

No. 08-16728

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VETERANS FOR COMMON SENSE and
VETERANS UNITED FOR TRUTH, INC.,

Plaintiffs-Appellants,

vs.

GEN. ERIC K. SHINSEKI, Secretary of Veterans Affairs, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of California
District Court No. C-07-3758-SC
The Honorable Samuel Conti

**APPELLANTS' RESPONSE TO APPELLEES' PETITION FOR
REHEARING AND REHEARING *EN BANC***

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INTRODUCTION

The panel held that the Department of Veterans Affairs (“VA”) is denying veterans’ procedural due process rights in two discrete but vital areas: timely provision of mental health care through its Veterans Health Administration (“VHA”) and service-connected death-and-disability compensation through its Veterans Benefits Administration (“VBA”). The panel did so based on extensive facts found by the district court after a bench trial and application of the undisputedly-applicable balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), for determining what process is due under the Fifth Amendment.

VA now seeks *en banc* review of four legal issues, only one of which it even partially raised before the panel. Even if VA did not waive those issues, its failure to raise three of them *at all* reflects a judgment by experienced appellate attorneys that they did not warrant review. VA offers no reason why this Court should take the extraordinary step of granting *en banc* review to address issues the government did not present to the panel.

Further, the procedural posture makes this case a particularly poor candidate for *en banc* review. The panel remanded for further proceedings, including entry of an appropriately tailored remedial order. (Op. 72-73, 94-95.) The district court has indicated it will supplement the record to

determine the current state of affairs at VA. If VA is dissatisfied with the subsequent remedial order, VA of course can appeal. 28 U.S.C. § 1292(a).

If a panel affirms that order, VA may seek *en banc* review of the issues it now presses. *See Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 995-97 (9th Cir. 2003) (*en banc*) (on second appeal, *en banc* court may review first panel decision even though it denied rehearing *en banc* on first appeal). At that time, however, this Court would be able to review the parties' arguments in the context of concrete remedies, rather than VA's speculative characterization of the "wholesale reform" it fears. (Pet. 3, 4, 6; *see id.* at 2 (predicting the effect that a yet-to-be-determined remedy is "likely" to have).)

In any event, none of the issues raised in VA's petition present any basis for *en banc* review. The panel correctly resolved each issue consistent with the decisions of this Court, the Supreme Court, and other courts of appeals.

STATEMENT

Appellants Veterans for Common Sense and Veterans United for Truth, Inc. (collectively “Veterans”), brought two distinct procedural due process claims against VA under the Fifth Amendment on behalf of themselves and their veteran members. First, Veterans challenged the adequacy of VHA’s existing procedures to safeguard against lengthy delays in the provision of mental health care. Second, Veterans challenged the adequacy of VBA’s existing procedures to safeguard against egregious delays in the processing of appeals of service-connected death-and-disability compensation claims.

The district court’s factual findings are startling, disheartening, and undisputed. Each day, eighteen of our nation’s veterans take their own lives. A quarter of the veterans who do are enrolled to receive health care from VA. (Op. 11-12.) Despite veterans’ statutory entitlement to mental health care (38 U.S.C. § 1710), many veterans with severe psychological conditions, including post-traumatic stress disorder, are placed on lengthy waiting lists for mental health care appointments. (Op. 14-15.) VA provides no process whatsoever for veterans to challenge appointment-scheduling decisions made by its administrators so they can demonstrate their urgent need for medical attention. (Op. 16-17, 65-66.) The district court found,

and VA never disputed, that VHA has adequate money “to carry out its mission of ensuring that veterans have the medical care they need.” 563 F. Supp. 2d 1049, 1063-64 (N.D. Cal. 2008).

In addition to the right to receive health care, veterans who return home from war suffering from combat-related injuries are statutorily entitled to service-connected death-and-disability compensation from VBA. 38 U.S.C. § 1110. The district court found that many recipients are totally or primarily dependent upon that compensation to sustain themselves and their families. (Op. 18.) A veteran who is denied service-connected death-and-disability compensation may appeal and a majority of veterans who do appeal prevail: 60 percent of all appeals result in either a grant of compensation or a remand for further proceedings. (Op. 90-91 n.37.)

Yet it takes, on average, 3.9 *years* for VBA to resolve an appeal. (Op. 26.) Much of that delay is arbitrary and furthers no governmental interests. For example, it takes 573 days, on average, and more than 1,000 days in some cases, for Regional Offices merely to “certify an appeal” to the Board of Veterans’ Appeals, the first-level internal appellate body. (Op. 26.) VBA is not subject to any time limits for such ministerial acts. (Op. 25.) The Board’s Chairman was “unable to explain the lengthy delays inherent in the

appeals process before the Board.” (Op. 27.) VA does not assert that resource constraints are responsible for the delays. (Op. 90.)

The panel held in relevant part that:

- VA and VA officials do not enjoy sovereign immunity from Veterans’ due process claims for prospective equitable relief.
- Veterans have organizational standing to bring constitutional claims challenging the absence of any procedure for their members to appeal VHA’s administrative appointment-scheduling decisions, and the adequacy of VBA’s existing procedures to safeguard their members from delays in VBA’s adjudication of veterans’ appeals from initial service-connected death-and-disability-compensation determinations.
- The Veterans Judicial Review Act (“VJRA”) does not strip the district court of jurisdiction over Veterans’ due process claims, as it is unnecessary to review the propriety of any particular “decision” of the VA to conclude that VA’s existing procedural safeguards, or lack thereof, are constitutionally inadequate under *Mathews v. Eldridge*.
- On the merits, the high risk of erroneous deprivation of critical service-connected mental health care and disability compensation to veterans can be remedied by additional procedural safeguards without undue burden to the government.

(Op. 46, 33-34 n.16, 56-57, 80-81, 64-65, 88-91.) Chief Judge Kozinski dissented in part. In his view, Veterans lack standing to pursue their constitutional claims, VJRA bars them, and VA’s existing procedural safeguards are adequate. (Diss. 4, 10.)

REASONS THE PETITION SHOULD BE DENIED

A. Sovereign Immunity Does Not Bar Claims Seeking To Compel Federal Agencies And Officials To Comply With The Requirements Of Procedural Due Process

VA did not address, much less defend, the district court's conclusion that sovereign immunity barred Veterans' constitutional due process claims. (Op. 39). The panel rejected the district court's conclusion that Congress had not waived sovereign immunity for Veterans' constitutional claims in the Administrative Procedure Act ("APA"), specifically 5 U.S.C. § 702. (Op. 39-46.) The panel relied on the well-reasoned opinion in *Presbyterian Church (USA) v. United States*, 870 F.2d 518, 524-25 (9th Cir. 1989). In his dissent, Chief Judge Kozinski did not dispute that holding.

VA points to no inter-circuit split. To the contrary, the D.C., Third, Eighth, and Tenth Circuits are all in agreement with the panel.¹

Nonetheless, for the first time in this Court, VA now argues that a constitutional claim seeking injunctive relief against federal agencies and officials cannot be heard unless the unconstitutional conduct is "final agency

¹ See, e.g., *Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) ("the waiver [in Section 702] is not limited to APA cases — and hence [] it applies regardless of whether the elements of an APA cause of action are satisfied"); *Red Lake Bank of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (same); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549-50 (10th Cir. 2001) (same); *Johnsrud v. Carter*, 620 F.2d 29, 30-31 (3d Cir. 1980) (same).

action” as that term is used in Section 704 of the APA. (Pet. 6.) VA relies exclusively (Pet. 6-7) on *Gallo Cattle Co. v. Department of Agriculture*, 159 F.3d 1194 (9th Cir. 1998). But *Gallo Cattle* involved a claim for relief under the APA itself. *Id.* at 1198. As the panel explained, *Gallo Cattle* had no occasion to address the APA’s waiver of sovereign immunity for a claim (like the one here) not brought under the APA. (Op. 45 n.22) The requirements of Section 704 “in no way limits [Section] 702’s broad waiver of sovereign immunity with respect to suits for injunctive relief against the federal government – suits for which the APA itself is not the cause of action.” (Op. 40.)²

Further, as the panel noted (Op. 46 n.23), even without a waiver, the suit could proceed against VA officials for injunctive relief under *Ex parte Young*, 209 U.S. 123, 158 (1908). Indeed, the Supreme Court consistently has permitted suits against federal officials and agencies to enforce constitutional rights, even without final agency action. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010). The APA made *Ex parte Young* less necessary (by permitting plaintiffs to

² Although VA points to two decisions suggesting tension between *Presbyterian Church* and *Gallo Cattle*, (Pet. 6), the discussion in those cases is dicta devoid of any legal analysis.

name the United States and not just its officials), but did not supplant it. (Op. 41-42 n.19 (quoting *Presbyterian Church*, 870 F.2d at 524).)

Nor, contrary to VA's claim (Pet. 8 n.2), is *Ex parte Young* inapplicable when the constitutional injury is inaction. *See Ex parte Young*, 209 U.S. at 158 (a federal court can "direct affirmative action where the officer . . . refuses or neglects to take such action"). To adopt VA's view would mean that, absent the APA, a federal prisoner would be barred by sovereign immunity from seeking to enjoin a warden to provide him medical treatment required by the Eighth Amendment. But of course, federal courts have long been open, apart from the APA, to provide prospective remedies for such constitutional violations.

B. The VJRA Does Not Divest District Courts Of Jurisdiction To Adjudicate Claims That VA Is Violating Due Process By Providing No Process, Or By Providing Process With Pervasive Delays

In the district court, VA argued that Section 511 of the Veterans Judicial Review Act, 38 U.S.C. § 511, barred all of Veterans' claims. The district court agreed only in part, finding the claims regarding service-connected death-and-disability compensation barred, but not the mental health claims. In framing the issues on appeal (VA Panel Br. 2), VA argued only that Section 511 barred the service-connected death-and-disability

claim. (Op. 54.) Now, in its petition, VA changes course and argues that Section 511 bars both claims. (Pet. 8-11.)

While VA cites cases from this and other circuits interpreting Section 511 (Pet. 9), it does not claim either an inter-circuit or intra-circuit split. And there is none, because the panel correctly followed the text of the statute and the relevant case law.

Section 511(a) provides that, generally, district courts may not review “questions of law and fact necessary to a decision by the [VA] under a law that affects the provision of benefits by the [VA].” At the same time, Congress provided that the Board of Veterans’ Appeals would have jurisdiction over “[a]ll questions in a matter which under section 511(a) of this title . . . is subject to decision by the [VA].” 38 U.S.C. § 7104(a). Only decisions of that internal appellate board are reviewable in the Court of Appeals for Veterans Claims, *id.* § 7252, and then the Federal Circuit, *id.* § 7292. Thus, it is clear that Congress did not intend to bar all claims, but merely to channel certain types of claims to the Federal Circuit.

Among claims *not* channeled to the Federal Circuit are claims involving health care decisions by the Veterans Health Administration. The Court of Appeals for Veterans Claims has concluded that neither it nor the Board of Veterans’ Appeals has jurisdiction over questions regarding the

substance or timing of provision of health care. *See Wright v. Shinseki*, No. 09-0109, 2009 WL 1204627, at *3 n.1 (Vet. App. Apr. 30, 2009). Thus, district courts provide the only forum to raise the constitutionality of the process for provision of mental health services. And there is no evidence that Congress intended to create the grave constitutional concerns that would arise if Veterans have no judicial forum in which to press their structural due process claims. *See Johnson v. Robison*, 415 U.S. 361, 366 & n.8, 372 (1974).

To be sure, decisions by the Veterans Benefits Administration to deny service-connected death-and-disability compensation can fall within Section 511. But the Federal Circuit has concluded that Section 511 “does not apply to every challenge to an action by the VA.” *Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005). It “only applies where there has been a ‘formal ‘decision’ by the Secretary” having a “relationship” with “delivery of benefits” that is not “too attenuated.” *Id.* at 1365, 1361 n.1 (rejecting argument that statute authorizing VA to suspend counsel from representing veterans at benefits hearing is “a law that affects the provision of benefits”). Section 511 does not extend to constitutional claims that do “not assert entitlement to a benefit.” *Cochran v. West*, 1999 WL 825133 (Fed. Cir. Oct. 8, 1999).

The panel correctly interpreted Section 511 according to its plain meaning to hold that Veterans' due process claims do not implicate Section 511. Veterans neither challenge, nor require the Court to wade into, any individual "decision" of the Secretary – the trigger for Section 511's bar. (Op. 79.) In principle, both VA (Pet. 10) and the dissent (Diss. 15) seem to agree with that reading of Section 511, but they insist that the nature of Veterans' due process claims necessitates a district court to delve into whether "VA acted properly" in handling individual appointment-scheduling decisions and individual service-connected death-and-disability compensation decisions. (Diss. 14; Pet. 10.) That is not so.

The parties do not dispute that the test applicable to Veterans' due process claims is the three-part balancing test set forth in *Mathews v. Eldridge*, which looks at the nature of the property interest at stake, the value of current and proposed procedures in reducing erroneous deprivation of that interest, and the burdens that would be created by additional procedures. Under *Mathews*, a plaintiff cannot prevail merely by showing that he personally would have benefitted from additional procedure. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321, 330 (1985) ("process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them"). Instead, the second

Mathews inquiry requires a plaintiff to show how, in the “generality of cases,” the risk of erroneous deprivation of the private interest from the currently-used procedures compares to the probable value of additional procedural safeguards. 424 U.S. at 344. It is the decreased risk of erroneous deprivation that is then weighed against any governmental burdens the additional procedures would create. *See id.*

Thus, as the panel recognized, the lengthy waiting times for mental health care appointments at VHA and the four-year appellate delays that plague VBA’s adjudication system for service-connected death-and-disability compensation establish in “the generality of cases” that there is an imminent “risk of erroneous deprivation.” (Op. 57.) This is particularly true where, as here, numerous veterans take their own lives while awaiting mental health care appointments (Op. 60-62), 60 percent of all appeals of service-connected death-and-disability compensation claims result in grants or remands (Op. 90-91, n.37), and thousands of veterans die each year while their appeals are pending thereby extinguishing their appeals (Op. 89).

Yet another factor weighs heavily against reading the statute to foreclose district court jurisdiction over structural due process claims like those here: a veteran appealing his decision through VBA to the Federal

Circuit lacks the ability at any stage to engage in discovery or otherwise make a case regarding the risk in the “generality of cases.”

Nor is there any basis to review the panel’s conclusion that Veterans’ claims are not barred by Section 502, which grants the Federal Circuit exclusive jurisdiction over direct challenges to VA regulations. There is no split of authority on that issue. Because Veterans’ due process claims challenge “VA’s actual *conduct*, not its codified *rules*” (Op. 78), the panel’s decision was compelled by Section 502’s plain language and this Court’s precedent. *See Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005) (holding that Section 502 only bars “*direct* challenges to VA rules and regulations”) (emphasis added); *Nehmer v. Dep’t of Veterans Affairs*, 494 F.3d 846, 857 (9th Cir. 2007) (same).

C. Veterans Have Article III Standing To Pursue Due Process Claims On Behalf Of Themselves And Their Members

The district court denied VA’s motion to dismiss for lack of standing, and VA’s appellate brief did not contend that Veterans lacked standing. (Op. 33 n.16.) While an Article III standing challenge cannot be waived, VA’s failure to raise it on appeal suggests it is weak, at best.

Veterans alleged injury to their members’ rights to procedural due process – that the organizations’ members were denied their property interest in their claims to mental health care and service-connected death-

and-disability compensation without any constitutionally-sufficient post-deprivation process. This procedural injury exists without regard to the ultimate outcome of that process. The Supreme Court long has recognized that denial of process is itself an injury, even assuming that the end result would not have changed with different process. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) (“the right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions”). It is thus not surprising that Veterans have standing even though they disavowed any challenge to VA’s ultimate decision on their members’ eligibility. This is a suit that seeks process, not a suit for mental health care or service-connected death-and-disability compensation.

VA, following Chief Judge Kozinski’s dissent, asserts that the panel’s ruling on standing “creates a square circuit split” with *Vietnam Veterans of Am. v. Shinseki*. (Pet. 13). There is no split. The D.C. Circuit stated that plaintiffs in that case alleged that they were injured by “the *average* length of time it takes at each stage of the claims [adjudication] process.” 599 F.3d 654 (D.C. Cir. 2010) (emphasis in original). The D.C. Circuit disagreed, finding that “the average processing time does not cause affiants injury; it is only *their* processing time that is relevant.” *Id.* (emphasis in original). The result in *Vietnam Veterans* was thus driven entirely by the D.C. Circuit’s

reading of plaintiffs' complaint as attributing the "cause" of their injury to "average" delays.

The panel in this case correctly distinguished *Vietnam Veterans* on the ground that "Veterans have simply done a better job alleging the facts required to establish their standing than did the plaintiff organization[s]" in *Vietnam Veterans*. (Op. 34 n.16.) Veterans in this case did not allege simply that "average" waiting times by themselves cause their members' injuries. Rather, the injury proved at trial in this action is the lack of adequate *procedures* for processing Veterans' service-connected death-and-disability claims. As discussed above in Part B, averages are critical in showing a violation of due process under *Mathews* because the process due is determined on a systemwide, not an individual, basis. Thus, instead of being the injury itself, average waiting times were evidence used to establish a due process violation. Veterans "rely upon average waiting times, among much other data and evidence to *illustrate*" the lack of adequate procedures. (Op. 34 n.16.) *See Mathews*, 424 U.S. at 346-347 & n.28 (court considered relevant statistics, including median waiting times and overall reversal rates, "in order fully to assess the reliability and fairness of a system of procedure").

In any event (although the issue was not briefed on appeal because VA did not raise standing), Veterans proved at trial that they have organizational standing based on their own injuries, i.e., diversion of their resources to combat VA's lack of process. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The executive director of one of the organizations testified that the organization expends a substantial amount of time working to improve the process and to reduce the time veterans spend waiting for health care and disability benefits. (E.R. 555.) This independent ground for standing was not at issue in *Vietnam Veterans*.

D. The Panel Committed No Legal Errors In Concluding That, Based On This Extensive Record, VA's Substantial Delays In Adjudicating Service-Connected Death-and-Disability Compensation Claims Or The Absence Of Any Appeal Process For Delays In Providing Medical Care Violated Due Process

1. The panel properly applied *Mathews*

VA does not dispute that *Mathews* supplies the legal framework applicable to Veterans' due process claims. (*See Op.* 63, 88.) VA instead contends that the panel did not apply the *Mathews* balancing test "properly." (Pet. 13.) Specifically, VA argues that the panel's remand to the district court to "determin[e] what new procedures should be implemented" necessarily means that "the panel failed to assess" one aspect of the *Mathews* test – "the probable value, if any, of additional or substitute

safeguards.” (Pet. 13.) This intensely fact-specific contention does not warrant *en banc* review.

In any event, contrary to VA’s argument, the panel did address the “probable value” of “additional safeguards.” “In the area of scheduling veterans for mental health care appointments,” the panel concluded that “the marginal value of ‘additional’ procedural safeguards is extraordinarily high because at present *no* procedure is in place to ensure that mental health appointments are provided soon enough.” (Op. 65.) “[A]ny additional procedure would produce meaningful improvement,” the panel concluded. (Op. 69 (emphasis in original).)

As for VBA’s processing of appeals of service-connected death-and-disability compensation claims, the panel specifically rejected the only argument embraced by the district court and raised by VA – that additional procedural safeguards to protect the timely processing of appeals would invariably divert VA resources away from initial service-connected death-and-disability compensation decisions at VBA Regional Offices. (Op. 89-91.) The panel rejected this argument, concluding that the delays were due to “gross inefficiency” and that there would be no diversion of VBA resources because VA concedes that it has no shortage of resources. (Op. 71, 89-90.) Any new appeals procedures, therefore, would not “come at the

expense” of initial service-connected death-and-disability compensation decisions. (Op. 89.) VA points to no evidence suggesting that conclusion is incorrect.

VA also contends that the panel “misunderstood” the existing procedural safeguards to assure timely medical treatment. (Pet. 14.)³ Any such factual error would provide no basis for *en banc* review; even if it would, there was no factual error. The panel correctly concluded that no process is available to veterans to appeal an appointment-scheduling decision made by a hospital clerk. (Op. 65-66.) Unlike the dissent, the panel did not make the mistake of “confusing the distinction between clinical delays and administrative ones and conflating the issues unique to each.” (Op. 66-67 n.31.)

2. Federal law gives veterans a property interest in timely medical care and timely resolution of appeals from service-connected death-and-disability compensation decisions

In the district court, VA argued that Veterans did not have a Due-Process-protected property interest in mental health care or service-connected death-and-disability compensation. The district court rejected that argument and VA did not renew it on appeal. (Op. 60.) Nor did Chief

³ VA identifies no factual errors as to the current system for service-connected death-and-disability compensation decisions.

Judge Kozinski question whether constitutionally-protected property interests are at stake.

All veterans have a protected property interest in medical care and service-connected death-and-disability compensation. Federal statutes give veterans an unconditional right to needed medical care, 38 U.S.C. §§ 1710, 1705(b)(1), timely death-and-disability compensation for service-connected injuries, *id.* §§ 1110, 5109B, 7101(a), and the right to appeal initial decisions regarding service-connected death-and-disability compensation, *id.* § 7105.

VA now contends that a 12-year-old Supreme Court decision requires this Court to reach a contrary result. (Pet. 16 & n.3 (citing *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999)).) VA did not cite *Sullivan*, much less rely on it to ask the panel to overrule prior Circuit precedent (which had recognized such a property interest). *See Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980); *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588 n.7 (9th Cir. 1992). Cases subsequent to *Sullivan*, in this and other circuits, have not read it to bar persons not currently receiving benefits from challenging the absence of appropriate procedures. *See Kapps v. Wing*, 404 F.3d 105, 115 (2d Cir. 2005) (“[e]very circuit to address the question . . . has concluded that applicants for benefits,

no less than current benefits recipients, may possess a property interest in the receipt of public welfare entitlements”).

Indeed, while this appeal was pending, the Federal Circuit held that veterans appealing denials of service-connected death-and-disability compensation have a Due-Process-protected property interest. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). When Veterans brought *Cushman* to the panel’s attention, VA merely stated that it was “currently evaluating” the case. [Dkt. No. 7033020.] VA never suggested to the panel that *Cushman* was wrongly decided (nor did it seek rehearing *en banc* in that case). VA now belatedly raises *Sullivan*, attempting in vain to manufacture an *en banc*-worthy issue where there is none.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing and rehearing *en banc*.

Dated: August 9, 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the alternative length limitations of Circuit Rule 40-1(a) and the Court's July 5, 2011 order by containing **4,188** words.

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I hereby certify that on August 9, 2011, 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:

APPELLANTS' RESPONSE TO APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

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

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