IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 04-035182
04-035183

In re: the EXXON VALDEZ

GRANT BAKER, et al., as representatives of the Mandatory Punitive Damages Class,

Plaintiffs-Appellees-Cross-Appellants,

v.

EXXON MOBIL CORPORATION, et al.,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the District of Alaska

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PETITION FOR REHEARING OR REHEARING EN BANC

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RULE 35(b)(1) STATEMENT

This petition seeks reconsideration en banc of two published panel decisions resulting in an unprecedented punitive damages award of $2.5 billion under federal maritime law. In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) ("Valdez I"); In re Exxon Valdez, Op. 19695 (9th Cir. Dec. 22, 2006) ("Valdez II"). See Kyocera Corp. v. Prudential-Bache Trade Svcs., 341 F.3d 987, 995-96 & n.13 (9th Cir. 2003) (en banc court may reconsider prior panel decision in same case). The decisions conflict with decisions of the Supreme Court, this Court, and other circuits on the following questions of exceptional importance:

1. Whether punitive damages may be awarded under federal maritime law for conduct (here, an oil spill) already governed by a federal statute with a comprehensive remedial scheme directed specifically at the same conduct. The panel's decision on this issue conflicts with Miles v. Apex Marine, 498 U.S. 19 (1990); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); and Saavedra v. Korean Air Lines, 93 F.3d 547 (9th Cir. 1996).

2. Whether a shipowner may be held vicariously liable for punitive damages under maritime law based solely on the recklessness of the master of a vessel at sea. The panel's decision on this issue acknowledges square conflicts with The Amiable Nancy, 16 U.S. 546 (1818); Lake Shore & M.S.R. v.

Prentice, 147 U.S. 101 (1893); Pacific Packing & Navigation v. Fielding, 136 F. 577 (9th Cir. 1905); Matter of P&E Boat Rentals, 872 F.2d 642 (5th Cir. 1989) (en banc); CEH v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995); and United States Steel v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969).

3. Whether $2.5 billion in punitive damages for the unintended and purely economic harms at issue here exceeds the maximum amount permissible under both federal maritime law and the Fifth Amendment's Due Process Clause. The panel's decision in Valdez II on this issue acknowledges two conflicts with Valdez I. It also conflicts with State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408 (2003), and BMW of N. Am. v. Gore, 517 U.S. 559 (1996).

These conflicts make reconsideration en banc necessary to secure and maintain the uniformity of this Court's decisions and adherence to controlling Supreme Court precedent.

INTRODUCTION

This case appeals the jury award of $5 billion in punitive damages for the oil spill from the tanker EXXON VALDEZ. Even as reduced by the panel to $2.5 billion, the award is hundreds of times larger than the largest punitive award ever approved by a federal appellate court for an unintentional tort,[1] and

[1] Mason v. Texaco, 948 F.2d 1546 (10th Cir. 1991) ($10 million for wrongful death).

undoubtedly larger than the sum of all punitive damages awards previously upheld by all federal courts. The panel's opinion thus implies that this unintended oil spill and the ensuing purely economic injury[2] deserve more punishment than all the fraud, malice, mayhem, and death for which federal courts have awarded such damages.

Remarkably, the facts that the panel says justify this unprecedented award - "Exxon's knowingly placing a relapsed alcoholic in charge of the Exxon Valdez," Slip Op. 19727 - are facts the jury neither found nor was required to find. Instead, the jury was misinstructed that if it found the vessel's master had been reckless (as it did), it must also find Exxon reckless. 23/4119:2-6, 4120:12-15. If the jury followed its instructions, it never reached the question of whether Exxon was independently reckless, as the panel assumed. There is thus a virtually complete disconnect between the factual basis on which the panel upheld punitive damages and the facts upon which the jury was instructed to award them.

Punitive damages, moreover, are permissible only if they bear a reasonable relationship to the government's interest in

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[2] "[T]his is not a case about befouling the environment. This is a case about commercial fishing." 270 F.3d at 1221. The award vindicates only "private economic and quasi-economic interests." Id. at 1231. Otherwise, any award would be precluded by res judicata. Id. at 1228, 1231.

punishment and deterrence. State Farm, 538 U.S. at 416. Here, the government has already imposed a public fine that both the district court and the U.S. Attorney General declared adequate to deter and punish, and the spill has cost Exxon more than $3.4 billion in clean-up costs, natural resources damages, voluntary claims settlements, and other costs -- more than enough to deter and punish anyone for anything.

It is important to view those government interests in the legal context of this case. This award of punitive damages was based solely on federal maritime law -- that is, judge-made federal common law. No state-law punitive claims of any kind are asserted and no governmental interests of any state are vindicated. The only governmental interests involved are the profoundly important national interests in protecting maritime commerce and providing uniform nationwide rules of conduct. See Sisson v. Ruby, 497 U.S. 358, 367 (1990).

Yet the panel's approval of the $2.5 billion award misapplies -- and disrupts the uniformity of -- federal maritime law. Indeed, the panel explicitly acknowledged conflicts with maritime-law precedents of the Supreme Court, this Circuit, and other circuits.

BACKGROUND

The facts are summarized in Valdez I, 270 F.3d at 1221-25, and detailed in the Joint Opening Brief of Appellants, No. 97-35191, at 4-20 ("EOB").

1. The EXXON VALDEZ, a modern, well-equipped tanker loaded with crude oil, ran aground on Bligh Reef in Prince William Sound, Alaska in 1989. The immediate cause was the failure of Third Mate Cousins to make a turn as he had been instructed. Captain Hazelwood gave Cousins "explicit, accurate orders" to turn the ship, but then left the bridge (recklessly, the jury found) before the turn was initiated. ER 574. For reasons never explained, the turn was not made as Hazelwood instructed, and the ship went aground, spilling 258,000 barrels of oil. 270 F.3d at 1223.

2. Exxon immediately acknowledged responsibility and paid more than $300 million to prevent or compensate economic harm from the spill, $2.1 billion for clean-up, and $900 million to restore damaged natural resources. 270 F.3d at 1223. Exxon also pled guilty to certain misdemeanors and was sentenced to a criminal fine of $150 million and restitution of $100 million. ER 96-106. The fine was remitted to $25 million because of Exxon's exemplary post-spill behavior. ER 101-03, 162:14-23. Exxon's total payments exceeded $3.4 billion.

3. This case was filed by commercial fishers and others who sought greater compensation for economic losses than the $300 million Exxon had already paid. They also sought billions in punitive damages. In a phased trial, a jury (a) returned a special verdict that Hazelwood had acted recklessly, (b) found, pursuant to its instructions, that Exxon was therefore also liable for punitive damages, (c) found that the spill had reduced plaintiffs' commercial fishing revenues by $287 million (later reduced to $19.6 million after offsetting pre-verdict payments), and (d) awarded $5000 in punitive damages against Hazelwood and $5 billion against Exxon.

4. Exxon appealed. The panel rejected Exxon's arguments against availability of punitive damages, but held that $5 billion exceeded constitutional limits, remanding for the district court to "set a lower amount." 270 F.3d at 1247. On remand the district court reduced the award to $4 billion. ER 554-56. Exxon again appealed. Before briefing, the Supreme Court decided State Farm, and the panel vacated the judgment sua sponte and remanded for reconsideration. The district court then increased the award to $4.5 billion. ER 649-50. Exxon appealed once more. A divided panel held that $4.5 billion also exceeded the due process maximum and remitted the award to $2.5 billion.

REASONS FOR GRANTING REHEARING OR REHEARING EN BANC

The panel's decisions raise two exceptionally important legal questions independently meriting rehearing or rehearing en banc.

I

The first question is whether punitive damages were legally permissible under governing maritime law. Valdez I creates two clear decisional conflicts on this question.

A

Punitive damages were barred in this case because Congress provided specific remedies -- including civil penalties -- for oil spills in the Clean Water Act ("CWA"), and did not provide for private punitive damages. The panel held punitive damages available notwithstanding the CWA, but described the question as "close" and "not without doubt." 270 F.3d at 1230.

In fact, precedents of the Supreme Court, this Court, and other circuits make clear that when Congress has established specific rules governing maritime conduct, those rules -- not judge-made common law -- determine the remedies available for maritime torts: "We sail in occupied waters. Maritime tort law is now dominated by federal statutes, and we are not free to expand remedies at will . . . [I]n an area covered by [a federal] statute, it would be no more appropriate to prescribe a different measure of damages [in a maritime tort] than to

prescribe a different statute of limitations, or a different class of beneficiaries." Miles, 498 U.S. at 36, 31; see Saavedra, 93 F.3d at 554 (maritime court "cannot 'supplement' Congress' remedy"); accord Dooley v. Korean Air Lines, 524 U.S. 116, 123 (1998).

Congress expressly established in the CWA the remedies it deemed appropriate to punish and deter oil spills. The Act makes shipowners liable for civil penalties and criminal fines up to "twice the gross [pecuniary] loss" caused by an oil spill. 33 U.S.C. §1319(c)-(d) (incorporating 18 U.S.C. §3571(d)). It caps liability for clean-up costs and natural resource damages at an amount based on the size of the vessel, but permits unlimited liability for them in cases of "willful negligence or willful misconduct." 33 U.S.C. §1321(f). Even in the case of willful misconduct, however, the CWA does not provide for punitive damages. The CWA thus embodies a congressional judgment that the potentially enormous costs of clean-up, natural resource damages, and criminal sanctions are sufficient to deter and punish oil spills.

Where, as here, "Congress has spoken directly to the question of recoverable damages on the high seas," Miles, 498 U.S. at 31, the maritime-law precedents cited above prohibit courts from imposing additional remedies through maritime tort law. Miles involved the Jones Act, but the rule it applied was

general and long-settled, explicitly barring courts from supplementing remedies for acts governed by any maritime statute, necessarily including the CWA. See 498 U.S. at 27, 31. Indeed, before Miles, the Supreme Court in Sea Clammers held that the existence of CWA remedies precluded federal courts from applying maritime tort law to alter the remedial balance struck by Congress. 453 U.S. at 21-22.[3] The First and Second Circuits have also applied this rule to conduct governed by CWA remedies. Conner v. Aerovox, Inc., 730 F.2d 835, 837-42 (1st Cir. 1984); In re Oswego Barge Corp., 664 F.2d 327, 335-41 (2d Cir. 1981). And this Court in Saavedra applied the rule to hold that a court cannot provide remedies under maritime tort law for injuries already covered by Death on the High Seas Act remedies. 93 F.3d at 554.

The panel's ruling allowing punitive damages despite the CWA's oil spill penalties squarely conflicts with those precedents.[4]

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[3] Sea Clammers applied the rule to bar punitive damages, as have numerous other maritime cases, e.g., Miller v. Am. President Lines, 989 F.2d 1450, 1454-59 (6th Cir. 1993).

[4] Valdez I suggests (270 F.3d at 1230) that punitive damages are "saved" by 33 U.S.C. §1365(e). The Supreme Court has held, however, that this savings clause has no bearing on whether the CWA displaces federal maritime law. Milwaukee v. Illinois, 451 U.S. 304, 329 (1981). Congress also preserved plaintiffs' compensatory claims in 33 U.S.C. §1321(o)(1), which allows suits to recover "damages to publicly owned or privately owned property resulting from a discharge of oil . . . ." Punitive

B

Punitive damages were also impermissible because under directly applicable Supreme Court and Ninth Circuit precedents, punitive damages may not be awarded against a shipowner solely for the reckless act of a master at sea.

In Amiable Nancy and Lake Shore, the Supreme Court held that under federal maritime law, punitive damages cannot be imposed against the owner of a vessel absent a showing that the owner itself "directed," "countenanced," or "participated in" the underlying tort. Amiable Nancy, 16 U.S. at 559. As the panel observed, these precedents establish a "general common law rule prohibiting vicarious liability for punitive damages for an owner" uninvolved in a tort. 270 F.3d at 1234.

The panel recognized that this Circuit followed that rule in Pacific Packing, 136 F. at 579, holding that "the owner of [a] vessel could not be vicariously liable for punitive damages merely and entirely on the basis of the captain's" misdeeds. 270 F.3d at 1234. The panel further explained that this Circuit broke from those precedents in Protectus Alpha Navigation v. North Pacific Grain Growers, 767 F.2d 1379 (9th Cir. 1985), holding that a shipowner can be vicariously liable for punitive damages based on the torts of a managerial agent acting in the

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damages, however, are not "damages to property," and do not survive the CWA. See EOB 37-38 & n.35.

scope of employment. 270 F.3d at 1235. The panel acknowledged that Protectus has been "specifically rejected by the Fifth Circuit," "accepted only in part by the First Circuit," and conflicts with a pre-existing decision of the Sixth Circuit. Id. at 1235 n.84 (citing P&E, 872 F.2d at 652; CEH, 70 F.3d at 705; Fuhrman, 407 F.2d at 1148); accord The State of Missouri, 76 F. 376, 380 (7th Cir. 1896). No other circuit has followed Protectus.

The panel, however, considered itself "bound by Protectus" and therefore upheld the vicarious liability instruction because it was "precisely in accord with Protectus." 270 F.3d at 1235-36. That instruction told the jury that under federal maritime law, the reckless act of a shipowner's employee is "held in law to be the reckless act" of the employer. 23/4119:5-6. Thus, once the jury had found Hazelwood reckless, it had no choice but to find Exxon reckless; it did not need to determine whether Exxon had been reckless independently of Hazelwood's own acts. 23/4119:2-6, 4120:12-15.[5]

[5] In fact, as the panel recognized, on the record below the jury "could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk." 270 F.3d at 1237. In post-trial press interviews, jurors confirmed that they held Exxon liable not because of Exxon's acts, but solely because of Hazelwood's. EOB 49 n.44.

In a virtual invitation to en banc review, Valdez I concludes, "[w]e must leave whatever challenge might be made to Protectus[] to our court if it rehears this case en banc or to a higher court." Id. at 1235 n.84.[6]

There are compelling reasons why the vicarious punishment rule of Protectus should not be the rule of this Circuit. Protectus rests on the idea that "no reasonable distinction can be made between the guilt of the employee . . . and the guilt of the corporation." 767 F.2d at 1386. Whatever the merits of that proposition where the employee's act implemented company policy (as in Protectus itself, see 270 F.3d at 1235 n.84), it is self-evidently untrue when the employee's act is forbidden by the employer and hostile to its vital interests. Fuhrman, 407 F.2d at 1148; see Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544-46 (1999) (no employer respondeat superior liability for discrimination if employer enforces antidiscrimination policy). All of Hazelwood's acts that plaintiffs charged as reckless were indisputably contrary to Exxon's policies -- policies adopted to safeguard Exxon's own vital interests in the safety of ship and

[6] The panel could have resolved the conflict by holding that Pacific Packing governs where, as here, the conduct was that of a master at sea, but that Protectus governs conduct of employees on land. This distinction would have been consistent with the maritime rule in other circuits, since one reason for the rule is that at sea the master must have unfettered control over a vessel's operations. Fuhrman, 407 F.2d at 1147. The panel rejected that approach. 270 F.3d at 1236.

cargo. When Hazelwood left the bridge, he violated explicit policy set forth in the Exxon's Bridge Manual. EOB 11-12. If Hazelwood was impaired by alcohol while on duty, that too violated Exxon's explicit policy. DX-3614 at S7304675970-7.

In addition, because maritime commerce entails risks not found on land, accidents can never be avoided entirely, and mariners must often make difficult decisions, maritime law has for centuries tilted the balance of tort policies against liability, to protect shippers and promote maritime commerce. See EOB 31-34, 80-85. "Through long experience . . . the law of the sea is concerned with . . . limitation of liability," Executive Jet Aviation v. Cleveland, 409 U.S. 249, 270 (1972), in order to "achiev[e] some assurance that the [shipping] industry will continue to attract a sufficient flow of risk capital to fulfill the shipping needs of this nation," Adams v. Montana Power, 528 F.2d 437, 439 n.1 (9th Cir. 1975); see Sisson, 497 U.S. at 367.

For that reason, maritime law has traditionally restricted or disallowed punitive damages. Guevara v. Maritime Overseas, 59 F.3d 1496, 1508 n.11 (5th Cir. 1995). Before this case, they had never been awarded for a maritime oil spill. Even if one assumes, as the panel held, that some room remains for punitive damages in oil spill cases despite the remedies available under the CWA, surely Congress can have contemplated in the CWA no

more than that punitive damages would be awarded in accordance with the traditional rules of maritime law. That means Amiable Nancy, not Protectus.

If Protectus does not apply here, the jury verdict cannot stand. Even if the jury could have found Exxon reckless based on its independent conduct, the instructions did not require the jury to find Exxon liable on that basis, and indeed required the jury to find Exxon reckless on a vicarious basis if the jury found Hazelwood reckless (as it did). When "it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground, the judgment must be reversed." Greenbelt Co-op Pub. Ass'n v. Bresler, 398 U.S. 6, 11 (1970); see Spectrum Sports v. McQuillan, 506 U.S. 447, 459-60 (1993).

II

The second issue worthy of en banc review is whether the $2.5 billion upheld in Valdez II is excessive as matter of federal maritime law and due process. The panel held that Exxon's conduct in causing the oil spill (on the unsupported assumption that the jury found fault with Exxon's own conduct) was in the "mid-range" of reprehensibility and therefore warranted a 5:1 ratio of punitive damages to economic harm. The panel further held that the proper economic harm to consider was $503 million, rather than the $20.3 million in actual compensatory damages awarded by judgments. Applying the 5:1

ratio to $503 million, the panel allowed punitive damages of $2.5 billion -- billions more than the legislatively established penalties for the very same oil spill. Though this analysis errs in many respects, we focus here on three key holdings that create decisional conflicts warranting reconsideration en banc.

A

The panel's application of a 5:1 ratio directly contradicts State Farm's instruction that "when compensatory damages are substantial, then a lesser ratio [of punitives to compensatories], perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. In other words, the more that other monetary payments by the defendant deter and punish its wrongdoing, the less the government interest in additional deterrence and punishment through punitive damages. Accord Glynn v. Roy Al Boat Management, 57 F.3d 1495, 1505 (9th Cir. 1995) (holding as a matter of maritime law that where other monetary liability "adequately serves to deter recalcitrance," punitive damages "are not needed to provide a powerful incentive for shipowners to investigate and pay promptly").

Valdez II disregards these principles, and in particular State Farm's teaching that the ratio of punitive to compensatory damages should not exceed a 1:1 ratio when the latter are "substantial." If $503 million is the correct compensatory

damages figure to employ in the ratio (but see below), it is "substantial" by any definition. The panel's unexplained failure to apply a maximum ratio of 1:1 to that amount is irreconcilable with State Farm.

B

The panel's adoption of $503 million as the relevant measure of economic harm directly contradicts its holding in Valdez I. See Jeffries v. Wood, 114 F.3d 1484, 1492 (9th Cir. 1997) (en banc) ("The manner in which panels apply law of the case is an important consideration for en banc review.").

In Valdez I, the panel held that in measuring compensatory damages for purposes of the ratio guidepost, "[t]he amount that a defendant voluntarily pays before judgment should generally not be used," because "that would deter settlements prior to judgment." 270 F.3d at 1244. Recognizing the importance of that ruling, plaintiffs petitioned for rehearing and rehearing en banc. They correctly observed that the panel's holding would put at issue hundreds of millions in harm "for which Exxon made pretrial payments," ER 270, and urged both the panel and the Court en banc to hold instead that pretrial and settlement payments do count as part of the "harm." The Court denied rehearing, no judge dissenting.

That key language in Valdez I thus became law of the case, and it reflected sound maritime law. In a maritime case, absent

a statute or controlling precedent, the federal court should (and indeed must) establish the controlling tort principles, including the extent to which punitive remedies are necessary to fulfill the goals of maritime tort law. Valdez I correctly applied those principles to encourage voluntary settlement and prompt compensation of injury, and to avoid massive punitive damages windfalls that would cripple rather than protect national maritime commerce.

On remand, however, the district court explicitly refused to follow Valdez I and included in its ratio analysis $493 million in voluntary pre-judgment payments on top of the $20.3 million in compensatory damages awarded by judgments. ER 625-30. Rather than correcting the district court's disregard of its mandate, the panel in Valdez II approved it, on the ground that State Farm had changed the law: "State Farm makes untenable the idea that a defendant's voluntary, pre-judgment payment of compensatory damages may not generally be used as part of the calculation of harm." Op. 19740.

This is wrong. According to Valdez II, the defendant in State Farm made a voluntary, pre-judgment payment of the "excess verdict," and "the Supreme Court did not use it to reduce the amount of total harm." Op. 19739. In fact, the amount of the excess verdict was never even part of the harm at issue in State Farm, which was $1 million "for a year and a half of emotional

distress." 538 U.S. at 426. The Supreme Court thus treated State Farm's pre-judgment payment of the excess verdict exactly as Valdez I treated Exxon's pre-judgment payments: it did not consider the excess verdict as "harm" for purposes of calculating the ratio. State Farm not only provides no basis for departing from Valdez I, it shows that Valdez I was right.[7]

C

Finally, the panel's express refusal to give any meaningful effect to the "comparable civil penalties" guidepost -- which mandates "substantial deference to legislative judgments concerning the appropriate sanctions for the conduct at issue," BMW, 517 U.S. at 583 -- conflicts with BMW, State Farm, and Valdez I.

Accurately describing this case as "unusually rich in comparables," Valdez I detailed multiple potential quantitative constraints imposed on punitive damages by comparable civil and criminal penalties applicable to this spill. 270 F.3d at 1245-46. In Valdez II, however, the panel reversed course and eschewed all such comparisons, holding that this guidepost

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[7] Even if 5:1 were proper, the panel failed to explain why $100 million (5 x $20.3 million) would not satisfy the government's interest in punishment and deterrence, especially as $100 million also roughly reflects the $150 million criminal fine imposed (before remittitur for Exxon's good conduct), and the $80 million which plaintiffs conceded was the maximum civil penalty for this spill. Exxon Reply Br., No. 04-035182, at 50.

serves only to gauge whether the legislature takes the conduct "seriously." Op. 19745-46. The panel again relied on State Farm (Op. 19745) to justify rejecting Valdez I (and BMW), because the Supreme Court there stated that it "need not dwell long on this guidepost." 538 U.S. at 428. But that was only because the award in State Farm so dramatically "dwarfed" the available civil penalty that the award's impropriety under this guidepost was obvious. Id.

The same is true here. Because this $2.5 billion award also dwarfs -- by billions of dollars -- all comparable legislative sanctions, including civil penalties directed to the very conduct in issue (see n.7 supra), State Farm manifestly supports Valdez I on this point. Valdez II impermissibly denies this guidepost any constraining force, effectively reading it out of the law, contrary to both BMW and State Farm.

CONCLUSION

The petition for rehearing or rehearing en banc should be granted.

DATED: January 12, 2007

Respectfully submitted,

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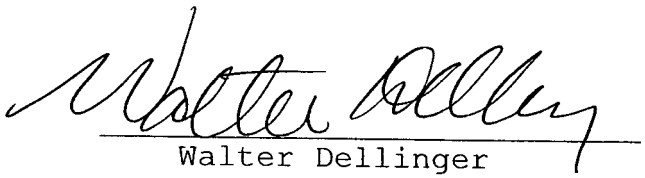
CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Circuit Rule 35-4 and 40-1, the attached petition for panel rehearing or rehearing en banc is monospaced, has 10.5 or fewer characters per inch and contains 4,199 words.

DATED: January 12, 2007



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CERTIFICATE OF SERVICE

I, Walter Dellinger, hereby certify that I am a member of the bar of this Court, and that on January 12, 2007, I caused the within Petition for Rehearing or Rehearing En Banc to be served pursuant to Rules 25 and 31 of the Federal Rules of Appellate Procedure by sending two copies via first class U.S. Mail, postage prepaid, to Liaison Counsel for Plaintiffs at the following address:

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