No. 09-17490
Decided September 21, 2012
Before Circuit Judges Thomas and Clifton and District Judge Pro

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF KIVALINA; CITY OF KIVALINA,

Plaintiffs-Appellants,

v.

EXXONMOBIL CORPORATION; BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS COMPANY; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; PEABODY ENERGY CORPORATION; THE AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICES CORPORATION; DUKE ENERGY CORPORATION; DTE ENERGY COMPANY; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; PINNACLE WEST CAPITAL CORPORATION; THE SOUTHERN COMPANY; RELIANT ENERGY, INC.; XCEL ENERGY, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California
The Honorable Saundra Brown Armstrong
District Court Case No. 08-cv-01138 SBA

PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Other Authorities

INTRODUCTION

The Court should grant rehearing *en banc* because the panel's majority opinion directly conflicts with the Supreme Court's holding in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). The panel held that the federal Clean Air Act ("CAA") displaces plaintiffs' damages claim for injuries from global warming. It relied upon *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"), where the Supreme Court held the CAA displaced a claim seeking injunctive relief against greenhouse gas emissions. But in *Exxon Shipping*, the Supreme Court unambiguously held that a federal common law damages claim is *not* displaced by the Clean Water Act ("CWA") – a federal environmental statute that, like the CAA, provides only injunctive relief and civil penalties – even though the CWA *does* displace a federal common law claim for injunctive relief. *Exxon Shipping* thus "suggests a different result" from the one reached by the majority, as the separate opinion here concurring in the result frankly stated. *See Kivalina v. ExxonMobil Corp., et al.*, No. 09-17490 (9th Cir. Sept. 21, 2012) ("*Kivalina*") (attached at Tab A hereto) at 11669 (Pro, J., concurring).

This question is of exceptional importance, as evidenced by the Supreme Court's frequent review of whether a statute displaces federal common law, including in recent cases such as *AEP* and *Exxon Shipping*. And "the unusual

importance of the underlying issue," *i.e.*, global warming, is also beyond doubt. *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007).

The direct conflict here between the majority opinion and *Exxon Shipping* practically jumps off the page. *Exxon Shipping* expressly limited the case on which the majority's decision rested, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) ("*Sea Clammers*"), to situations where "plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the [Clean Water Act]." *Exxon Shipping*, 554 U.S. at 489 & n.7. As Judge Pro noted in his separate opinion here, *Exxon Shipping* "appears to be a departure from" *Sea Clammers*. *Kivalina* at 11663 (Pro, J., concurring). But the majority opinion ignored *Exxon Shipping*'s limitation of *Sea Clammers*. Here – as in *Exxon Shipping* – plaintiffs seek only damages under federal common law (the federal common law of nuisance here; the federal common law of maritime in *Exxon Shipping*) and thus the CAA does not displace plaintiffs' common law damages claim for the same reason that the CWA did not displace the common law damages claim in *Exxon Shipping*. *See id.* at 489 (holding the CWA did not "eliminate *sub silentio* companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals"). The panel's decision to the contrary was error.

There is no reasoned basis on which to distinguish *Exxon Shipping*. All parties and both opinions of the panel agree that the CAA and CWA precedents on displacement are interchangeable. Indeed, *Sea Clammers*, upon which the panel majority (and defendants) rely, is, like *Exxon Shipping*, a CWA case. Nor does it matter that *Exxon Shipping* involved maritime law. *United States v. Texas*, 507 U.S. 529, 534 (1993) (holding "there is no support in our cases" for such a distinction in applying displacement test).

Consideration of Kivalina's case by the *en banc* Court is necessary to secure and maintain compliance with Supreme Court precedent as well as to ensure uniformity between *Kivalina* and this Court's decision in *Exxon Shipping* that the Supreme Court affirmed.

Kivalina is an Inupiat Eskimo village in Alaska. It is represented here by its governing bodies – the Native Village of Kivalina (a federally recognized Native American Tribe) and the City of Kivalina (an Alaskan municipality) (collectively, "Kivalina"). Kivalina alleges that defendants' emissions of greenhouse gases have contributed to global warming, which is injuring Kivalina by melting the sea ice that formerly protected it from fall and winter storms; the federal government has concluded that the result is a severe erosion problem such that the entire village

must now relocate or be destroyed.[1] Defendants – fossil fuel producers and coal-burning electric power producers – are among the world's largest global warming polluters by virtue of their massive greenhouse gas emissions. Kivalina invokes a long-recognized legal claim of public nuisance in which each polluter who contributes substantially to a body of pollution that is causing harm to the plaintiff may be held liable as a causal contributor.[2] Kivalina invokes federal common law due to the interstate nature of the pollution.[3] Kivalina also alleges that a group of the defendants conspired over many years to hide what they knew about the

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[1] GAO, Alaska Native Villages: Most are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance, Dec. 2003, at 29-32, *available at* http://www.gao.gov/assets/250/240810.pdf; U.S. Army Corps of Engineers, Alaska District, Alaska Village Erosion Technical Assistance Program: An Examination of Erosion Issues in the Communities of Bethel, Dillingham, Kaktovik, Kivalina, Newtok, Shishmaref, and Unalakleet, Apr. 2006, at 23-25, *available at* http://housemajority.org/coms/cli/AVETA_Report.pdf.

[2] *See, e.g.*, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696-97 (7th Cir. 2008) (*en banc*) (Posner, J.) ("Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance (the common law basis for treating pollution as a tort), pollution of a stream to even a slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others makes the condition of the stream approach the danger point.") (quotation omitted); *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1158 (Cal. 1884).

[3] *See AEP*, 131 S. Ct. at 2535 ("'When we deal with air or water in their ambient or interstate aspects, there is a federal common law.'") (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*")).

catastrophic harms from global warming, including the very kind of harm now befalling the village. Kivalina seeks the money necessary to move its village out of harm's way.

The legal question here is of exceptional importance; it has repeatedly occupied the Supreme Court's attention, as noted above. As the defendants in *AEP* (some of whom are also defendants here), stated in their petition for *certiorari*: "The questions presented by this case are recurring and of exceptional importance to the Nation." Petition for a Writ of Certiorari, *American Electric Power Co. v. Connecticut*, U.S. Supreme Court No. 10-174, 2010 U.S. Briefs 174, at *12 (Aug. 2, 2010). For Kivalina, the exceptional importance of this case cannot be doubted inasmuch as its very physical and cultural existence are at stake, a fact the majority acknowledges. "Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea." *Kivalina* at 11657.

Kivalina respectfully submits that the grounds for rehearing *en banc* are satisfied.

ARGUMENT

I. THE PANEL OPINION CONFLICTS WITH *EXXON SHIPPING*.

This case squarely presents the issue of whether a statute that displaces a federal common law cause of action for injunctive relief also displaces a federal common law damages action. *Exxon Shipping* answers this question in the negative and directly conflicts with the panel decision.

Here, there is no dispute that the federal CAA displaces a federal common law claim seeking injunctive relief arising from air pollution generally or greenhouse gases specifically. That was the holding of *AEP*. Similarly, in *Exxon Shipping*, there was no dispute that the federal CWA displaced a federal common law claim for injunctive relief arising from water pollution. That was the holding of *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"). This Court expressly recognized in *Exxon Shipping*, prior to being affirmed in relevant part by the Supreme Court, that the displacement holding in *Milwaukee II* was tied to the relief sought: "*Milwaukee [II]* held that a federal district court could not impose and enforce more stringent effluent limitations than those established by the administrative agency charged with enforcement of the Clean Water Act, so *for purposes of a claim seeking that relief*, the Clean Water Act preempted the common law remedy." *In re Exxon Valdez*, 270 F.3d 1215, 1230 (9th Cir. 2001)

(emphasis added). The defendant in *Exxon Shipping* argued that *Milwaukee II* and *Sea Clammers* required the Court to find that the CWA displaced a punitive damages claim under the federal common law claim of maritime tort. This Court disagreed:

> [W]here a private remedy does not interfere with administrative judgments (as it would have in *Milwaukee [II]*) and does not conflict with the statutory scheme (as it would have in *Sea Clammers*), a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy. *It is reasonable to infer that had Congress meant to limit the remedies for private damage to private interests, it would have said so. The absence of any private right of action in the Act for damage from oil pollution may more reasonably be construed as leaving private claims alone than as implicitly destroying them*.

Id. at 1231 (emphasis added).

The Supreme Court affirmed this holding and expressly limited the displacement analysis in *Milwaukee II* and *Sea Clammers* to situations where the plaintiff seeks different effluent standards from those set by the statute:

> If Exxon were correct here, there would be preemption of provisions for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from oil spills or other water pollution. But we find it too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.
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> * * *
>
> All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies, *see, e.g., United States v. Texas*,

> 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law" (internal quotation marks omitted)); nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption. In this respect, this case differs from [*Sea Clammers* and *Milwaukee II*], where plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA. Here, [plaintiff's] private claims for economic injury do not threaten similar interference with federal regulatory goals with respect to "water," "shorelines," or "natural resources."

Exxon Shipping, 554 U.S. at 488-89 & n.7.

Despite the decisions of this Court and the Supreme Court in *Exxon Shipping* that the absence of a federal statutory damages remedy does not displace a federal common law damages action, the panel here held the opposite. It concluded that, under *Sea Clammers* and *Exxon Shipping*, "if a cause of action is displaced, displacement is extended to all remedies" and therefore that *AEP* – an injunctive relief case like *Milwaukee II* – somehow *sub silentio* "extinguished Kivalina's federal common law public nuisance damage action." *Kivalina* at 11655.

The majority here misread *Exxon Shipping* by placing undue emphasis on words that, when taken out of context, take on a changed meaning. In *Exxon Shipping*, the Supreme Court rejected Exxon's attempt to distinguish between

compensatory damages (which Exxon conceded were not displaced) and punitive damages (which it contended were displaced). In doing so, the Supreme Court noted that it had "rejected similar attempts to sever remedies from their causes of action." 554 U.S. at 489 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-56 (1993)). The panel majority construed this statement to mean that once displacement attaches to a cause of action, it applies to "all remedies." *Kivalina* at 11655. Not so. If it were true, *Exxon Shipping* would have come out the other way.

Judge Pro's opinion concurring in the result points out the flaw in the majority's reasoning:

> While *Exxon* stated that the Court has rejected "attempts to sever remedies from their causes of action," *id.* at 489, *Exxon* made this pronouncement in the context of examining whether one form of damages ought to be severed from another form of damages without any statutory textual basis for doing so. The *Exxon* Court was not evaluating whether a claim for damages is of a different character than a claim for injunctive relief. In fact, the case upon which *Exxon* relied for that statement, *Silkwood*, likewise disapproved of an attempt to sever compensatory and punitive damages, but its overall holding suggests that severing rights and remedies *is appropriate* as between damages and injunctive relief in some circumstances

Kivalina at 11665 (Pro, J., concurring) (emphasis added). Judge Pro then explains that *Silkwood* actually supports Kivalina's position because it held that punitive damages under state law were available against a nuclear plant operator even

though Congress had preempted states from enjoining nuclear plant operations under state law. *Id*. at 11665-66. "Indeed, the Supreme Court concluded that congressional silence on the matter of damages claims, and its failure to provide a federal remedy for injured persons, made it 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'" *Id.* at 11666 (quoting *Silkwood*, 464 U.S. at 251).

In short, both *Exxon* and *Silkwood* stand for the proposition that it *is* appropriate to treat a damages claim and an injunctive claim differently for purposes of determining whether Congress intended to displace or preempt common law. And, as Judge Pro also observed, *Exxon* and *Silkwood* are not alone in their disparate treatment of injunctive and damages claims: "It is not inexorably the rule that the unavailability of one remedy necessarily precludes the availability of another remedy arising out of the same asserted right or injury." *Id.* at 11666 n.1 (Pro, J. concurring) (citing *Cipollone v. Liggett Group, Inc*. 505 U.S. 504, 518-19 (1992), and *Ex Parte Young*, 209 U.S. 123 (1908)).

Nor can *Exxon Shipping* be distinguished on the basis that it involved maritime law rather than federal common law, or that the claimed involved was labeled "maritime tort" rather than "maritime nuisance." In applying the displacement of federal common law test, "there is no support in our cases . . . for a

distinction between general federal common law and federal maritime common law." *United States v. Texas*, 507 U.S. 529, 534 (1993); *see also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996) (holding that maritime law is "a species of judge-made federal common law"). And any alleged distinction between maritime tort and "nuisance" is merely semantic. *See, e.g., Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1030-31 (5th Cir. 1985) (*en banc*) (holding in maritime tort case that "rephrasing the claim as a public nuisance claim does not change its essential character") (quotation marks omitted). The majority itself implicitly recognized the falsity of such distinctions by declining defendants' invitation to embrace them here.

To be sure, in *Exxon Shipping* this Court accepted an alleged distinction between maritime tort and maritime nuisance in an attempt to distinguish *Conner v. Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), a maritime nuisance case that had held such a claim to be displaced by the CWA under *Milwaukee II*. *See In re Exxon Valdez*, 270 F.3d at 1231. But *Conner* is no longer good law in light of *Exxon Shipping* (which explains why defendants never cited it in any of their briefs), and under the Supreme Court's reasoning there is no longer any basis for distinguishing it.

In fact, a nuisance claim lends itself naturally to *Exxon Shipping*'s

distinction between injunctive and damages claims because the substance of a public nuisance claim for damages fundamentally differs from that of a public nuisance claim for injunctive relief.[4] The very balancing process that compares the utility of the defendant's conduct to the plaintiff's harm – a process that defendants contend would inevitably embroil this public nuisance case in a regulatory enterprise assigned to the Environmental Protection Agency[5] – is dispensed with in a damages case, especially where, as here, the harm is severe. *See* Restatement (Second) of Torts § 829A (1979) ("An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation."); *see also id*. cmt. b ("[C]ertain types of harm may be so severe as to require a holding of unreasonableness as a matter of law, regardless of the utility of the conduct."); *id.* § 826 cmt. f ("The process of comparing the general utility of the activity with the harm suffered as a result is adequate if the suit is for an injunction prohibiting the activity. But it may sometimes be incomplete and

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[4] *See, e.g.*, Restatement (Second) of Torts § 821B cmt. i (1979) ("There are numerous differences between an action for tort damages and an action for injunction or abatement, and precedents for the two are by no means interchangeable.").

[5] *See, e.g.*, Answering Br. for Defendants-Appellees Shell Oil Co. *et al.* at 66.

therefore inappropriate when the suit is for compensation for the harm imposed."). Kivalina's nuisance claim fits *Exxon Shipping*'s distinction between an injunctive claim and a damages claim perfectly.

The common thread running throughout the displacement cases is that the federal common law cannot create a parallel track with a regulatory regime established by Congress. Thus, in *AEP* the displacement holding, like *Milwaukee II*, was expressly limited to injunctive relief claims seeking abatement of the nuisance. "We hold that the Clean Air Act *and the EPA actions it authorizes* displace any federal common law right *to seek abatement of carbon-dioxide emissions* from fossil-fuel fired power plants." *AEP*, 131 S. Ct. at 2537 (emphases added). *AEP* emphasized the critical fact that the CAA empowered EPA to grant exactly the relief plaintiffs sought. "The Second Circuit erred, we hold, in ruling that federal judges may *set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits.*" *Id*. at 2540 (emphasis added). And again: "[t]he [CAA] itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants – *the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.*" *Id.* at 2538 (emphases added).

Here, Kivalina does not seek to set emissions caps. It seeks damages.

Federal common law applies where a court "is compelled to consider federal questions which cannot be answered from federal statutes alone." *Milwaukee II*, 451 U.S. at 313. The CAA lacks any parallel damages remedy for air pollution victims and thus does not provide an answer to the question of whether Kivalina is owed compensation. *AEP* itself recognizes that remedies are at the heart of the displacement inquiry: the "reach of remedial provisions is important to [the] determination [of] whether [a] statute displaces federal common law." *AEP*, 131 S. Ct. at 2538. Yet the panel here concluded that *AEP* mandates displacement in this case even though the CAA – like the CWA at issue in *Exxon Shipping* – has nothing at all to say about how, whether, when or by whom private claims for persons injured by interstate pollution should be compensated. The right to sue for damages for nuisance arises from the common law; if Congress intended to eliminate that right, it would say so. To borrow *Exxon Shipping*'s language, it is "too hard" to conclude that the CAA (a statute dedicated to cleaning the air) "was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring" public and private property with air pollution. *Exxon Shipping*, 554 U.S. at 488-89.

The Supreme Court has previously emphasized the narrowness of the

displacement test:

> [T]he relevant inquiry is whether the statute "[speaks] *directly* to [the] question" otherwise answered by federal common law. *Milwaukee II*, *supra*, at 315. (emphasis added). As we stated in *Milwaukee II*, federal common law is used as a "necessary expedient" when Congress has not "spoken to a *particular* issue."

County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226, 236-37 (1985). The Court emphasized the words "*directly*" and "*particular*" to underscore the same point at issue here, *i.e.*, the mere establishment of a regulatory regime does not, by *sub silentio* implication, somehow wipe away all federal common law damages remedies for injured persons. In *Oneida*, the Court held that a statute prohibiting conveyances of tribal lands without the approval of the federal government did not displace a tribe's federal common law claim for ejectment seeking damages for wrongful conveyance and occupation of its land. 470 U.S. at 231-32. Although the legislation authorized the President to remove illegal occupants of Indian lands, it did "not speak directly to the question of *remedies* for unlawful conveyances of Indian land." *Id*. at 237 (emphasis added).

Similarly, in *United States v. Texas*, *supra*, the Supreme Court held that a federal common law claim for interest on debts owed to the United States by a state was not displaced by a statute that regulated federal debt collections. The circuit court had wrongly concluded that Congress had occupied the field of debt

collection and *sub silentio* displaced the federal common law rule governing interest on debts by state and local governments to the federal treasury. But, as in *Exxon Shipping* and *Oneida Indian Nation*, the fact that Congress was merely "silent" about a particular federal common law remedy while establishing other remedies, comprehensive so far as they went, was not enough to displace all common law remedies. *Texas*, 507 U.S. at 535.

The majority here reached the opposite conclusion from the one mandated by *Exxon Shipping*, *Oneida*, and *Texas*. It held that Congress' silence about private claims for pollution displaces all common law remedies. The panel simply failed to follow binding Supreme Court caselaw.

Finally, the panel could have avoided any arguable tension with *Sea Clammers* simply by adhering to *Exxon Shipping*'s explanation of *Sea Clammers*. The *Sea Clammers* plaintiffs had sued federal and state officials under statutory and constitutional claims, and had so intertwined their federal common law claims with alleged statutory violations and requests for injunctive relief that they "amounted to arguments for effluent-discharge standards different from those provided by the CWA." *Exxon Shipping*, 554 U.S. at 489 n.7. This is exactly what Kivalina does *not* seek here.

At bottom, the panel fails to identify anything in the CAA suggesting that

Congress intended, *sub silentio*, to eliminate the common law rights of interstate air pollution victims to sue for damages under federal nuisance law. *Exxon Shipping*, *Oneida Indian Nation* and *Texas* all forbid such displacement by statutory silence.

II. ANY OTHER BASIS FOR AFFIRMING WOULD CONFLICT WITH *AEP* AND *MASSACHUSETTS*.

Judge Pro would have affirmed the dismissal for lack of standing. *See Kivalina* at 11672-76. However, *AEP* affirmed (by an equally divided Court, due to Justice Sotomayor's recusal), the Second Circuit's decision that standing was proper in that global warming tort case. *See AEP*, 131 S. Ct. at 2535. And in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court upheld standing in a global warming case. Here, standing is substantially less difficult to establish than in *Massachusetts*, for two reasons. First, Kivalina has sued private party emitters directly whereas in *Massachusetts* plaintiffs sued the government for failing to regulate third parties, a form of standing that "is ordinarily substantially more difficult to establish" than in a direct case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation marks omitted). Kivalina therefore does not need any special assistance in the standing analysis from a statute or sovereign status that, defendants argued here, would be required under *Massachusetts*. Second,

Kivalina seeks damages, so redressability is easily satisfied. Kivalina has standing.

The district court dismissed this case on the basis of the political question doctrine (as well as standing). However, the Supreme Court rejected the political question argument in *AEP*. *See AEP*, 131 S. Ct. at 2535 & n.6. Here, where damages are sought, the argument is even weaker. *See Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("A key element in our conclusion that the plaintiffs' action is justiciable is the fact that the plaintiffs seek only damages for their injuries."). The political question defense is of no avail.

CONCLUSION

Kivalina respectfully requests that the Court rehear this case *en banc*.

Dated: October 4, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD LIMIT REQUIREMENTS

The foregoing Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14-point plain, roman style font, and is 4,070 words, including footnotes, headings and quotations.

/s/ Matthew F. Pawa
Matthew F. Pawa

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 4, 2012, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Matthew F. Pawa
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