeed, some of the younger children and their parents will not even know that the exams took place. These Class members will then be left without any remedy for the strip-searches conducted upon them when they were minors pursuant to an unconstitutional government policy.

The District Court denied Plaintiff's motion to certify the action as a class action due to *individualized damages issues*. In response, Plaintiff requested the District Court certify an issue class under Rule 23(c)(4) on the issue of liability only. The District Court also denied this motion, again citing *individualized damages issues*. The Ninth Circuit's opinion affirming the order erroneously applies this Court's opinion in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) and directly conflicts with the Second Circuit's opinion in *Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 461 F.3d 219 (2d Cir. 2006).

This Court has never provided guidance on Rule 23(c)(4) certification. However, this issue is of increasing national importance as federal courts around the country grapple with certification of classes of individuals whose constitutional rights have been violated.[2] In civil rights class actions, where numerous class

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[2] Some courts grappling with civil rights issues have initially denied certification but then later granted issue certification as to liability. *See, e.g.*, *In Re Nassau County Strip Search* Cases, No. 99-cv-2844, 2010 U.S. Dist. LEXIS 99783 (E.D.N.Y. Sept. 22, 2010); *Amador v. Baca*, No. 10-cv-1649, 2016 U.S. Dist. LEXIS 186544, at *3-4 (C.D. Cal. Nov. 18, 2016). Other courts have granted class certification where the government defendant acted pursuant to a uniform policy. *See, e.g.*, *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004); *Fonder v. Sheriff of Kankakee County*, No. 12-cv-2115, 2013 U.S. Dist. LEXIS 148026 (C.D. Ill. Oct. 15, 2013); *McBean v. City of New York*, 260 F.R.D. 120 (S.D.N.Y. 2009); *Jones v. Murphy*, 256 F.R.D. 519 (D. Md. 2009); *Smith v. Dearborn County, Ind.*, 244 F.R.D. 512 (S.D. Ind. 2007); *Moyle v. County of Contra Costa*, No. C-05-02324, 2007 U.S.

members have been treated in the same unlawful way by a government actor pursuant to a uniform policy, these violations are likely to evade any remedy without issue class certification due to the frequently individualized nature of the damages which are typically unsuitable for certification under Rule 23(b). Therefore, it is imperative that this Court address the issue.

The District Court and the Panel both committed the same four legal errors, the outcome of which is to deprive the Class members of any remedy.

First, the District Court and the Panel improperly considered *individualized damages issues* in deciding whether common liability issues predominate. When considering whether to certify a liability-only class, the court must look at the liability issues in isolation to determine if common issues predominate. The Panel, however, relied on cases that did not concern issue certification or Rule 23(c)(4) and held that Plaintiff was required to "show that damages could be efficiently calculated on a classwide basis following success in the liability phase of the litigation." Pet. App. 12a. This holding renders Rule 23(c)(4) superfluous and is contrary to the Ninth Circuit's own opinion in *Valentino v. Carter-Wallace, Inc.*, where it held, "Even if the common questions do not predominate over the individual questions so that class certification of the *entire action* is warranted, Rule 23 authorizes the district court in appropriate cases to *isolate the common issues* under Rule 23(c)(4)(A) and proceed with class treatment of *these particular issues*." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (emphasis added).

Dist. LEXIS 89509 (N.D. Cal. Dec. 5, 2007); *Blihovde v. St. Croix County*, 219 F.R.D. 607 (W.D. Wis. 2003); *Maneely v. City of Newburgh*, 208 F.R.D. 69 (S.D.N.Y. 2002).

Second, whether this is an "appropriate case" for certification of a liability class turns upon the "superiority of class adjudication over other litigation alternatives." *Id*. The District Court erred in its superiority analysis under Rule 23(c)(4) because it should have compared litigating the issue to be certified (here, liability) on a classwide basis with litigating that same issue on an individualized basis, but it did not. Instead, the District Court held that certifying a liability class would not be superior to, or more efficient and economical than, individual litigation because *individualized damages determinations* would be required whether or not a liability-only class is certified. The Panel tacitly affirmed this holding as well. This was error because, like the predominance analysis, damages determinations have no place in the superiority analysis concerning a Rule 23(c)(4) issue class. *See, e.g., Augustin*, 461 F.3d at 230 ("we perceive little difficulty in managing a class action on the issue of liability.").

Third, the District Court also found that certification of a liability class would not be superior to individualized liability determinations because "if Plaintiff succeeds in determining that Defendant is liable for violations of the Fourth and Fourteenth Amendments, this will have preclusive effect in subsequent suits with respect to liability." Pet. App. 8a. The District Court's holding (and the Ninth Circuit's affirmance) was error because: (1) collateral estoppel is not available for use against a government entity; and (2) even if it were, adjudication of liability on a classwide basis is still more "efficient and expeditious than individualized litigation." *Valentino*, 97 F.3d at 1233. As the Second Circuit recognized in *Augustin*, even if

collateral estoppel were available, "each individual plaintiff would have to establish anew that defendant[] w[as] collaterally estopped . . . and, if not, that defendant[] w[as] liable on the merits." *Augustin*, 461 F.3d at 228.

Fourth, the Panel failed to address additional reasons that certification of a liability class is superior to other litigation alternatives, including that, absent class certification and its attendant classwide notice procedures, most of the Class members – all of whom were children at the time of the violations, many of whom still are, and who number in the many thousands – will never know that the County violated their clearly established constitutional rights, and thus never will be able to vindicate those rights. "As a practical matter, then, without use of the class action mechanism, individuals harmed by defendant['s] policy and practice may lack an effective remedy altogether." *Id.* at 229.

Certiorari is necessary to permit this Honorable Court to provide much needed guidance to the lower courts on the appropriate analysis of predominance and superiority when certifying an issue class under Rule 23(c)(4). Absent such guidance, the courts will continue to grapple with these issues, and courts will continue to deny victims of civil rights violations any meaningful remedy when class members' injuries are not economically large enough to justify individual contingent representation.

II. STATEMENT OF THE CASE

This is a civil rights class action against Defendants County of San Diego, A.B. and Jessie Polinsky Children's Center ("Polinsky"),[3] and San Diego County Health and Human Services Agency (collectively, "Defendant" or the "County") arising out of the County's institution and enforcement of a policy, practice, and custom pursuant to which children up to 18 years old held at Polinsky were undressed and subjected to head-to-toe investigatory physical examinations, including the intrusive examination of genitalia.[4] These unnecessary and excessive examinations were conducted without the consent or presence of the children's parent(s) or legal guardian(s), without any court order or warrant for such examinations after notice to the parents and an opportunity to be heard, and without exigent circumstances, all in violation of Plaintiff's and the Class members' civil rights, including those secured under the Fourth and Fourteenth Amendments to the Constitution and those set forth in clear and established law.[5] *See Wallis ex rel. Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000); *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009). The Ninth Circuit in *Mann*, 907 F.3d at 1167, held that the County's

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[3] "Polinsky" is an emergency shelter care facility for children operated by the County through its Health and Human Services Agency.

[4] The proposed class is defined as all children who had not yet reached 20 years of age as of August 24, 2015 and who were placed at Polinsky and subjected to a physical examination without the presence of their parent or legal guardian, without the consent of their parent or legal guardian, without an individualized order of the court authorizing their examination, and without exigent circumstances (the "Class").

[5] The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a).

policy of conducting *these very same physical examinations* on children entering Polinsky without parental consent or exigent circumstance violated their constitutional rights, and that "[t]he County's continued failure to provide parental notice and obtain consent for the Polinsky medical examinations has harmed families in Southern California for too long."

When Plaintiff first moved for class certification, the District Court held that this proposed class action satisfies each of the requirements of Rule 23(a) (*i.e.*, numerosity, commonality, typicality, and adequacy) and Rule 23(b)(3)'s predominance requirement as to the issue of the County's liability. *D.C. v. County of San Diego*, No. 15cv1868-MMA (NLS), 2017 U.S. Dist. LEXIS 185548, at **28-42 (S.D. Cal. Nov. 7, 2017). The District Court denied Plaintiff's motion, however, finding that because proving injury to human dignity and emotional distress would vary from person to person, damages issues will predominate over the common issues. *Id*. at *48.

Plaintiff filed a renewed motion for class certification and requested the District Court certify, in the alternative, an issue class under Rule 23(c)(4) for purposes of determining the County's liability. The District Court denied this motion finding that: (1) proving injury to human dignity and emotional distress with respect to Plaintiff's claims will vary from person to person; (2) certifying a liability-only class would not materially advance the litigation because Plaintiff had not devised a plan to resolve the damages issues after a determination of liability; and (3) certification was not superior to Class members litigating their own individual

cases because they could rely upon nonmutual offensive collateral estoppel to establish liability.

Plaintiff filed a petition for permission to appeal under Rule 23(f), which the Ninth Circuit Court of Appeals granted, and argued on appeal that the District Court committed legal error in several respects and abused its discretion in failing to certify, at a minimum, a liability issue class under Rule 23(c)(4) for purposes of determining the County's liability. Specifically, Plaintiff argued that: (1) injury to human dignity is a measurable, compensatory, general damage that is separate from emotional distress damages and is subject to classwide proof;[6] (2) the District Court erred by imposing a requirement that Plaintiff proffer a plan for resolving the *entire case, including individualized damages*, as a prerequisite to certifying a liability-only class; (3) issue preclusion cannot be used against government entities such as the County; (4) certification of a liability class is superior to individual litigation because the District Court can make a liability finding applicable to all Class members; and (5) absent a class action here, the children whose rights the County violated will for all practical purposes be without a remedy.

The Panel affirmed the District Court's order denying certification of a liability class, reasoning that the District Court did not abuse its discretion because: (1) "regardless of any resolution of issues a liability-only class might afford, individualized injuries of each class member would still potentially require tens of thousands of trials;" (2) "plaintiffs seeking certification must nevertheless carry their

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[6] While Plaintiff does not address this argument herein, he reserves the right to reassert it should the Court grant the petition for writ of certiorari.

burden of showing damages are capable of efficient calculation;" and (3) "D.C. failed to show that damages could be efficiently calculated on a classwide basis following success in the liability phase of the litigation." Pet. App. 12a.

The Panel's opinion improperly imposes a requirement for issue certification of a liability class under Rule 23(c)(4) that is identical to the requirement of full class certification and, thus, renders the Rule 23(c)(4) provision a nullity, namely, that Plaintiff demonstrate that that the entire case, including the individualized damages, can be resolved on a classwide basis. The requirement conflicts with the Ninth Circuit's holding in *Valentino* and the holdings of multiple other circuits that certification of an issue class under Rule 23(c)(4) requires only that common questions predominate over individual ones *within the specific issues that are certified* (*i.e.*, liability) rather than in the entire cause of action (*i.e.*, liability and damages). *See Valentino*, 97 F.3d at 1234. The Panel also failed to address the District Court's erroneous conclusion of law that certification of a liability class is not superior to individualized litigation because of the individualized damages issues and because, should the Court find the County individually liable to Plaintiff, collateral estoppel would apply to absent Class member claims against the County in subsequent individual litigation.

III. REASONS FOR GRANTING THE WRIT

A. When Considering Whether to Certify a Liability-Only Issue Class, it is an Abuse of Discretion for the Court to Consider Individualized Damages Issues

The District Court's denial of certification of a liability-only class and the Panel's affirmance of that decision both turned on the likelihood that there would be individualized damages issues after a liability determination. However, damages issues are irrelevant when considering certification of a liability-only class under Rule 23(c)(4), where the court is to consider the predominance of common liability issues or the superiority of litigating those common liability issues as a class action versus individually.

B. Individualized Damages Issues are Irrelevant to the Analysis of Whether Common Liability Issues Predominate Over Individualized Liability Issues

The Ninth Circuit in *Valentino* recognized that under Rule 23(c)(4), "[e]ven if the common questions do not predominate over the individual questions so that class certification of *the entire action* is warranted, Rule 23 authorizes the district court in appropriate cases to *isolate the common issues* under Rule 23(c)(4)(A) and proceed with class treatment of *these particular issues*." *Valentino*, 97 F.3d at 1234 (emphasis added). Therefore, when considering whether to certify an issue class for determination of liability, the court must look at the liability issues in *isolation* to determine if common issues predominate. The District Court and the Panel here improperly considered individualized *damages* issues in deciding whether common

liability issues predominate and whether litigation of *liability* on a classwide basis is superior to litigation of the issue on an individual basis.

As to the predominance analysis, the Panel's requirement that Plaintiff demonstrate that the *entire* case, including the individualized damages, can be "efficiently calculated on a classwide basis" for certification of a liability class under Rule 23(c)(4) conflicts with the Ninth Circuit's holding in *Valentino* and the holdings of multiple other circuits that certification of an issue class under Rule 23(c)(4) only requires that common questions predominate over individual ones *within the specific issues that are certified* (*i.e.*, liability) rather than in the entire cause of action (*i.e.*, liability and damages). *See* Fed. R. App. P. 35(b)(1) & 9th Cir. R. 35-1; *Valentino*, 97 F.3d at 1234; *Augustin*, 461 F.3d at 226; *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 411-12, 415 (6th Cir. 2018); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012); *In re Deepwater Horizon*, 739 F.3d 790, 816 (5th Cir. 2014).

As the Second Circuit recognized in *Augustin*, "the plain language and structure of Rule 23 support [this] view." *Augustin*, 461 F.3d at 226. Rule 23(c)(4) provides: "When appropriate, an action may be maintained as a class action with *respect to particular issues*." (emphasis added). "As the rule's plain language and structure establish, a court must first identify the issues potentially appropriate for certification 'and . . . then' apply the other provisions of the rule, *i.e.*, subsection (b)(3) and its predominance analysis." *Augustin*, 461 F.3d at 226 (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003) (reasoning that the rule's

language provides this 'express command' that 'courts have no discretion to ignore.'")).[7]

Moreover, as the Second Circuit also recognized, the Advisory Committee Notes with respect to Rule 23(c)(4) confirm this understanding:

> "For example, in a fraud or similar case the action may retain its 'class' character *only* through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims."

Augustin, 461 F.3d at 226 (quoting Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 1996 amend.) (emphasis added in *Augustin*). "As the notes point out, a court may employ Rule 23(c)(4) when it is the 'only' way that a litigation retains its class character, *i.e.*, when common questions predominate only as to the 'particular issues' of which the provision speaks." *Id.* "Further, the notes illustrate that a court may properly employ this technique to separate the issue of liability from damages." *Id.* *See also* 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1790 at 271 (2d ed. 1986) ("The theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member.").

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[7] "[T]he issue-class approach most accurately reflects the plain language of Rule 23(c)(4) — both before and after it was amended in 2007." *Jacks v. DirectSat USA, LLC*, No. 10-cv-1707, 2015 U.S. Dist. LEXIS 28881, at *15 (N.D. Ill. Mar. 10, 2015). The 2007 amendments to Rule 23(c)(4) were "not intended to change the meaning of the subprovision" but were "meant 'to be stylistic only' in order to make the rule 'more easily understood . . . .'" *Id.* at *16 (quoting Fed. R. Civ. P. 23 adv. comm. n. to 2007 amend.).

The contrary approach that the District Court and the Panel took renders Rule 23(c)(4) "virtually null." *Augustin*, 461 F.3d at 226. If the cause of action, as a whole, must satisfy the predominance requirement of Rule 23(b)(3), "a court considering the manageability of a class action – a requirement for predominance under Rule 23(b)(3)(D) – [would have] to pretend that subsection (c)(4) – a provision specifically included to make a class action more manageable – does not exist until after the manageability determination [has been] made." *Gunnells*, 348 F.3d at 439. Accordingly, "a court could only use subsection (c)(4) to manage cases that the court had already determined would be manageable *without* consideration of subsection (c)(4)." *Id.* This approach contravenes the "'well-settled'" principle "'that courts should avoid statutory interpretations that render provisions superfluous.'" *Augustin*, 461 F.3d at 227 (citation omitted). It was therefore error to require Plaintiff to demonstrate that damages can be efficiently calculated on a *classwide basis* once a classwide liability determination has been made.

The cases the Panel relied upon are inapposite. Neither this Court's opinion in *Comcast,* 569 U.S. at 34, nor any of the Ninth Circuit opinions in *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2019) or *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) concerned certification of an *issue class* under Rule 23(c)(4). Accordingly, those opinions' discussions of a plaintiff's burden concerning damages calculations are wholly irrelevant to the analysis of whether a plaintiff must demonstrate that damages can be calculated on *a classwide basis* for certification of a *liability-only* issue class under Rule 23(c)(4).

C. Individualized Damages Issues are Irrelevant to the Analysis of Whether Determination of Liability on a Classwide Basis is Superior to Individualized Litigation of Liability

When a court is conducting the superiority analysis for purposes of certification of a liability-only issue class, it must analyze the superiority of determining *liability* on a classwide basis versus on an individual basis, and individualized damages determinations are not relevant to that analysis. If the District Court and the Panel had conducted the proper analysis, the only logical conclusion would have been that a classwide determination of liability will "significantly advance the resolution of the underlying case, thereby achieving judicial economy and efficiency." *Valentino*, 97 F.3d at 1229. As the Second Circuit recognized, "when plaintiffs are 'allegedly aggrieved by a single policy of defendants,' such as the blanket policy at issue here, the case presents 'precisely the type of situation for which the class action device is suited' since many nearly identical litigations can be adjudicated in unison." *Augustin*, 461 F.3d at 228 (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001)). Again, the District Court and the Panel erred in considering individualized damages issues when deciding whether litigating liability on a classwide basis would be more efficient, economical and, therefore, superior to litigating it on an individual basis.

While the District Court and the Panel did not speak in terms of a "superiority" analysis, the District Court's finding that certification of liability class would not "materially advance the litigation because individualized damages determinations would still be required" (Pet. App. 8a) is in effect a finding, albeit an erroneous one, that certification of an issue class is not superior to individualized

litigation. The Panel found that the District Court acted within the bounds of its discretion when it considered that individualized damages determinations would still be required after a finding of liability. Pet. App. 12a. Again, however, consideration of individualized *damages* determinations are irrelevant to the issue of whether a *liability-only* issue class should be certified, otherwise, as discussed above, Rule 23(c)(4) serves no purpose.

D. Collateral Estoppel Does Not Apply to the County of San Diego

The District Court also erred in finding that certification of a liability-only class is not superior to individual litigation due to the potential application of collateral estoppel because collateral estoppel cannot be used against a governmental entity such as the County. The Panel did not address this error.

In *United States v. Mendoza*, 464 U.S. 154, 155 (1984), this Court held that "the United States may not be collaterally estopped on an issue . . . adjudicated against it in an earlier lawsuit brought by a different party." Lower courts have applied this holding to other federal and state governmental entities. *See, e.g.*, *Nat'l Med. Enters., Inc. v. Sullivan*, 916 F.2d 542, 545 (9th Cir. 1990) (applying *Mendoza* to the Secretary of Health and Human Services and noting "the well-established rule that nonmutual offensive collateral estoppel cannot be asserted against the government"); *Coleman v. Cal. Bd. of Prison Terms*, 228 F. App'x 673, 675 (9th Cir. 2007) (applying *Mendoza* to the California Board of Prison Terms; "the Supreme Court unanimously rejected the application of offensive nonmutual collateral estoppel against the government"); *Idaho Potato Comm'n v. G&T Terminal*

Packaging, Inc., 425 F.3d 708, 714 (9th Cir. 2005) (applying *Mendoza* to nonmutual defensive collateral estoppel against The State of Idaho Potato Commission); *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689-90 (9th Cir. 2004) (applying *Mendoza* to nonmutual offensive collateral estoppel against the Commissioners of the Idaho State Tax Commission).

This rule of law also applies to district court decisions concerning local governments. *See Mann*, 907 F.3d at 1159 n.6 ("We have 'hesitate[d] to give preclusive effect to the previous litigation of a question of law by estoppel against a state party when no state law precedent compels that we do so,' . . . and we decline to do so here.") (citing *Coeur D'Alene Tribe of Idaho*, 384 F.3d at 689); *Atencio v. Arpaio*, 161 F. Supp. 3d 789, 814 (D. Ariz. 2015) ("prudential concerns also convince the Court that nonmutual collateral estoppel should not be applied against the County [of Maricopa]") (citing *Mendoza*, 464 U.S. at 161).

Clearly litigating the issue of the County's liability on a classwide basis would be far more economical and efficient than (and therefore superior to) litigating the issue thousands of times in individual cases.

Furthermore, even if collateral estoppel could be used against the County in subsequent lawsuits, adjudication of liability on a classwide basis is still more "efficient and expeditious than individualized litigation" (*Valentino*, 97 F.3d at 1233) because "each individual plaintiff would have to establish anew that defendant[] w[as] collaterally estopped . . . and, if not, that defendant[] w[as] liable on the merits." *Augustin*, 461 F.3d at 228.

E. Without Certification, Class Members Lack an Effective Remedy

The fair resolution of a controversy requires considering whether, in the absence of issue certification, class members would be effectively precluded from bringing a potentially meritorious suit, or unfairly hamstrung in doing so. The District Court and the Panel failed to address that:

> Absent class certification and its attendant class-wide notice procedures, most of [the class members] – who potentially number in the thousands – likely will never know that defendant[] violated their clearly established constitutional rights, and thus never will be able to vindicate those rights. As a practical matter, then, without use of the class action mechanism, individuals harmed by defendant['s] policy and practice may lack an effective remedy altogether.

Augustin, 461 F.3d at 229.

In "negative value" cases with limited damages, unless a case is certified, few class members can feasibly bring successful individual suits. Here, it is likely that a large number of Class members have claims for general dignity damages and not much larger special damages claims, and it would therefore be difficult to impossible for Class members to find an attorney willing to take their case for injury to dignity alone. As a practical matter, then, without use of the class action mechanism, individuals harmed by Defendant's policy and practice, that was already found by the Ninth Circuit to be unconstitutional, may lack an effective remedy altogether. As the First Circuit held in *Tardiff*:

> [O]nly the limited number of cases where serious damage ensued would ever be brought without class status and . . . the vast majority of claims would never be brought unless aggregated because provable actual damages are too small. This is a conventional argument for a class action, . . . and it applies here . . . . *[F]or most strip search claimants, class status here is not only the superior means, but probably the only feasible one . . . to establish liability and perhaps damages.*

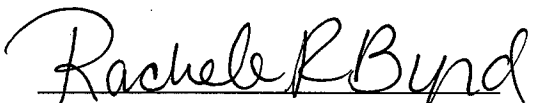
Tardiff, 365 F.3d at 7 (emphasis added) (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997)). *See also Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.)*, 722 F.3d 838, 861 (6th Cir. 2013) ("Use of the class method is warranted particularly because class members are not likely to file individual actions – the cost of litigation would dwarf any potential recovery."); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (noting that in certain cases "aggrieved persons may be without any effective redress unless they may employ the class-action device").

Courts are directed to measure certification against "other available methods" of resolving the controversy. Rule 23(b)(3). Neither the District Court nor the Panel did so here. The realistic alternatives for resolution of the controversy are not superior to certification of a liability issue class. Absent issue certification, Class members lack any effective remedy and the County will not be held accountable for its many years of unlawfully strip-searching children.

IV. CONCLUSION

Plaintiff respectfully requests that this Honorable Court grant the petition for a writ of certiorari.

Respectfully submitted,



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APPENDIX

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

D.C., a minor by and through his Guardian Ad Litem, Helen Garter, on behalf of himself and all others similarly situated Plaintiff, v. COUNTY OF SAN DIEGO; JESSIE POLINSKY CHILDREN'S CENTER; and SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Defendants.	Case No.: 15cv1868-MMA (NLS) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S RENEWED MOTION FOR CLASS CERTIFICATION AND TO ALTER OR AMEND THE ORDER DENYING MOTION FOR CLASS CERTIFICATION [Doc. No. 69]

Plaintiff D.C., a minor, filed this putative class action through his guardian ad litem pursuant to 42 U.S.C. § 1983, alleging Defendants violated his and putative class members' constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. *See* Doc. No. 19, First Amended Complaint ("FAC"). Presently before the Court is Plaintiff's "Renewed Motion for Class Certification and to Alter or Amend the Order Denying Motion for Class Certification." Doc. No. 69-1 ("Mtn."). Defendant County of San Diego[1] opposes [Doc. No. 73 ("Oppo.")] and Plaintiff replies [Doc. No. 76 ("Reply")]. For the reasons stated herein, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's motion. Specifically, the Court **DENIES** Plaintiff's renewed request for class certification

[1] Defendant County of San Diego asserts it has been erroneously sued as A.B. and Jessie Polinsky Children's Center and San Diego County Health and Human Services Agency. Only Defendant County of San Diego opposes Plaintiff's renewed motion for class certification. Any further reference to "Defendant" refers to Defendant County of San Diego.

and **GRANTS** Plaintiff's request to amend the Court's November 7, 2017 "Order: Denying Plaintiff's Motion to Strike; and Denying Motion for Class Certification" [Doc. No. 68 ("Order")].

RELEVANT BACKGROUND

Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), Plaintiff previously filed a motion to certify a class of "[a]ll children who had not yet reached 20 years of age as of August 24, 2015 and who were placed at A.B. and Jessie Polinsky Children's Center and subjected to a physical examination without the presence of their parent or legal guardian, without the consent of their parent or legal guardian, without an individualized order of the court authorizing their examination, and without exigent circumstances." *See* Doc. Nos., 60, 60-1. The Court found that the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—were met, but that Plaintiff failed to satisfy Rule 23(b)(3)'s predominance requirement because "individualized damages issues predominate over common questions." Order at 16-32.

LEGAL STANDARD

Federal Rule of Civil Procedure 23 "confers 'broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court.'" *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 107 (N.D. Cal. 2008) (citing *Armstrong v. Davis*, 275 F.3d 849, 872 n.28 (9th Cir. 2001)). Pursuant to Rule 23(c)(1)(C), "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see*

Lambert v. Nutraceutical Corp., 870 F.3d 1170, 1181 (9th Cir. 2017). "Accordingly, it is not uncommon for district courts to permit renewed certification motions that set out a narrower class definition or that rely upon different evidence or legal theories." *Hartman v. United Bank Card, Inc.*, 291 F.R.D. 591, 597 (W.D. Wash. 2013).

District courts "have ample discretion to consider (or to decline to consider) a revised class certification motion after initial denial." *In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70, 73 (2d Cir. 2007); *see also Hartman*, 291 F.R.D. at 597 (indicating the court's discretion to reconsider class certification "cuts both ways"). "[I]n the absence of materially changed or clarified circumstances . . . courts should not condone a series of reargruments on the class issues by either the proponent or the opponent of the class." *Id.* at 597 (quoting Newberg on Class Actions § 7:47). As such, plaintiffs "must show some justification for filing a second motion, and not simply a desire to have a second or third run at the same issues." *Id.*

DISCUSSION

Plaintiff asks the Court, for the first time, to certify the putative class as a liability class pursuant to Federal Rule of Civil Procedure 23(c)(4).[2] Mtn. at 12-18.

[2] Plaintiff states that he "requested the Court consider . . . certifying a liability issue class under Rule 23(c)(4)" in his reply brief to the initial motion for class certification, but that "the Order did not consider whether the proposed Class should be more narrowly certified solely for the purpose of determining the County's liability to class members." Mtn. at 6. While Plaintiff asserts he "requested" or "suggested" the Court consider certification pursuant to Rule 23(c)(4) in a footnote in his reply to the motion for class certification, the footnote referenced does not make such a request. *See* Mtn. at 6; *see also* Reply at 3 n.2; Doc. No. 65 at 17 n.9. The footnote merely explained that a judge in a different case "later certified two

Defendant argues Plaintiff's failure to propose a methodology for determining damages class wide prohibits certification under Rule 23(c)(4).[3] Oppo. at 13-29.

The Ninth Circuit has approved the use of issue classes pursuant to Rule 23(c)(4) where certification under Rule 23(b)(3) is not proper because common questions do not predominate. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *Kamakahi v. Am. Soc'y for Reprod. Med.*, 305 F.R.D. 164, 188, 194 (N.D. Cal. 2015) (certifying an issue class regarding whether challenged limitations on compensation violated the Sherman Act where plaintiffs failed to demonstrate an "ability to show the fact of damage to each class member through common proof"); *Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2014 WL 6815779, at *7-9 (N.D. Cal. Dec. 3, 2014) (declining to certify a liability class in a case where plaintiff satisfied predominance requirement as to liability but not damages), *affirmed by* 693 Fed. App'x 578 (9th Cir. 2017). "One problem posed by the certification of issue classes is that this could be used as an end-run around Rule 23(b)(3)'s predominance requirement." *Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-9366-SVW (MANx), 2014 WL 7338930, at *10 (C.D. Cal. Dec. 18, 2014) (citing

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liability classes and several subclasses under F.R.C.P. 23(c)(4)." *Id*. This is far from a suggestion or request that the Court consider certifying the putative class in the instant action pursuant to Rule 23(c)(4). Even if the language of the footnote were a request or suggestion to certify the class pursuant to Rule 23(c)(4), arguments "raised only in footnotes, or only on reply, are generally deemed waived." *In re Estate of Saunders*, 745 F.3d 953, 962 n.8 (9th Cir. 2014).

[3] Defendant also contends Plaintiff is actually seeking reconsideration of the Court's prior Order. Oppo. at 7-13. However, Plaintiff clarifies that he "is not asking the Court to reconsider or reject any of its findings, but, rather, in light of those findings as to liability issues . . . , that it amend its order and grant certification to a liability-only class." Reply at 3 (emphasis added). Accordingly, the Court declines to address Defendant's argument with respect to reconsideration.

Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996)). However, "refusing to certify an issue class under Rule 23(c)(4) unless the predominance requirement was met would render Rule 23(c)(4) a nullity." *Id.* (citing *In re Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006)).

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[4] Fed. R. Civ. P. 23(c)(4) (emphasis added). "Certification of an issues class under Rule 23(c)(4) is 'appropriate' only if it 'materially advances the disposition of the litigation as a whole.'" *Rahman v. Mott's LLP*, 693 Fed. App'x 578, 579 (9th Cir. 2017) (quoting William B. Rubenstein, 2 Newberg on Class Actions 4:90 (5th ed. 2012) (quoting Manual for Complex Litigation, Fourth, § 21.24 (2004))); *see also Valentino*, 97 F.3d at 1229-30.

In determining whether to certify a liability class in cases where the plaintiff satisfied predominance as to liability, but not damages, courts often look to whether the plaintiff has offered a damages model tied to their theory of liability. *See Loritz v. Exide Technologies*, No. 2:13-cv-02607-SVW-E, 2015 WL 6790247, at *23 (C.D. Cal. July 21, 2015) (indicating that "[c]ourts differ regarding whether to certify a liability-only class when Plaintiffs fail to adequately present a damages model tied to their theory of liability"). Courts often decline to certify a liability class where

[4] Plaintiff argues courts in this Circuit "must" certify a liability class where the only bar to predominance is that calculation of damages is not feasible on a class wide basis. Mtn. at 13 (citing *Kamakahi v. Am. Soc'y for Reprod. Me*d., 305 F.R.D. 164, 193 (N.D. Cal. 2015)). However, Rule 23(c)(4) itself precludes such an argument. *See* Fed. R. Civ. P. 23(c)(4). Rule 23(c)(4) provides that an issue class may be certified, "when appropriate." *Id.*

plaintiffs "fail to show any model for calculating damages that (1) can be applied classwide (even if the model will be used to make individualized determinations) and (2) is tied specifically to the plaintiffs' theory of liability." *Id.* For example, a decision to deny certification of a liability class under Rule 23(c)(4) has been affirmed where the plaintiff "failed to articulate why a bifurcated proceeding would be more efficient or desirable" and was "vague as to whether he intends to later certify a damages class, allow class members to individually pursue damages, or ha[d] some other undisclosed plan for resolving the case." *Rahman v. Mott's LLP*, 693 Fed. App'x at 579-80; see also *Rahman*, 2014 WL 6815779, at *9.

Plaintiff asserts that certification of a liability class will materially advance the litigation because it would be more efficient to adjudicate in one proceeding whether Defendant's policies and practices violated putative class members' civil rights. Mtn. at 16-17. With respect to damages, Plaintiff asserts that the court can "devise imaginative solutions," including bifurcating liability and damage trials, appointing a special master to preside over individual damage proceedings, or decertify the class after the liability trial and instruct class members on how to resolve damages for subclasses specific to class members' ages at the time they were examined. Id. Plaintiff also explains that adjudicating damages may ultimately be unnecessary, as the parties could settle or Defendant could prevail at the liability phase. Id. Ultimately, however, Plaintiff claims the "Court should reserve the question of how damages should be adjudicated until the liability phase is complete." *Id.* at 18.

None of Plaintiff's proffered options is particularly desirable. As the Court indicated in its prior Order, "[w]hile establishing liability with respect to the alleged violations of the Fourth and Fourteenth Amendments will be common, proving injury to human dignity and emotional distress with respect to these claims will vary from person to person." Order at 29. Should Plaintiff prevail on the issue of liability, a second class or set of subclasses on the issue of damages could not be certified because "individualized damages issues predominate over common questions." *Id*. at 32. As Defendant explains, "this would simply postpone the 37,000 jury trials on damages, not eliminate the need for them." Oppo. at 26. Moreover, Defendant argues that appointing a special master would divest it of its right to a jury trial and due process rights to present individualized defenses. Id. at 26-27. Even further, Plaintiff's contention that the case might settle or that Defendant might prevail at the liability phase are speculative, particularly where, as here, Defendant "is not interested in discussing settlement in any event." *Id*. at 27.

Plaintiff's arguments are vague as to what his proposed plan for resolving the case is. *See* Mtn.; *see also* Reply. Plaintiff merely lists possible plans without explanation of how those proffered plans relate to the instant action. In fact, Plaintiff's request to "reserve the question of how damages should be adjudicated until the liability phase is complete" further suggests Plaintiff has not devised a plan to resolve this case after the liability phase. Mtn. at 18. As a result, Plaintiff has failed to carry his burden of demonstrating that certification of a liability class

would materially advance resolution of the entire case. *See Rahman*, 693 Fed. App'x at 579.

While liability may be determined on a class wide basis, this determination will not materially advance the litigation because individualized damages determinations would still be required. Further, if Plaintiff succeeds in determining that Defendant is liable for violations of the Fourth and Fourteenth Amendments, this will have preclusive effect in subsequent suits with respect to liability. *See Syverson v. IBM*, 461 F.3d 1147, 1153-54 (9th Cir. 2006) (stating that "offensive nonmutual issue preclusion is appropriate only if (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment; and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action") (internal citations omitted). As such, a series of individual lawsuits are just as efficient as a class action where damages would need to be determined on an individualized basis. *See Burton v. Nationstar Mortg., LL*C, No. 1:13-cv-00307-LJO-JLT, 2014 WL 5035163, at *18 (E.D. Cal. Oct. 8, 2014) (declining to certify a Rule 23(c)(4) class where it was not a superior method of litigating the claims presented and would not serve the interests of judicial economy). Accordingly, the Court **DENIES** Plaintiff's request to certify a liability class under Rule 23(c)(4).

CORRECTIONS TO THE COURT'S PRIOR ORDER

Plaintiff also moves the Court to correct "typographical errors" pursuant to

Federal Rule of Civil Procedure 60(a). Mtn. at 18. Defendant did not address this in its opposition. *See* Oppo. Under Rule 60(a) "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders." Fed. R. Civ. P. 60(a). The Court has reviewed Plaintiff's proposed amendments and **AMENDS** the Order filed on November 7, 2017 (Doc. No. 68) as follows:

(1) "subsequent" replaces the word "prior" on page 15, line 2;

(2) "consented" replaces the words "did not consent" on page 26, line 17; and

(3) "an" replaces the word "no" on page 26, line 17.

CONCLUSION

Based on the foregoing, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's motion. Specifically, the Court **DENIES** Plaintiff's renewed request to certify the putative class and **GRANTS** Plaintiff's request to amend the Order as delineated above.

IT IS SO ORDERED.

Dated: February 2, 2018

Hon. Michael M. Anello
United States District Judge

FILED
NOV 5 2019
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

D.C., a minor by and through his Guardian Ad Litem, Helen Garter, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. COUNTY OF SAN DIEGO; et al., Defendants-Appellees.	No. 18-55853 D.C. No. 3:15-cv-01868-MMA-NLS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, Senior District Judge, Presiding

Argued and Submitted October 16, 2019
Pasadena, California

Before: NGUYEN and MILLER, Circuit Judges, and VITALIANO,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

D.C., on his own behalf and on behalf of others similarly situated, brought this action against the County of San Diego, under 42 U.S.C. § 1983, for violation of his constitutional rights. He now appeals the district court's denial of his motion to certify a liability-only class.[1] We have jurisdiction under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f), and we affirm.

D.C. contends that determination of the question of liability on the claims he seeks to advance could fit comfortably within the ambit of Rule 23(c)(4). See Fed. R. Civ. P. 23(c)(4). Notwithstanding any success D.C. might have in advancing liability-only class claims against the County—and his burden has very likely been lightened by our decision in *Mann v. County of San Diego*, 907 F.3d 1154 (9th Cir. 2018)—certification of such a class would be "appropriate" only if the adjudication of the certified issues would "significantly advance the resolution of the underlying case, thereby achieving judicial economy and efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1229 (9th Cir. 1996).

Consideration of D.C.'s request for certification of a liability-only class cannot be divorced from the impact the certification decision might have on the resolution of class claims. In his complaint, D.C. alleges that he and other putative class members suffered damages for, inter alia, emotional distress, humiliation, and loss of "human dignity" resulting from the County's overly intrusive physical examinations of them. The district court found that, regardless of any resolution of

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[1] D.C.'s motion for certification of a liability-only class under Rule 23(c)(4) followed the district court's earlier denial of certification to his proposed Rule 23(b)(3) class. The latter determination is not before us on this appeal.

issues a liability-only class might afford, individualized injuries of each class member would still potentially require tens of thousands of trials. It was appropriate for the district court to bring its practical assessment and broader perspective to its consideration of D.C.'s request for certification of a liability-only class.

Although we are, of course, mindful that individualized questions of damages cannot alone defeat class certification, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013), plaintiffs seeking certification must nevertheless carry their burden of showing damages are capable of efficient calculation. *Id.* at 514; *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (damages must only be "capable of measurement on a classwide basis" to promote the efficient resolution of the class action for certification) (emphasis added); *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2019).

The district court correctly recognized and applied this standard in considering D.C.'s request for certification of a Rule 23(c)(4) liability-only class, finding, within the bounds of its discretion, that D.C. failed to show that damages could be efficiently calculated on a classwide basis following success in the liability phase of the litigation. Based on its finding that certification of a liability-only class would not significantly advance the resolution of the class claims, the district court did not abuse its discretion by denying D.C.'s motion for certification of a liability-only class.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JAN 14 2020
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

D.C., a minor by and through his Guardian Ad Litem, Helen Garter, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

COUNTY OF SAN DIEGO; A.B. AND JESSIE POLINSKY CHILDREN'S CENTER; SAN DIEGO HEALTH AND HUMAN SERVICES AGENCY,

Defendants-Appellees.

No. 18-55853

D.C. No.
3:15-cv-01868-MMA-NLS
Southern District of California,
San Diego

ORDER

Before: NGUYEN and MILLER, Circuit Judges, and VITALIANO,* District Judge.

The panel voted to deny Appellant's petition for panel rehearing. Judges Nguyen and Miller voted to deny Appellant's petition for rehearing en banc, and Judge Vitaliano so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and rehearing en banc is denied.

* The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.