

No. 08-16728

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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VETERANS FOR COMMON SENSE;  
VETERANS UNITED FOR TRUTH

Plaintiffs-Appellants,

v.

ERIC K. SHINSEKI, Secretary, Department of Veterans Affairs, et al.,  
Defendants-Appellees.

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On Appeal from the United States District Court  
for the Northern District of California

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**APPELLEES' PETITION FOR REHEARING  
AND REHEARING *EN BANC***

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## INTRODUCTION AND SUMMARY

The Department of Veterans Affairs (“VA”) is firmly committed to ensuring that our nation’s veterans receive top-quality health care and timely and accurate decisions on service-connected death and disability compensation claims. The VA operates under a framework of continuous and pervasive Congressional oversight, and works regularly with Congress to obtain the necessary resources to achieve these goals. In turn, Congress closely monitors these issues, and enacted the Veterans Judicial Review Act (“VJRA”) to prevent the courts from second-guessing the VA’s performance of these critical functions. Given the VJRA’s clear intent to reduce the judiciary’s involvement in “technical VA decision-making,” H.R. Rep. No. 100-963, at 21 (1988), and more general separation-of-powers principles designed “to protect agencies from undue judicial interference with their lawful discretion,” *Norton v. Southern Utah Wilderness Alliance (“SUWA”)*, 542 U.S. 55, 66 (2004), the district court properly recognized that it had no authority to order the VA to change the way it provides health care and monetary benefits to veterans.

In reversing the district court, the panel majority (Reinhardt, Hug, JJ.) ignored basic limits on judicial authority to compel systemic reform of agency programs and the specific “‘keep out’ sign,” Diss. Op. at 2 (Kozinski, C.J.), that Congress erected – the VJRA – to preclude courts from second-guessing decisions by the VA affecting the provision of benefits. By installing the district court as a “reluctant commandant-in-chief,” *id.* at 1, and directing the court to engage in a wide-ranging and standardless

inquiry to identify “what additional procedures are necessary” to improve the VA’s provision of mental health care and monetary benefits, Maj. Op. at 72, 94, the panel effectively wrested control of the VA from the politically-accountable branches of government that are best-positioned to identify the needs of veterans and allocate limited resources to address those needs. The open-ended mandate the panel has assigned on remand requires the district court to engage in policy-making functions that the court is ill-equipped to handle: implementing structural reforms to the VA’s procedures for providing mental health care and monetary benefits to veterans. This broad, legislative mandate is particularly inappropriate given Congress’s commitment to a non-adversarial model for providing benefits to veterans, and the “considerable leeway” Congress must be given to prescribe procedures in this context. See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 326 (1985).

The practical impact of the panel’s decision can hardly be overstated. Overruling “both Congress’s and the VA’s judgment on the amount of process due to veterans seeking benefits,” Diss. Op. 36, the panel majority has set in motion a process that is likely to strip important procedural protections from the non-adversarial system Congress designed in order to resolve benefits appeals sooner, while adding burdensome procedures with respect to mental health care (*e.g.*, the right to appeal “administrative” scheduling decisions) that will not provide any practical benefit given the ample safeguards the VA has already implemented to ensure that *all* veterans in need of emergency treatment timely receive it. As Chief Judge Kozinski

recognized, the extensive policy-making endeavor the panel contemplates on remand is not only “an Article III putsch,” it will also “distract the VA from its ultimate mission: taking care of veterans who risked their lives for this nation.” *Id.* at 2.

Given the enormous practical significance of the issues involved in this case, we respectfully request rehearing en banc. The panel’s decision presents at least four questions of exceptional importance, and it conflicts in various ways with decisions by the Supreme Court, this Court, and other circuits. See Fed. R. App. P. 35(b)(1).

As outlined below, the full Court should consider the following questions:

1. Whether the waiver of sovereign immunity in APA Section 702 extends to due process claims seeking to compel wholesale reform of agency programs based on allegations of systemic “unreasonable delay.”
2. Whether provisions of the VJRA divesting district courts of jurisdiction to review VA regulations and VA benefits decisions, 38 U.S.C. 502, 511, preclude courts from determining whether “average” delays in the VA’s provision of mental health care or its adjudication of disability compensation claims violate due process.
3. Whether organizational plaintiffs that have disavowed any claims for relief based upon delays suffered by individual veterans (in an effort to avoid the jurisdictional limits of the VJRA) have standing to pursue due process claims predicated upon “average” delays by the VA.
4. Whether the panel erred in holding that “average” delays in the VA’s provision of mental health care and its adjudication of benefits claims violate due process.

## STATEMENT

Plaintiffs, two veterans advocacy organizations, filed suit against the VA alleging system-wide “unreasonable delay” in the VA’s provision of mental health care and monetary benefits to veterans. In an effort to circumvent the prohibition on judicial review of VA benefits decisions, 38 U.S.C. 511, plaintiffs disavowed claims for individual veterans arising from any specific benefits decision, see Compl. ¶ 39, and instead sought broad injunctive relief compelling systemic changes to the way the VA provides mental health care to veterans, and orders directing the VA to process claims for monetary benefits more quickly across-the-board.

The district court (Conti, J.) ruled in favor of the VA. *Veterans for Common Sense v. Peake* (“VCS”), 563 F. Supp. 2d 1049 (N.D. Cal. 2008). The court first held that it lacked authority to compel wholesale reform of the VA’s policies and programs for administering medical care and providing monetary benefits to veterans. The court held that Congress has committed decisions regarding the timing and adequacy of medical care for veterans solely to the discretion of the VA and that plaintiffs had not shown any systemic failure by the VA to take discrete and required action. *Id.* at 1079-83. The court also held that Sections 502 and 511 of the VJRA divested it of jurisdiction to review claims of systemic unreasonable delay by the VA in providing benefits. *Id.* at 1083-84. On the merits, the court found that “average” delays by the VA were neither “unreasonable” under the APA nor a violation of due process under the Constitution, *id.* at 1085-89.

A divided panel of this Court affirmed in part and reversed in part. While acknowledging that “in theory, the political branches of our government are better positioned than are the courts to design the procedures necessary to save veteran’s lives,” Maj. Op. at 4, the panel declared that failures by Congress and the VA to adequately address systemic delays in the provision of mental health care and the adjudication of disability compensation claims had made it necessary for the court to take action, *id.* at 5. Because plaintiffs failed to identify any “discrete action” that the VA was “required” to take, the panel recognized that it lacked authority to provide any relief under the APA. *Id.* at 48-54, 74-75. However, the panel concluded that it could provide the very same relief precluded under the APA as a remedy for due process violations. The panel further held that the VJRA did not divest the district court of jurisdiction over plaintiffs’ systemic due process claims because, in the panel’s view, those claims did not require the court to review any VA benefits decisions. *Id.* at 76-87. Finding due process violations by the VA, the panel instructed the district court to hold further proceedings to determine “what additional procedures are necessary” to improve the VA’s delivery of mental health care and its adjudication of benefits claims, and to “enter an appropriate order” directing the VA to implement as-yet unspecified remedies. *Id.* at 72-73, 94-95.

In dissent, Chief Judge Kozinski declared that the panel majority “dramatically oversteps its authority, tearing huge gaps in the congressional scheme for judicial review of VA actions.” Diss Op. 36.

## ARGUMENT

### **I. The Panel Erred In Holding That The Waiver of Sovereign Immunity In APA Section 702 Extends To Due Process Claims Seeking To Compel Reform Of Agency Programs Based On Allegations Of Systemic “Unreasonable Delay.”**

Prior to the panel’s ruling, there was a split in this Court’s decisions on the question whether the waiver of sovereign immunity in APA Section 702 is limited by the requirement of “final agency action” in 5 U.S.C. 704. See Op. at 41-45 (discussing divergent holdings in *Gallo Cattle Co. v. Dep’t of Agriculture*, 159 F.3d 1194, 1198 (9th Cir. 1998), and *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989)). Although at least two panels of this Court recently noted this conflict in circuit precedent and specifically declined to resolve it, see *Gros Ventre Tribe v. United States*, 469 F.3d 801, 809 (9th Cir. 2006); *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1086 (9th Cir. 2010), the panel in this case declared that *Gallo Cattle* and *Presbyterian Church* are “readily distinguishable,” Op. at 45 n.22, and held that Section 702 waives sovereign immunity for constitutional claims seeking injunctive relief without regard to any other limitations on judicial review in the APA, *id.* at 46.

The panel’s resolution of this circuit split on an issue that at least two other panels of this Court took care to avoid provides an adequate basis, standing alone, for rehearing *en banc*. But the panel’s decision is also wrong and will likely have serious adverse consequences because it allows plaintiffs to circumvent fundamental limits on judicial authority to compel wholesale reform of agency programs, see *SUWA*, 542

U.S. at 66 (explaining that these limits are designed “to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve”), by re-characterizing claims of “unreasonable delay” under the APA as due process claims. This Court has previously rejected attempts by plaintiffs to avoid APA limits by re-packaging their claims, see *Ecology Center, Inc. v. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999), and the panel’s decision suffers from the same flaw. Fundamental limits on judicial authority to compel agency action “unreasonably delayed” apply equally to APA claims and due process claims.

Contrary to the panel’s premise, due process claims do not provide more leeway than APA claims for courts to rummage through agency programs looking for ways to improve them.<sup>1</sup> See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). This case illustrates the untenable results such a rule would produce.

Although the panel conceded that it could not order the VA to implement its *own* plans (*e.g.*, the Mental Health Strategic Plan and the Feeley memorandum) – because they did not prescribe discrete and required action, Op. 53-54 – the panel believed there was no impediment to ordering the VA to implement whatever procedures and plans the district court might fashion on remand.

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<sup>1</sup> No distinction can properly be drawn between “unreasonable delay” claims under the APA and those under the Constitution because the APA was enacted to provide a uniform vehicle for courts to review *all* types of challenges to agency action, including constitutional claims. See *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999); 5 U.S.C. 706(2)(B) (allowing courts to set aside agency action that is “contrary to constitutional right, power, privilege, or immunity”).

The panel could not circumvent basic limits on judicial review by tethering relief to a due process claim rather than an APA claim, because the panel's broad mandate to decide "what procedural protections are necessary" to remedy the due process violations it found will result in precisely the same "judicial entanglement in abstract policy disagreements" that the Supreme Court has rejected. See *SUWA*, 542 U.S. at 66. At the very least, the scope of the sovereign immunity waiver in APA Section 702 must be informed by fundamental limits on judicial review. Plaintiffs' due process claims seeking broad reform of the VA's programs for providing mental health care and monetary benefits to veterans simply do not fall within that waiver.<sup>2</sup>

**II. The Panel Erred In Holding That Provisions Of The VJRA Divesting Courts Of Jurisdiction To Review VA Regulations And VA Benefits Decisions Do Not Preclude Plaintiffs' Due Process Claims Alleging Systemic Unreasonable Delays.**

Prior to 1988, there was no judicial review of veterans benefits decisions. As the Supreme Court recognized in *Walters*, Congress designed a non-adversarial scheme for providing benefits to veterans and expressly prohibited judicial review.

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<sup>2</sup> In a footnote, the panel suggested that the scope of Section 702's immunity waiver is irrelevant because "Veterans's constitutional challenge could proceed against all individual defendants under *Ex parte Young*." Op. at 46 n.23. That suggestion is contrary to decisions by this Court recognizing that the APA "replaced the *Ex Parte Young* fiction as the doctrinal basis for prospective relief." *Peabody Western Coal*, 610 F.3d at 1085-86. Moreover, that suggestion is wrong on its own terms because, even where unconstitutional conduct is alleged, sovereign immunity bars suit "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1947).

*Walters*, 473 U.S. at 311 (citing 38 U.S.C. 211(a)). After courts found ways to circumvent early limits on judicial review, see *Traynor v. Turnage*, 485 U.S. 535 (1988), Congress responded by enacting the VJRA, which Chief Judge Kozinski aptly characterized as “a big ‘keep out’ sign” for the courts. Diss. Op. at 2.

The primary purpose of the VJRA was to decrease the “involvement of the judiciary in technical VA decision-making.” H.R. Rep. No. 100-963, at 21 (1988). In the VJRA, Congress broadly divested district courts of jurisdiction to review challenges to VA rules and regulations, 38 U.S.C. 502, and any “questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary,” 38 U.S.C. 511(a). As numerous courts have recognized, the VJRA prohibits federal district courts from entertaining suits that would require them to determine whether the VA “acted properly” in handling requests for benefits, see *Broudy v. Mather*, 460 F.3d 106, 115 (D.C. Cir. 2006); *Hicks v. Small*, 69 F.3d 967, 970 (9th Cir. 1995), including constitutional claims, see *Hall v. U.S. Dep’t of Veterans Affairs*, 85 F.3d 532, 535 (11th Cir. 1996); *Hicks v. Veterans Admin.*, 961 F.2d 1367, 1368 (8th Cir. 1992), and claims alleging systemic delays, see *Beamon v. Brown*, 125 F.3d 965 (6th Cir. 1997). The VJRA likewise precludes suits challenging VA decisions regarding health care. See *Larabee by Jones v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992). Such claims are independently barred on the ground that decisions about the nature and timing of health care are for the VA to “determine,” 38 U.S.C. 1710(a)(1), and thus are committed solely to the VA’s discretion.

The panel's decision is contrary to the VJRA, and "is nothing less than a rebellion against Congress's consistent policy of limiting judicial review of the VA's affairs." Diss. Op. at 5. The panel held that 38 U.S.C. 511 posed no barrier to plaintiffs' claims of systemic delay in the VA's provision of mental health care and monetary benefits because it believed a court could decide those claims without first determining whether the VA "acted properly" in any individual case. See Op. at 56 (stating that plaintiffs could "challenge the lack of adequate *procedural safeguards* to ensure that veterans receive timely care"); *id.* at 80-81 (stating that plaintiffs did not challenge any decision "actually made by the Secretary," but rather "the VA's systematic failure to timely render decisions on appeal"). That is incorrect. In fact, the systemic nature of plaintiffs' claims necessarily rests on an aggregation of individual claims and actually *compounds* the degree of judicial intrusion into VA decision-making – precisely the outcome Congress sought to avoid in enacting the VJRA. While plaintiffs seek to eschew a challenge to *specific* VA benefits decisions, as such, they encroach far more on the VA's discretionary activities by calling into question each and every decision by the VA that may have any impact on timing in individual cases, including judgments about whether immediate medical treatment is needed and about what evidence is required to decide monetary benefits claims.

As Chief Judge Kozinski explained, the "time the VA needs to adjudicate a claim depends on its complexity as well as the amount of evidence the VA needs to generate for the veteran," and it is therefore impossible to "say whether a delay is

unreasonable without ‘determin[ing] first’ how much time the VA should have taken to process that veteran’s disability compensation. Diss. Op. at 18. But that is precisely the inquiry that Section 511 forecloses. Nor can plaintiffs avoid the case-specific inquiry necessary to assess a claim of unreasonable delay, see *Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986), by stating their claims at a higher level of generality, because systemic claims that “average” delays by the VA are unreasonable are, at bottom, claims that delays are unacceptable in *every* case, or at least a majority of cases. See Diss. Op. at 19 (“we can’t adjudicate this claim without evaluating whether the VA ‘acted properly’ at each step in deciding the benefits request.”).

Finally, as Chief Judge Kozinski recognized, 38 U.S.C. 502 independently bars plaintiffs’ claims of systemic delay because those claims “challenge conduct that the VA’s existing regulations either permit or require.” Diss. Op. at 24. By directing the district court to consider imposing new programmatic requirements governing the VA’s provision of mental health care, Op. 72, and mandatory time limits for the VA’s adjudication of benefits claims, *id.* at 94, the panel effectively authorized the promulgation of new regulations and the invalidation of old ones – actions that Section 502 prohibits. See *Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005).

### **III. The Panel Erred In Holding That Plaintiffs Have Standing To Pursue Due Process Claims Predicated Upon “Average” Delays.**

In *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010), the D.C. Circuit recently affirmed the dismissal of virtually identical claims of system-wide

“unreasonable delay” in the VA’s adjudication of disability compensation claims on the ground that the organizational plaintiffs in that case lacked standing. Because the plaintiffs in *Vietnam Veterans* predicated their claims upon “average” delays and disavowed relief for individual members – in “a rather apparent effort to avoid the preclusive bite” of Section 511 – the D.C. Circuit held that “the asserted illegal action the VA has committed” did not cause them any injury. *Id.* at 661-62.

The panel’s decision squarely conflicts with *Vietnam Veterans*. As in that case, the plaintiffs here attempted to circumvent the VJRA’s jurisdictional limits by disavowing claims for individual veterans. Diss. Op. at 6 (noting that plaintiffs “disavowed any intention of seeking relief for individual veterans” and relied solely on evidence of “average” delays). Because “plaintiffs here disavowed all individual injuries to their members – both actual and likely – and relied on evidence of average delays,” *id.* at 10, they lack standing just as surely as the plaintiffs in *Vietnam Veterans*.

The panel attempted to distinguish *Vietnam Veterans* on the ground that the plaintiffs in that case only sought relief predicated upon “average” delays by the VA whereas the plaintiffs in this case “complain of a variety of injuries actually being experienced or likely to be experienced in the near future by their members.” Op. at 34 n.16. But that assertion cannot be squared with plaintiffs’ disavowal of relief for individual veterans, see Diss. Op. at 6 (citing Compl ¶ 39), or the panel’s exclusive reliance on evidence of *average* delays to support its analysis, *id.* at 7-9 (noting evidence of “average” delays cited by the panel). Given the exclusively systemic nature of

plaintiffs' claims, Chief Judge Kozinski properly concluded that they were indistinguishable from the claims in *Vietnam Veterans*; indeed he found that "plaintiffs in our case have more explicitly disavowed individual relief." *Id.* at 9. Accordingly, the panel's decision is "not just dead wrong; it creates a square circuit split on an issue that requires national uniformity." *Id.* at 10.

#### **IV. The Panel Erred In Holding That "Average" Delays In The VA's Provision Of Mental Health Care And Its Adjudication Of Benefits Claims Violate Due Process.**

On the merits, the panel erred in at least three significant ways in finding systemic due process violations by the VA.

First, the panel did not properly apply the due process balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The panel failed to recognize that there is inherent tension between requests for greater procedural protections and requests for speedier agency action. In part because of this tension, the panel was unable to identify any specific new procedures or actions by the VA that would reduce delays while simultaneously preserving important procedures designed to protect veterans. Because the panel left the task of determining what new procedures should be implemented to the district court, see Op. 72, 94, the panel failed to assess "the probable value, if any, of additional or substitute safeguards." *Mathews*, 424 U.S. at 335. Because the identification of procedures that may provide meaningful additional protections is an essential component of the *Mathews* balancing test – not merely a

ministerial detail to be sorted out in remedial proceedings – the panel failed to conduct all the necessary analysis to find a systemic due process violation.

Second, the panel misunderstood – and therefore erroneously discounted – the many procedural safeguards the VA has already implemented to ensure that veterans who need emergency treatment receive it immediately. As Chief Judge Kozinski summarized, under existing VA protocols, veterans who show up at VA medical centers expressing suicidal intentions are seen immediately, Diss. Op. at 25, the VA operates a “national 24/7 suicide prevention hotline” to provide counseling for veterans, *id.* at 26, and “[v]eterans who don’t need emergency care are protected by a policy” that requires follow-up evaluation within 14 days, *id.* at 27. Moreover, veterans can appeal all *medical* decisions and “can seek the help of a Patient Advocate, who will champion their cause with the VA.” *id.* at 30. The panel discounted the value of these procedures because it believed veterans had no way to challenge “administrative” scheduling decisions by the VA. Op. 65. As Chief Judge Kozinski explained, however, the record evidence showed that “[m]edical staff see the veteran first,” and only after that are “administrative” scheduling decisions made. Diss. Op. at 28. In short, current VA procedures allowing veterans to appeal “clinical” decisions – which plaintiffs did not challenge, Op. at 65 n.30 – provide adequate safeguards against erroneous deprivation. At a minimum, the panel majority could not properly conclude that plaintiffs had established the necessary predicate for a due

process violation under *Walters*: “that current procedures create an extraordinarily strong showing of probability of error.” Diss. Op. at 32.

Finally, the panel erred in holding that the VA violated the due process rights of veterans with respect to mental health care, because Congress committed decisions regarding health care for veterans solely to the discretion of the VA and plaintiffs therefore cannot claim a due process right to any particular type of care in any particular time frame. An individual does not have a basis for obtaining particular medical services unless the VA first “determines” that they are needed, see 38 U.S.C. 1710(a)(1), a determination that encompasses both the nature and the timing of the services. Because there are no meaningful standards to guide courts in reviewing the VA’s medical judgments in this context, that action is committed to the VA’s discretion. See *Heckler v. Chaney*, 470 U.S. 821, 838 (1985); *California v. United States*, 104 F.3d 1086, 1093-94 (9th Cir. 1997).

At a minimum, the panel erred in holding that plaintiffs have a protected property interest in mental health care because the VA’s determinations regarding the type and timing of mental health care “needed” in a particular case are committed solely to the Secretary’s discretion. See *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 756 (2005) (noting that “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion”); *Cushman v. Shinseki*, 576 F.3d 1290, 1297-98 (Fed. Cir. 2009) (same); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (same). Thus, even assuming a cognizable right to medical services could arise

at some point under the statutory scheme that might trigger due process scrutiny, no such right could arise in the absence of the requisite determination by the VA. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61 (1999).<sup>3</sup>

## CONCLUSION

For the foregoing reasons, this Court should rehear this case *en banc*.

Respectfully submitted,

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<sup>3</sup> For similar reasons, applicants for disability benefits do not have an entitlement to monetary benefits – and thus would not appear to have a property interest in the benefits as such – until they have been found by the VA to have satisfied required eligibility criteria, including that they have a service-connected disability. Although this Court concluded otherwise in *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588 n.7 (9th Cir. 1992), which bound the panel, that case was decided before the Supreme Court's decision in *Am. Mfrs. Mut. Ins. Co.*, *supra*.

CERTIFICATE OF COMPLIANCE PURSUANT TO  
CIRCUIT RULES 35-4 AND 40-1

I hereby certify that the attached petition for panel rehearing and rehearing *en banc* is proportionately spaced, has a typeface of 14 points or more and contains 4198 words, as permitted under the alternate length limitations applicable to rehearing petitions under Circuit Rules 35-4 and 40-1.

s/ Charles W. Scarborough  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2011 I filed an electronic copy of the foregoing rehearing petition with the United States Court of Appeals for the Ninth Circuit, with electronic service provided to opposing counsel.

s/ Charles W. Scarborough  
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