Nos. 2021-D193, 22-BG-891

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of

JEFFREY B. CLARK

A Member of the Bar of the District of Columbia Court of Appeals

Bar No. 455315

Date of Admission: July 7, 1997

PETITION FOR DIVISION REHEARING OR EN BANC REHEARING

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INTRODUCTION

Respondent Jeffrey B. Clark is facing disciplinary charges stemming from his service as an Assistant Attorney General in the U.S. Justice Department, which he left in January 2021. The Office of Disciplinary Counsel ("ODC") argues in its Specification of Charges issued in July 2022 that an unsent draft letter he is said to have authored, which suggested the State of Georgia's Legislature should further investigate alleged election irregularities identified in a Georgia Senate report, violated ethics rules involving dishonesty and interference with the administration of justice. These charges were filed despite the fact that numerous officials on the opposite side of the political aisle from Mr. Clark had repeatedly claimed irregularities in the 2000, 2004, and 2016 presidential elections, that allegedly worked in favor of Republican Presidents, all with no attempt at all even being made by ODC to investigate for disciplinary purposes those among them who were D.C. Bar members.

On December 6, 2023, a Division of this Court granted an ODC motion to enforce a subpoena seeking documents from Mr. Clark ("December 6 Order"). In doing so, the Court not only disregarded the published Fifth Amendment decision of *In re Artis*, 883 A.2d 85 (D.C. 2005), but failed to explain how it could grant such a motion in the face of Mr. Clark's valid invocation of executive and law enforcement privileges. Indeed, the Court took this action in a two-page *per curiam* order that lacks any analysis or case law citation.

If the December 6 Order is not reevaluated, it will permanently undermine the Court's well-considered precedent on how the Fifth Amendment applies to bar discipline proceedings. It will also deprive Mr. Clark of his constitutional rights and undermine executive and law enforcement privilege—important legal doctrines in which all Americans have a vested interest. Finally, the December 6 Order will also call into question the continued vitality of *In re Artis* as a historically

significant precedent on D.C. attorney disciplinary matters.

Mr. Clark submits that the simplest way to address the problematic December 6 Order is for the Division to take a more careful look at the legal issues involved, especially (but not limited to) those concerning Mr. Clark's invocation of the Fifth Amendment. The Division should hold that the subpoena does not override Mr. Clark's valid Fifth Amendment invocation. If the Division does not revise the December 6 Order, Mr. Clark respectfully requests the entire Court to reconsider it *en banc* under Rule 35.[1]

Finally, if neither the Division nor the whole Court sees fit to correct the constitutional and other errors in the December 6 Order, the Court should at least confirm that Mr. Clark has no obligation to respond to any of the invalid disguised interrogatories in the ODC subpoena that also were propounded in violation of *In re Artis*.

PROCEDURAL BACKGROUND

Prior to the current Motion to Enforce and before it brought charges, ODC filed a Motion to Compel compliance with an investigative-stage subpoena on February 3, 2022. The subpoena sought substantially the same materials as those sought by the instant subpoena.

Mr. Clark filed a thorough response to the investigative subpoena motion on February 15, 2022 raising Fifth Amendment and other legal objections. *See* Ex. 1. On January 31, 2022, he had also sent to ODC a substantial set of objections to such a subpoena. *See* Ex. 2 (including sub-exhibits). In particular, the response explained—across seven pages of analysis—why the subpoena violated his Fifth Amendment rights, including his Fifth Amendment act of production

[1] Mr. Clark is not admitting that any responsive materials exist. He is not required to state at this point whether there are any responsive documents, as doing so could waive his Fifth Amendment act of production privilege. This footnote shall thus substitute for having to write "to the extent any responsive materials exist" over and over throughout this filing anytime privileges are discussed.

privilege.[2] *See* Ex. 1 at 8-14. The Fifth Amendment act of production privilege protects against the communicative aspects of producing documents such as admitting authenticity and that the documents are in one's custody and control. *See United States v. Hubbell*, 167 F.3d 552 (D.C. Cir. 1999); *In re Public Defender Service*, 831 A.2d 890 (D.C. 2003). The dispute was never decided, however, because this Court held on September 15, 2022 that ODC's own voluntary decision to bring public charges mooted the investigative subpoena. ODC could have waited for a resolution of its February 2022 subpoena-enforcement action (which was fully briefed by March 2022), but apparently lacked the patience to do so.[3]

On October 22, 2022, ODC attempted to enforce a new, post-Specification of Charges subpoena over Mr. Clark's continuing legal objections. *See* Ex. 3 at 8-14. ODC's motion acknowledged that the materials were subject to Mr. Clark's prior objections (which, again, had never been ruled on in light of DCCA No. 22-BG-0059 being dismissed as moot). *See*, *e.g*. *id*. at 4 (stating that Mr. Clark "also suggested that some of the materials might be subject to executive privilege."). Moreover, in responding to the Motion to Enforce, Mr. Clark incorporated his arguments from the extensive filings he had made in response to the investigative stage subpoena, including the lengthy discussion of the Fifth Amendment. *See* Ex. 4 at 7 ("Respondent respectfully incorporates by reference the arguments he previously made"). ODC filed a reply on November 7, 2022 that completed the briefing and made all relevant issues (including Mr. Clark's roster of objections) ripe for decision by this Court.

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[2] Technically, Mr. Clark's position was that the Court need not reach the act of production privilege because ODC's subpoena for documents effectively sought ***testimony*** from Mr. Clark. For example, the subpoena requires Mr. Clark to produce documents "of which [he] was aware" on a certain date. As argued at greater length in the past filings in this dispute, the Motion to Enforce can therefore be denied on classic Fifth Amendment grounds, without having to reach the act of production doctrine objection to the subpoena.

[3] *See generally* DCCA Case No. 22-BG-0059. We incorporate by reference all of the filings therein, as this is the legal dispute that the December 6 Order says nothing about let alone analyze or set out a reasoned rejection of Mr. Clark's arguments.

The matter remained pending[4] until December 6, 2023, when the Court issued its two-page order that granted ODC's motion without even mentioning the Fifth Amendment, executive privilege, or any of the other legal issues Mr. Clark had raised. It simply gave Mr. Clark 10 days to "produce all documents and files described in the Disciplinary Counsel's subpoena duces tecum."

Our fear is that, because a lot of the focus from October 2022 until December 2023 had shifted to removal issues in filings during that period, the Division of the Court that issued the December 6 Order wrongly assumed that when federal stays pending appeal concerning the removal issue had been denied, the path for compliance with the October 2022 subpoena had been fully cleared and no legal objections remained. But for the reasons we explained above, that is not true. The Fifth Amendment, executive privilege, and law enforcement privilege issues have never been definitively decided here and some form of rehearing is thus necessary to ensure that they get the resolution they deserve.

REHEARING AND EN BANC REVIEW

Rule 40 allows for the non-prevailing party to petition the Court for rehearing and requires the party to "state with particularity each point of law or fact that the petitioner believes the division has overlooked or misapprehended."

Rule 35 provides that a majority of the judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard en banc. En banc rehearing is appropriate where 1) en banc consideration is necessary to secure or maintain

[4] While the matter was pending, Mr. Clark removed the case to federal court. *See In re Jeffrey B. Clark*, No. 1:22-mc-96. The district court remanded the case and Mr. Clark appealed. That appeal remains pending before the Circuit Court and Mr. Clark's opening brief was recently filed. *See In re: Jeffrey Clark*, No. 23-7073. The district court remand order (and denial of stays regarding that order) ***did not*** moot the pending subpoena dispute. Not at all.

uniformity of the court's decisions or 2) the proceeding involves a question of exceptional importance.

ARGUMENT

I. Division Rehearing Is Appropriate to Give Proper Consideration to Mr. Clark's Fifth Amendment Claim, as the Division Did Not Explain Its Decision or How it Comports with *In re Artis*.

The Division should rehear the case to re-examine Mr. Clark's valid Fifth Amendment assertion, which it ignored in the December 6 Order. Mr. Clark's Fifth Amendment claim is well set out in his filings but we will summarize it here, as updated based on new events occurring since the subpoena dispute first arose in February 2022:[5] He is a defendant in *State v. Trump et al*, charging a Georgia RICO violation and an attempted false statement. *See* Case No. 23 SC 188947 (Fulton Cty. Super. Ct. pending). He is an unindicted coconspirator in *United States v. Trump*, charging Conspiracy to Defraud the United States and other offenses. *See* Case No. 1:23-cr-257 (D.D.C. pending). These cases plainly give Mr. Clark a valid Fifth Amendment claim against compelled testimony.

Additionally, ODC's subpoena is, in substance, a set of disguised interrogatories. For example, the subpoena begins with "[p]roduce all documents and records…***of which you were aware*** before January 4, 2021 that contain evidence of irregularities in the 2020 presidential election." (emphasis added). If Mr. Clark were forced to comply with this and similarly worded requests, he would not only be producing documents but "testifying" on various subjects such as the state of his knowledge on a particular date relevant to the case. This is an obvious Fifth Amendment violation under *In re Artis*, 883 A.2d at 101.

[5] At the time of briefing, Mr. Clark had not yet been charged in Georgia or named an unindicted co-conspirator in the federal case. The Court can take judicial notice of these undisputed facts which, of course, make Mr. Clark's Fifth Amendment claim even stronger now that it was then.

Because of ODC's decision to issue disciplinary interrogatories (which are illegal under *In re Artis*) under the guise of a subpoena, this Court need not reach the act of production doctrine and can decide the case on pure Fifth Amendment testimonial grounds, as the *In re Artis* court did as well. However, even if ODC's subpoena had properly limited itself to requesting documents and not testimony, Mr. Clark would still have a valid Fifth Amendment claim under the act of production privilege.[6]

This Court's December 6 Order did not discuss the Fifth Amendment. This leaves Mr. Clark, the public, and the historical record ignorant of why the Court has not recognized this important right, which this Court has a long legacy of zealously protecting. This Court should re-examine the question and hold that Mr. Clark has a valid Fifth Amendment claim in response to ODC's subpoena. At the very least, the Division should grant rehearing to explicitly explain why it is not recognizing Mr. Clark's Fifth Amendment right.

II. En Banc Reconsideration Is Necessary to Maintain Uniformity of This Court's Decisions and Because This Case Presents Several Questions of Exceptional Importance.

a. The December 6 Order Conflicts with In re Artis*, This Court's Leading Case on the Fifth Amendment in Bar Discipline Proceedings.*

In re Artis is an important precedent where this Court made clear that attorney disciplinary proceedings are "quasi-criminal," that the Fifth Amendment applied to them, and that ODC was ***not empowered*** to serve interrogatories on respondents. The case involved an attorney who failed to respond to interrogatories served by Bar Counsel (now called Disciplinary Counsel). *See In re Artis*, 883 A.2d at 88. The Board recommended suspension and Bar Counsel objected to the Board's failure to adopt the Hearing Committee's recommendation that Respondent's readmission

[6] There is a narrow exception to the act of production privilege where the existence of the subpoenaed materials is a "foregone conclusion." *In re Public Defender Service*, 831 A.2d at 912. However, ODC never attempted to argue this exception.

be conditioned on him responding to the interrogatories. *See id*. at 90-91. The Board had not included this condition in part because the interrogatories violated the Fifth Amendment and there was no authority for Bar Counsel to issue them in the first place. *See id*. at 98. This Court upheld the Board's decision and recognized the respondent's right to assert his Fifth Amendment privilege. *See id*. at 103. According to Westlaw, *In re Artis* has since been relied on in ten published decisions of this Court since it was handed down.

Mr. Clark would seem to have an even stronger case against ODC here. The respondent in *In re Artis* was not facing criminal charges and simply ignored Bar Counsel's interrogatories rather than affirmatively asserting his rights. *See id*. at 88. Mr. Clark, by contrast, is a current criminal defendant and has made an extensive record designed to preserve his Fifth Amendment rights.

This Court's December 6 Order ignored *In re Artis* and its obvious application here. This violates this Court's own precedent directly and its precedent concerning how precedent must be treated: "As a panel of this court, we are bound to follow this precedent. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (one panel of the court may not overturn the decision of a previous panel)." *Collins v. United States*, 73 A.3d 974, 981 (D.C. 2013). Only this Court, sitting *en banc*, can overrule or modify *In re Artis* and craft a new set of guiding principles concerning how the Fifth Amendment applies to attorney discipline cases.

Any reasonable person would interpret the Court's handling of *In re Clark* as rendering *In re Artis* a dead letter. Absent further action from the Division, this Court should intervene *en banc* to make clear that *In re Artis* is still good law and that the Fifth Amendment continues to apply in disciplinary proceedings.

b. Questions of Exceptional Importance

In addition to being necessary to maintain the uniformity of this Court's decisions, *en banc*

review is necessary here because this matter involves questions of exceptional importance.

i. This Precedent-Setting Case Is the First Attempt by Any State or Local Bar to Subject High-Level Executive Branch Deliberations to Bar Discipline.

First, this case is the only one we are aware of where a state bar (or analogue, as D.C. is manifestly ***not*** a "State") has attempted to exercise disciplinary authority over a high-ranking, Senate-confirmed federal government official for actions taken in the course of his duty. Federal lawyers have done many controversial things in modern history, such as creating legal justifications for enhanced interrogation techniques and warrantless wiretapping. For reasons we will not delve into here, Assistant Attorney General Clark's draft letter recommending that Georgia investigate certain alleged problems in the 2020 election has become the test case of whether federal policymaking can ever be an appropriate subject for professional discipline. No matter the outcome, *In re Jeffrey Clark* will be a precedent-setting case for decades to come. How this Court handle's the executive privilege, law enforcement privilege, and Fifth Amendment issues that go to the heart of this case are therefore questions of exceptional importance.

ii. Executive Privilege

Second, the case involves executive privilege, which is a legal doctrine long thought essential to the abilities of our Article II Chief Executives to perform the duties of their office. Executive privilege allows a President to protect from disclosure "documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). The privilege is "not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. GSA*, 433 U.S. 425, 499 (1977). Former Presidents retain the right to assert executive privilege over documents generated during their administrations. *See id*. at 449, 451.

Former President Trump has made such an assertion specifically with respect to Mr. Clark. In an August 2, 2021 letter to Mr. Clark, Douglas Collins, an attorney for Donald Trump informed Mr. Clark that the former President would not waive executive privilege. *See* Ex. 5. Discussing President Trump's communications with DOJ officials, Mr. Collins also stated publicly that "[t]he former president still believes those are privileged communications that are covered under executive privilege."[7] *See also id.* (Collins "railed against [a purported] DOJ waiver as 'political' and said he hopes the former officials [a group that includes Mr. Clark] will withhold any information from Congress that would fall under executive privilege."). Mr. Clark has, at all times, faithfully obeyed this instruction coming from President Trump as delivered through former Congressman Collins, acting as the President's lawyer.[8] And Mr. Clark has received no instructions to the contrary since August 2022.

To be sure, a former President's invocation of executive privilege can, in some circumstances, be overridden. *See, e.g., Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021).[9]

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[7] *See* Tyler Olson, *Trump Foreshadows Executive Privilege Fight in Election Investigations, But Won't Try to Block Testimony Yet: Letter says DOJ approval for former officials to testify about Trump is "unlawful,"* FOX NEWS (Aug. 3, 2021), https://www.foxnews.com/politics/trump-executive-privilege-election-investigations-wont-block-testimony (last accessed December 9, 2023).

[8] *See* Jeff Clark, *Jeff Clark in His Own Words: Why I Fight to Honor Executive Privilege—The Constitution and the separation of powers are at stake*, AMERICAN SPECTATOR (Jan. 16, 2022), *available at* https://spectator.org/jeff-clark-in-his-own-words-why-i-fight-to-honor-executive-privilege/ (last visited Dec. 17, 2023).

[9] The Supreme Court raised serious questions about the Biden Administration's assertions that it could waive executive privilege for President Trump—questions the Supreme Court majority and Justice Kavanaugh, who wrote separately, were at pains to preserve. *See Trump v. Thompson*, 142 S. Ct. 680 (2022). *See id.* at 680 (Kavanaugh, J., respecting denial of petition) ("The Court of Appeals suggested that a former President may not successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, at least if the current President does not support the privilege claim. As this Court's order today makes clear, ***those portions of the Court of Appeals' opinion were dicta and should not be considered binding precedent going forward***. Moreover, I respectfully disagree with the Court of Appeals on that point. A former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. ***Concluding otherwise would eviscerate the executive privilege for Presidential communications.***") (emphasis added).

Significant unresolved legal questions abound here.

However, ODC never even attempted to make any showing to try to penetrate executive privilege and the Division's December 6 Order does not acknowledge the issue. For a Court to order production of executive privileged documents is a very weighty matter and deserves careful consideration. If the December 6 Order is allowed to stand, Mr. Clark could later potentially be forced—on pain of contempt—to disclose executive privileged materials without even having the privilege status or lack thereof specifically and explicitly decided by a court. This constitutes another reason why this matter presents a question of exceptional importance.

Relatedly, Mr. Clark urges this Court to reconsider the aspects of the December 6 Order that rush ahead to decide this controversy now, while (a) Mr. Clark's federal-officer removal appeal remains pending in the D.C. Circuit (for we maintain, on Mr. Clark's behalf, that only an Article III court should resolve the executive privilege dispute here, among other legal disputes); (b) Mr. Clark's prosecution in Fulton County, Georgia remains pending). In short, the better course is for this Court to enter a general deferral or stay of this matter pending resolution of the removal issues and the Fulton County prosecution. This path of judicial restraint would spare this Court from having, itself, to wade into complex, contentious, and momentous constitutional issues.[10]

iii. Law Enforcement Privilege

Because ODC's subpoena targets Mr. Clark's work as a Justice Department official, responsive materials may be covered by the law enforcement privilege. *See Friedman v. Bache Halsey Stuart Shields, Inc*., 738 F.2d 1136, 1341 (D.C. Cir. 1984) (law enforcement privilege protects from dissemination information contained in both criminal and investigatory files).

Indeed, in a December 5, 2023 letter, U.S. Justice Department official Brian P. Hudak

[10] This Court could grant a stay by following the same path we recently requested that the D.C. Circuit take by granting a stay under *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023). *See* Ex. 7 (and sub-exhibits). There we note that, recently, both Special Counsel Jack Smith and Judge Chutkan of the U.S. District Court for the District of Columbia recognized that appeals concerning where or whether trials should be held trigger automatic stays pending appeal.

informed Mr. Clark that, in the current view of the U.S. Justice Department, the law enforcement privilege trumps state/local subpoena power:

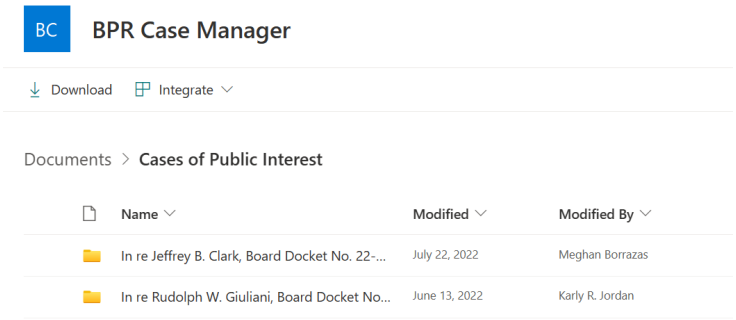
> Lastly, I note, that the Department and its officials acting in their official capacities are not within the general subpoena power of state ***or municipal tribunals***.
>
> *See*, *e.g.*, *Houston Bus. J. v. Off. of the Comptroller of the Currency*, 86 F.3d 1208, 1211-12 (D.C. Cir. 1996) ("In state court the federal government is shielded by sovereign immunity, which prevents the state court from enforcing a subpoena …. Thus, a state-court litigant must request the documents from the federal agency pursuant to the agency's regulations[.]"); *Est. of Pal v. Barcode Corp*., Misc. No. 19-0109 (CKK), 2019 WL 4709902 (D.D.C. Sept. 26, 2019) (state court subpoena to Department component could not be enforced; collecting cases); *Santini v. Herman*, 456 F. Supp. 2d 69 (D.D.C. 2006) ("a court cannot enforce a subpoena against a federal agency employee when the agency has enacted valid Touhy regulations"); *Longtin v. Dep't of Just*., Civ. A. No. 06-1302 (JMF), 2006 WL 2223999, at *2 (D.D.C. Aug. 3, 2006) ("It is settled beyond all question that the sovereign immunity of the United States precludes a state court from enforcing a subpoena or a subpoena duces tecum issued by a state court and served on a non-party federal government agency.").

Ex. 6 at 2 (emphasis and paragraph break added).

Thus, the December 6 Order puts Mr. Clark in the impossible, Catch-22 position of receiving opposite instructions from this Court and from the current U.S. Department of Justice leadership. Mr. Clark should not be put in the position of having to either violate his responsibilities as a former public servant or fail to comply with a seemingly ill-considered *per curiam* order of this Court that does not rest on any legal reasoning or even citation to legal authorities. Moreover, delivering confidential law enforcement information into the hands of state/local actors who may not have the best interest of the separate federal sovereign as their motivation thwarts the very purposes that the law enforcement privilege doctrine was developed to protect in the first place. The same is true if this controversy is construed as involving Article I actors (like ODC and this Court) in contention with Article II actors like Mr. Clark. This constitutes another question of exceptional importance which this Court should decide *en banc*.

iv. The Presidential Election

Finally, it is no use ignoring the obvious fact that the issues and evidence in this case are highly relevant to the Presidential election to take place in November of next year. Indeed, the Board of Professional Responsibility posts most documents from this case in a section of its website entitled "Cases of Public Interest" and the media has paid consistent and intense attention.[11] This provides an additional reason why the weighty constitutional concerns at issue here are matters of exceptional importance, as ODC itself must be taken as conceding, simply because it created and continues to maintain this section of its website, giving Mr. Clark's case a prominent position on it:



CONCLUSION

For the foregoing reasons, Mr. Clark requests the Division to rehear this case and deny the Motion to Enforce based on Mr. Clark's valid invocation of his Fifth Amendment rights, as well as on grounds of the executive and law enforcement privileges. If the Division does not see fit to

[11] There are only two Cases of Public Interest listed: This case and one against Rudolph Giuliani. ODC's bias against Republicans, especially those seen as allied with President Trump, is palpable. To our knowledge, ODC is not even investigating potential disciplinary charges against prominent Democrat Hunter Biden, who has been indicted federally. Hence, no materials about that matter are publicly posted. Similarly, although a significant past subject of attorney discipline in D.C., Kevin Clinesmith, pleaded guilty to a federal crime for corrupting the Foreign Intelligence Surveillance Court process, no documents related to his case are publicly posted in ODC's "Cases of Public Interest Page." *See* https://districtofcolumbiabar.sharepoint.com/:f:/s/BPRCaseManager/EoQyfnWsortAjQdff-cO5u8BLOdzWgKvqabxA_9s1yo9rQ?e=0MLkNs (last visited Dec. 16, 2023). We are also unaware that this section of ODC's website even existed before the charges brought against Messrs. Clark and Giuliani.

take this action, Mr. Clark requests the Court to hear the matter en banc with full briefing and oral argument.

Alternatively, this Court could exercise judicial restraint by entering a general deferral or stay in this matter pending the resolution of the criminal case against Mr. Clark in Georgia and/or pending the resolution of appellate proceedings in the Article III court system concerning whether Mr. Clark is entitled to federal officer removal under 28 U.S.C. § 1442. That would eliminate the Court's need for now to resolve Fifth Amendment issues or thorny executive privilege and law enforcement privilege disputes.

Respectfully submitted this 18th day of December 2023.

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**Motion for pro hac vice admission before DCCA in progress*

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served counsel for the opposing party with a copy of this ***Petition for Panel Rehearing or En Banc Review*** through the Court's efiling system:

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