IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-35182 & 04-35183

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

PETITION FOR REHEARING OR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

RULE 35(b)(1) STATEMENT

The divided panel decision denying appellants Exxon Mobil Corporation and Exxon Shipping Company (collectively "Exxon") any appellate costs, even though Exxon's appeal succeeded in obtaining a *$4.5 billion* reduction in the original punitive damages judgment, conflicts with "the Supreme Court's decision in this case and precedent in other circuits." Op. 7089 (Kleinfeld, J., dissenting). The following question of exceptional importance is presented:

Whether an appellant who achieves a 90% reduction in a substantial damages award on appeal should be awarded at least those costs incurred to obtain security for the portion of the award ultimately reversed on appeal.

INTRODUCTION

This case is an appeal from a punitive damages award of $5 billion. To challenge that award on appeal without turning the entire amount over to plaintiffs, Exxon was forced to obtain an irrevocable letter of credit (the functional equivalent of a supersedeas bond) securing the full amount of the judgment. After almost twelve years of appellate process, Exxon's premiums on the letter of credit (as occasionally adjusted during the appeal) eventually exceeded $60.6 million. At the end of that appellate process, the Supreme Court agreed with Exxon that almost $4.5 billion of the award—nearly 90%—was unlawful.

Federal Rule of Appellate Procedure 39(e)(3) protects the rights of appellants in Exxon's position, who are forced to incur exorbitant bond costs to exercise their rights to appeal large damages awards. The appellant normally must bear the bond costs initially, but Rule 39(e)(3) allows the appellant to recover them if its challenge to the award is successful. The Rule thereby implements the centuries-old principle that a successful litigating party should be compensated for the costs incurred to achieve its success.

The panel decision violates that principle. The decision holds that in any case involving a "split decision" on damages—i.e., where the damages award is upheld, but reduced, even drastically—the defendant must bear 100% of the bond costs it paid to secure the unlawful award during appeal. That rule is unfair and contrary to the plain logic of Rule 39, as Judge Kleinfeld's dissent recognizes. It is also contrary to the Supreme Court's own costs ruling in this case favoring Exxon, and to decisions from other circuits allowing the defendant to recover the bond costs incurred to secure the portion of the award invalidated on appeal.

Applied here, that approach would require that Exxon be compensated for 90% of its $60.6 million in bond costs—or $54.5 million—reflecting the costs it incurred to secure the portion of the judgment it successfully challenged on appeal. There is no legal or equitable basis for denying Exxon compensation for those

costs, which reflect Exxon's success on appeal dollar-for-dollar. Rehearing or rehearing en banc should be granted.

BACKGROUND

1. On September 24, 1996, the district court entered judgment awarding plaintiffs $5 billion in punitive damages. Exxon exercised its right to appeal that judgment. Exxon asked plaintiffs, and later the district court, to waive the supersedeas bond during appeal, explaining that it was unnecessary (Exxon's net worth even then exceeded the award by many multiples), and that if Exxon prevailed on appeal, plaintiffs themselves would bear the costs of the enormous bond. *E.g.*, D. Ct. Dkt. No. 6691, at 8. But plaintiffs nevertheless demanded security for the entire judgment, and the district court agreed. To secure the $5 billion award (as occasionally adjusted) during the 12-year appellate period, Exxon ultimately paid the banks that provided the letter of credit approximately $60.6 million. *See* Op. 7095 (Kleinfeld, J., dissenting).

2. On June 26, 2008, the U.S. Supreme Court issued its opinion rejecting the original punitive damages judgment. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). The Court held that Exxon was subject to "maximum punitive damages" of $507.5 million—10% of the original award. *Id.* at 2634. To the extent plaintiffs prevailed in any respect, it was only by barely preserving that small proportion of the award: the Court divided 4-4 on the question whether *any*

award could stand, given the jury's instruction on vicarious liability for punitive damages. *Id.* at 2616. And even then, "the Court took pains to point out" that the summary affirmance "did not mean" the plaintiffs' arguments in defense of the award "were correct." Op. 7090 (Kleinfeld, J., dissenting); *see* 128 S. Ct. at 2616 ("it should go without saying that the disposition here is not precedential on the derivative liability question").

3. Plaintiffs also advanced their own affirmative arguments on appeal as to the size on the award. Plaintiff's efforts were wholly unsuccessful. After this Court's first decision vacating and remanding the original award, *see Baker v. Hazelwood*, 270 F.3d 1215 (9th Cir. 2001), the district court reduced the award to $4 billion. The plaintiffs filed a cross appeal, but before the case was submitted, this Court again vacated and remanded for reconsideration of the award. *See Sea Hawk Seafoods, Inc. v. Exxon Corp.*, 2003 U.S. App. Lexis 18219 (9th Cir. 2003). After the district court entered a new judgment for $4.5 billion, plaintiffs again cross-appealed, seeking restoration of the full $5 billion award. This Court rejected plaintiffs' appeal, ruling instead that the $4.5 billion awarded by the district court still exceeded the constitutionally permissible maximum amount by $2 billion. *See Baker v. Exxon Mobil Corp.*, 490 F.3d 1066, 1095 (9th Cir. 2007). Plaintiffs finally took their fight to the Supreme Court, filing a conditional cross-petition for certiorari, arguing that if the Supreme Court reviewed this Court's

judgment, it should uphold the original $5 billion award as legally valid. Cond. Cross-Pet. for Cert., *Baker v. Exxon Mobil Corp.*, No. 07-276 (U.S.). The Court denied plaintiffs' petition without comment, on the same day it granted Exxon's petition. *See Baker v. Exxon Shipping Co.*, 128 S. Ct. 499 (2007).

4. On August 12, 2008, the Court issued its formal judgment, which, *inter alia*, awarded Exxon all costs allowable under Supreme Court Rule 42.1. The judgment also instructed this Court to address a dispute between the parties concerning the interest applicable to the remaining $507.5 million award.

5. On August 27, 2008, Exxon paid the plaintiff class $383,349,750, largely satisfying the principal amount of the punitive damages award upheld on appeal exclusive of interest, after reductions for previously negotiated setoffs and cede-backs. Exxon withheld $70 million to cover Exxon's appellate bond costs.

6. On remand, the panel unanimously held that plaintiffs were entitled to interest on the reduced award dating to the original September 24, 1996 judgment, and that interest ran at the 5.9% rate applicable to a judgment issued that same day. Op. 7084-86; *id.* at 7089 (Kleinfeld, J., concurring in part).

The panel sharply divided, however, on the issue of Exxon's entitlement to its appellate bond costs. The panel majority described the outcome of the appeal as a "mixed result," in which "neither side is the clear winner," because while Exxon achieved "a reduction by 90% of the original $5 billion" award, it nevertheless still

"owes the plaintiffs $507.5 million in punitives." Op. 7087-88. Characterizing Exxon as the prevailing party entitled to costs, the majority argued, "ignores the hard-fought, even relentless battle Exxon waged to avoid any liability for punitives, a battle that resulted in an evenly divided decision by the Supreme Court in 2008 leaving in place our 2001 decision on vicarious liability." Op. 7087. In response to Exxon's argument that in such circumstances, costs should be apportioned according to the percentage damages reduction achieved on appeal, the panel majority held that such an approach would lead the Court in future cases into a "thicket" of "increased and wasteful litigation over the apportionment of costs." *Id.* at 7088.

Judge Kleinfeld dissented on the costs issue. "[R]espect for the Supreme Court's decision in this case and precedent in other circuits," he explained, "obligates us to award Exxon most, but not all, of its costs for its mostly successful appeal." *Id.* at 7089. Judge Kleinfeld rejected the majority's suggestion that Exxon should be wholly denied costs merely because it waged a vigorous but ultimately (barely) unsuccessful effort to invalidate the award completely: "Exxon appealed and fought. The Supreme Court determined that Exxon was largely correct, more right than we were. The law requires Exxon to be compensated in part for that battle, not punished for it …." Op. 7091.

Appellate Rule 39, Judge Kleinfeld emphasized, reflects the "ancient principle" that "all costs items expended in the prosecution of the proceeding should be borne by the unsuccessful party." Op. 7092 (quoting Fed. R. App. P. 39, Adv. Comm. Note). To implement that principle, Judge Kleinfeld argued—citing precedents from other circuits—that costs should be apportioned to reflect the extent of each party's success. "A party 'prevails' when it wins substantial relief; the amount of the cost award is determined by looking at the extent of the party's success." Op. 7099. Because plaintiffs succeeded in defending 10% of the punitive damages award, Exxon should be required to bear the costs of challenging that much of the award, Judge Kleinfeld concluded. But as to the remaining 90%, Exxon's appeal was successful, and it therefore should be compensated proportionally for the costs of achieving that success. Op. 7095. Such a "mathematical" approach would not be the "thicket" the majority feared, Judge Kleinfeld concluded, because "taking 90% of a number" is simple "arithmetic." Op. 7101-02.

7. Exxon has notified plaintiffs' counsel that on July 1, 2009, Exxon will pay the plaintiff class an additional $470,268,908, satisfying its liability for post-judgment interest to date and leaving unpaid only $70 million to cover the contested bond costs (including interest). This petition for rehearing or rehearing en banc challenges only the decision to deny Exxon 100% of those costs.

ARGUMENT

A. The Panel Decision Violates The Traditional Rule That The Prevailing Party In A Judicial Proceeding Is Entitled To Reimbursement For The Costs It Incurred To Achieve Success

It has been settled for more than 500 years that a prevailing party in an action at law may recover its costs as a matter of course. "As early as 1487 English law had codified the common law practice 'that if a judgment be affirmed on writ of error, the writ be discontinued, or if the party suing it be nonsuited then *the defendant in error was to have his costs*.'" *Baez v. Department of Justice*, 684 F.2d 999, 1002 (D.C. Cir. 1982) (en banc) (citation omitted). The American legal system has followed the same rule from its inception. *See id.*; *In re Costs in Civil Cases*, 30 F. Cas. 1058, 1059 (C.C.N.Y. 1852). That long tradition has established a modern presumption favoring an award of costs to the prevailing party that is "very powerful indeed." *Baez*, 684 F.2d at 1004; *see Delta Airlines, Inc. v. August*, 450 U.S. 346, 352 (1981) (costs liability is "a normal incident of defeat"); *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 593 (9th Cir. 2000) (en banc) ("costs are to be awarded as a matter of course in the ordinary case").

The longstanding common-law rule on cost recovery is now codified in the civil and appellate procedural rules. *See* Fed. R. Civ. P. 54(d); Fed. R. App. P. 39. Under Civil Rule 54(d), as under other cost- and fee-shifting provisions, the plaintiff is awarded costs as the "prevailing party" so long as it obtains a

significant benefit from its lawsuit, even if the plaintiff did not prevail on all or even most of the issues it raised. *See, e.g.*, *K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471, 477 (9th Cir. 1974) (Rule 54(d)); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (fee-shifting statute); *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1035-37 (9th Cir. 2006) (fee-shifting statute).

Appellate Rule 39 largely tracks Civil Rule 54(d) in structure and language, and reflects the same "very powerful" presumption "favoring costs award to prevailing parties." *Baez*, 684 F.2d at 1004; *see U.S. v. Imperial Irrigation Dist*, 595 F.2d 525, 532 (9th Cir. 1979) (parties on appeal "should be allowed costs in the case in which they prevailed"). And Rule 39 expressly designates the costs of a supersedeas bond or other bond as taxable in favor of a prevailing defendant. *See* Fed. R. App. P. 39(e)(3).

Under Appellate Rule 39, when the ruling below is affirmed or reversed, costs are automatically awarded to the prevailing party unless the appellate court provides otherwise. *See* Fed. R. App. P. 39(a)(2)&(3). Rule 39(a)(4) addresses "mixed" outcomes on appeal, providing that when a judgment is "affirmed in part, reversed in part, modified, or vacated," appellate costs "are taxed only as the court orders." This provision gives the appellate court that rendered the "mixed" judgment authority to determine the extent to which either party should be deemed

to have prevailed for the purposes of costs liability. And like a plaintiff under Civil Rule 54(d), a defendant-appellant—formerly labeled the "plaintiff in error" on appeal—need not prevail on every issue it raises on appeal to be deemed the prevailing party in that proceeding. *See* Op. 7102 n.63 (Kleinfeld, J., dissenting) (citing 14 examples of this Court's precedents awarding costs to appellate parties who did not prevail in every respect); Wright et al., Fed. Prac. & Proc. § 3985, at 213 (Supp. 2008) (citing additional cases). In short, even when the plaintiff preserves some aspect of a favorable judgment on appeal and thus remains the prevailing party *at trial*, the defendant who obtains significant (if not complete) relief from that same result on appeal is properly deemed a prevailing party *in the appellate proceeding*.

The panel decision here fails to respect the centuries-old rule that a prevailing party in a judicial proceeding should not be penalized for achieving substantial success in the proceeding. Clearly, "the denial of costs is in the nature of a penalty." *Sun Ship, Inc. v. Lehman*, 655 F.2d 1311, 1317 (D.C. Cir. 1983) (quotation omitted). And it is an especially severe penalty here—Exxon is being forced to bear $54.5 million in costs incurred to secure almost $4.5 billon in punitive damages liability that *never should have been entered against it*.

The panel majority's main justification for inflicting such a severe monetary penalty on Exxon is that the "equities in this case fall squarely in favor of the

plaintiffs—the victims of Exxon's malfeasance." Op. 7088. But the equities here work entirely in the opposite direction, especially given that this is a punitive damages appeal. Plaintiffs were fully compensated for their economic injuries long ago. This appeal has been solely about what *additional* amount Exxon must pay, *not* to compensate plaintiffs, but to punish Exxon. Plaintiffs thus lose nothing from their loss compensation if the punitive damages award is offset by compensation for the bond costs incurred for the part of the award invalidated on appeal. Indeed, the panel's ruling that plaintiffs are entitled to post-judgment interest at a 5.9% rate, which substantially exceeds real interest rates since 1996, already provides plaintiffs an interest windfall of *$170-180 million* beyond what their punitive damages judgment would have earned in the market over the same period. *See* Exxon Costs & Interest Br., Exh. B, at 4.[1] There is thus no equitable basis for relieving plaintiffs of their long-recognized obligation to compensate Exxon for the costs of its success on appeal. And to the extent the panel decision is suggesting that Exxon simply *deserves* to bear 100% of its bond costs, as an *additional* $60.6 million in punishment for its conduct, the decision squarely contradicts the Supreme Court's holding that $507.5 million is the maximum punishment permissible here.

[1] Further, the security was unnecessary and plaintiffs knew they would likely bear its substantial costs if Exxon successfully challenged the award. *Supra* at 3.

The panel majority also denies Exxon compensation for any bond costs on the ground that Exxon sought to overturn the award entirely, but plaintiffs successfully defended $507.5 million of it. Op. 7087-88. But that is an argument for denying Exxon its bond costs for *that remaining portion of the award*, not for denying Exxon *all* of its bond costs. The majority's analysis also fails to appreciate the difference between trial success and appellate success. In the trial proceeding, the plaintiff starts from zero and seeks to obtain some relief from the defendant. To the extent the plaintiff obtains some relief greater than zero, the plaintiff may be deemed the prevailing party, even if it did not obtain all the relief it sought. *See supra* at 9-10. On appeal, by contrast, the defendant appealing a monetary judgment is starting not from zero, but from *the amount of the judgment*, which the defendant is trying to eliminate or reduce. Thus, every dollar the judgment is reduced on appeal is a success for the defendant and a loss for the plaintiff, even if the defendant did not obtain all the appellate relief it sought. It thus defies logic to say that a defendant who succeeds on appeal in drastically reducing a damages award has not "prevailed" in any sense, and it defies longstanding cost-award principles to say that such a defendant should not be compensated *at all* for the costs of obtaining meaningful appellate relief.

B. The Panel Decision Contradicts The Supreme Court's Costs Ruling In This Case

The Supreme Court's own costs ruling in this case recognized Exxon's appellate success, awarding Exxon all of its costs in that Court. As Judge Kleinfeld's dissent observes, the panel majority's complete refusal to award Exxon any bond costs contradicts that ruling. Op. 7096-98. The general rule is that "when the Supreme Court reverses a circuit court order . . . and awards costs for the Supreme Court litigation to the now prevailing appellant," the appellate court awards costs under Rule 39 "to the now successful appellant for appeals on both the circuit and Supreme Court levels, as well as for costs incurred in the district court." *Furman v. Cirrito*, 782 F.2d 353, 355 (2d Cir. 1986). The panel decision's holding to the contrary thus conflicts with the Court's decision in this case, as well as the Second Circuit's decision in *Furman*. Op. 7097-98 (Kleinfeld, J., dissenting).

The panel decision points to the nominal difference between the Supreme Court's rule on costs and this Court's rule on costs, but the difference is irrelevant, as Judge Kleinfeld recognized:

> For both our rule and the Supreme Court's rule, the words are discretionary, "unless the Court otherwise orders" in the Supreme Court, "only as the court orders" here. In substance the rules are the same, leaving costs to the court's discretion. They do so against the background of our legal system, which has, for the better part of a millennium, awarded costs to prevailing plaintiffs, and for about half a millennium to whichever party prevailed.

Op. 7097. Put slightly differently, the Rules' semantic difference does not mean the Appellate Rule rejects the longstanding substantive principle that when a party initiates a legal proceeding and achieves some meaningful relief in that proceeding, its efforts have succeeded at least to that extent, and it should be compensated for the costs of achieving that success. That principle must govern the exercise of an appellate court's authority under Rule 39(a)(4) to make costs awards in "mixed result" cases. And as the Supreme Court's cost ruling demonstrates, that principle compels recognition that the invalidation of $4.5 billion in potential punitive damages liability—90% of the total—makes Exxon's appeal a success, justifying compensation for the costs of achieving that success.

C. The Panel Decision's Rejection Of Cost Apportionment Conflicts With Other Circuits' Decisions

While a defendant who obtains a marked reduction in a damages award on appeal clearly has prevailed at least to some extent, the plaintiff who preserves a substantial component of a damages award—defeating arguments for its outright elimination—has also achieved meaningful appellate success. After all, if the component of the award preserved on appeal had been the amount originally awarded, and the plaintiff had defeated the same arguments for outright elimination of the award, the plaintiff would have been entirely successful on appeal.

The best way to treat a "mixed result" as to damages, where the award is substantially reduced but some significant gross or percentage amount is preserved, is to treat the defendant as prevailing, but only to the extent the defendant successfully challenged the award, and to award it the bond costs required to secure the invalidated portion of the award. Thus where, as here, the defendant obtains a 90% reduction in the award, the defendant should be awarded 90% of its bond costs. Op. 7095 (Kleinfeld, J., dissenting) ("Because Exxon won 90% of its case [on appeal] and paid 90% of the $60.6 million [in total bond costs] to hold onto money it ultimately did not owe, Exxon ought to recover 90% of its allowable supersedeas bond costs."). Such a simple, clear, mathematical ratio is predictable and easy to administer, and—most importantly—it fulfills the costs rule's main objective of compensating parties for the costs of their litigation success.

The panel decision categorically rejects this apportionment approach on the ground that it would create a "thicket" of "increased and wasteful litigation" over appellate costs in future damages appeals involving "mixed results." Op. 7088. But as Judge Kleinfeld's dissent explains, percentage apportionment requires no more than simple arithmetic. Op. 7101-02. And as Judge Kleinfeld's dissent also points out, this Court *already* routinely makes costs awards in a variety of "mixed result" contexts, rather than automatically ordering each party to bear its own costs in all such cases. *See* Op. 7102 n.63 (citing cases); *see also Thompson v. Paul*, 547

F.3d 1055, 1065 (9th Cir. 2008) (dividing total appellate costs equally between the parties); *Riensche v. Cingular Wireless LLC*, 2009 WL 784265, at *1 (9th Cir. 2009) (same). That practice has not unleashed a flood of wasteful costs litigation even in those subjective cases, and here the issue is much more objective: a ratio-based approach to apportioning bond costs in cases involving large punitive damages awards will provide a clear answer in virtually every case, thereby avoiding precisely the collateral costs litigation the panel majority fears.

Other circuits have endorsed the apportionment approach rejected by the panel decision. In *Quaker Action Group v. Andrus*, 559 F.2d 716 (D.C. Cir. 1977), the court made a proportional allocation of cost awards to reflect the extent of the plaintiff's victory on appeal. *Id.* at 719; *see* Op. 7101 (Kleinfeld, J., dissenting). In *Republic Tobacco Co. v. North Atlantic Trading Co.*, 481 F.3d 442 (7th Cir. 2007), the Seventh Circuit upheld an award of bond costs where the defendant's appeal successfully reduced a damages award from $18.6 million to $3 million. *Id.* at 448-49. Contrary to the panel majority's suggestion, the appellate court in *Republic Tobacco* did not simply defer to the trial court's exercise of discretion, but instead affirmatively directed the trial court to consider allocating bond costs according to the proportion of the award reduced on appeal. *Id.* In *Emmenegger v. Bull Moose Tube Co.*, 324 F.3d 616 (8th Cir. 2003), the Eighth Circuit endorsed the same allocation approach. *Id.* at 626-27. And Judge Newman, former Chief

Judge of the Second Circuit, has also indicated that the practice is common in his Court. Hon. Jon O. Newman, *Decretal Language: Last Words in an Appellate Opinion*, 70 Brooklyn L. Rev. 727, 735 (2005) ("If the opinion directs a mixed outcome, appellant's costs can be apportioned, e.g., 'the appellant may recover 2/3 of its costs.'"); *see, e.g.*, *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 607 (2d Cir. 1986) (ordering each party to bear 50% of total costs in mixed result appeal); *Gordon H. Mooney Ltd. v. Farrell Lines, Inc.*, 616 F.2d 619, 626 (2d Cir. 1980) (same). None of these circuits has experienced a rash of "wasteful" appellate costs litigation.

D. The Fact That Cost Determinations In "Mixed Result" Cases Are Discretionary Does Not Undermine The Need For Rehearing

The panel decision's costs ruling is not immune from rehearing merely because it is a nominally discretionary determination under Rule 39(a)(4). *See, e.g.*, *U.S. v. Curtin*, 489 F.3d 935 (9th Cir. 2007) (en banc) (discretionary evidentiary ruling); *U.S. v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc) (discretionary sentencing determination); *U.S. v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (en banc) (discretionary venue transfer ruling). Discretion must be exercised consistent with law. And as shown above, the panel decision errs legally by failing to accord adequate respect for the right of the successful litigating party to obtain compensation for the costs of its success, and by categorically rejecting the costs-apportionment approach other courts have adopted. The latter conclusion, in

particular, reveals the panel decision to be more than a fact-specific discretionary judgment without consequence for future cases. The decision's analysis is explicitly categorical: apportioning costs in *any* case is the wrong approach, the panel majority holds, because it would lead to wasteful costs litigation in *all* cases. That holding will govern future cases, but it is both incorrect and unfair to parties who achieve significant, but less-than-total, appellate success.

CONCLUSION

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

DATED: June 29, 2009

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 proportionally spaced, has a typeface of 14 points or more, and contains 4,197 words.

DATED: June 29, 2009

/s/John F. Daum
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CERTIFICATE OF SERVICE

I, Karen L. Ezell, hereby certify that I am a member of the bar of this Court, and that on June 29, 2009, 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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