No. 10-1479

UNITED STATES COURT OF APPEALS

FOR THE

THIRD CIRCUIT

MARIA ARGUETA; WALTER CHAVEZ; ANA GALINDO; W.C. by and through his parents Walter Chavez and Ana Galindo; ARTURO FLORES; BYBYANA ARIAS; JUAN ONTANEDA; VERONICA COVIAS; YESICA GUZMAN,

Plaintiffs-Appellees,

- v. -

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE"); JULIE L. MYERS, Assistant Secretary for Immigration and Customs Enforcement; JOHN P. TORRES, Deputy Assistant Director for Operations, Immigration and Customs Enforcement; SCOTT WEBER, Director, Office of Detention and Removal Operations, Newark Field Office; BARTOLOME RODRIGUEZ, Former Director, Office of Detention and Removal Operations, Newark Field Office; JOHN DOE ICE AGENTS 1-60; JOHN SOE ICE SUPERVISORS 1-30; JOHN LOE PENNS GROVE OFFICERS 1-10,

Julie L. Myers, Bartolome Rodriguez,
John P. Torres, Scott Weber,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (No. 2:08-CV-1652 (PGS))

PETITION FOR REHEARING EN BANC

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June 28, 2011

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STATEMENT OF COUNSEL

The undersigned express a belief, based on reasoned and studied professional judgment, that the panel decision in *Argueta v. ICE*, No. 10-1479 (June 14, 2011) (attached hereto as Exhibit A), is contrary to the decisions of the United States Supreme Court and the Third Circuit, including *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Matrixx v. Siracuso*, 131 S. Ct. 1309 (2011); *Leatherman v. Tarrant County*, 507 U.S. 163 (1993); and *Fowler v. UMPC Shadyside*, 578 F.3d 203 (3d Cir. 2009). Consideration by the full court is necessary to secure and maintain uniformity of decisions in this court.

This appeal also involves questions of exceptional importance, namely: (1) whether *Iqbal* eliminated a cause of action against supervisory government officials for their knowledge of and acquiescence in a pattern and practice of subordinate wrongdoing; and (2) whether the heightened pleading standard effectively adopted by the panel will cause confusion in civil cases throughout the Circuit about the proper role of courts in assessing the sufficiency of pleadings.

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PRELIMINARY STATEMENT

This appeal raises a question of exceptional importance: whether the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), eliminates claims of supervisory liability for an official's knowledge of and acquiescence in a widespread pattern of unconstitutional law enforcement. At least five other Circuits have held that such claims survive *Iqbal*.[1] Yet the panel in this appeal, following prior decisions in *Santiago v. Warminster Township*, 629 F.3d 121, 130 n.8 (3d Cir. 2010), and *Bayer v. Monroe County Children & Youth Services*, 577 F.3d 186, 190 n.5 (3d Cir. 2009), declined to reach this pressing question. Litigants in civil rights cases need to know whether and how to allege claims of supervisory liability in this Circuit. This is reason alone for rehearing en banc.

Moreover, rather than directly deciding this important question, the panel dismissed the Supervisory Defendants by adopting a heightened pleading standard that significantly alters the standards set forth in *Iqbal*, *Matrixx v. Siracuso*, 131 S.

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[1] *See Starr v. Baca*, 633 F.3d 1191, 1196 (9th Cir. 2011); *Doe v. School Board Broward County*, 604 F.3d 1248, 1266-67 (11th Cir. 2010); *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009); *Sandra v. Grindle*, 599 F.3d 583, 590 (7th Cir. 2010); *see also Wright v. Leis*, No. 08-3037, 335 F. App'x 552, 2009 WL 1853752, at *3 (6th Cir. June 30, 2009) (per curiam) (accepting supervisory liability claim after *Iqbal* without discussing that decision); *Langford v. Norris*, 614 F.3d 445, 463–64 (8th Cir. 2010) (same).

Ct. 1309 (2011), and *Fowler v. UMPC Shadyside*, 578 F.3d 203 (3d Cir. 2009), and that few future plaintiffs could ever meet.

As the panel itself conceded, Plaintiffs' "lengthy," fifty-one page Complaint was supported by "extensive and carefully drafted" pleadings and "an impressive amount of documentation" regarding notice to the Supervisory Defendants. *Argueta v. ICE*, slip op. at 5, 30, 31 (June 14, 2011). As such, Plaintiffs' allegations of knowledge far exceed those that a *unanimous* Supreme Court recently held sufficient to support an inference of knowledge on the part of corporate decision-makers. *Matrixx*, 131 S. Ct. at 1323 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).[2] The panel improperly disregarded the authoritative weight of *Matrixx*'s pleading analysis.

Along the same lines, the panel failed to heed the Supreme Court's admonition to consider a complaint's allegations "holistically," *Matrixx*, 130 S. Ct. at 1234; instead, the panel disregarded numerous key allegations and parsed others in an incomplete, technical, and unreasonable manner. In addition, the panel failed to heed *Iqbal*'s instruction to draw all reasonable inferences in a plaintiff's favor at the pleading stage; instead, it repeatedly credited *Defendants*' interpretation of the

[2] Plaintiffs' detailed allegations also far exceed the single allegation of notice the Court deemed insufficient to plausibly support a claim of Ashcroft's discriminatory intent in *Iqbal*, 129 S. Ct. at 1952, or the single (largely conclusory) allegation of notice deemed insufficient to plausibly support a claim of supervisory liability in *Santiago*, 629 F.3d at 134.

facts. It also imposed, contrary to Supreme Court instruction, a requirement that plaintiffs plead, without the benefit of any discovery, specific (*i.e.*, "exact") facts about actions Defendants should have taken to remediate widespread harms.

In sum, the panel's dramatic break from extant pleading standards effectively forecloses potentially meritorious civil rights claims from proceeding past the pleading stage, provides broad immunity to supervisory officials even when widespread wrongdoing can fairly be attributed to their "knowledge and acquiescence," and more broadly, will produce great uncertainty among district courts regarding their authority – in any civil case – to scrutinize and weigh the probative value of otherwise well-pled allegations.

ARGUMENT

I. THE PANEL'S ADOPTION OF A HEIGHTENED PLEADING STANDARD CONTRAVENES DECISIONS OF THE SUPREME COURT AND THIS COURT.

Plaintiffs allege that the Supervisory Defendants are liable for causing the egregious Fourth Amendment violations at issue. With deliberate indifference to the consequences, Julie Myers and John Torres adopted and maintained policies pursuant to the national "Operation Return to Sender" program that created a high likelihood of unconstitutional searches and seizures. When the predictable violations quickly ensued, Myers and Torres, along with defendants Scott Weber and Bartolome Rodriguez, knew of and acquiesced in this pattern of

unconstitutional misconduct by their subordinates. Plaintiffs suffered harm as a result. These have been well recognized theories of liability in this Circuit. *See Santiago*, 629 F.3d at 129 n.5; *see also Baker v. Monroe Township*, 50 F.3d 1186, 1191 n.3 (3d Cir. 1995) (liability exists where "a supervisor tolerated past or ongoing misbehavior").

The allegations in Plaintiffs' "lengthy" complaint, *Argueta*, slip op. at 5, amply support this theory of liability. Specifically, the Complaint provides an "extensive discussion," *id*. at 7, of Myers and Torres's decisions to order an 800% increase in the quota of arrests of so-called "fugitive" aliens (*i.e*. those with outstanding deportation orders) for each seven-member ICE Fugitive Operations Team – which produced great and foreseeable pressure to skirt constitutional limitations on home entries and searches. *Id.* at 7-9. Plaintiffs allege that a pattern of warrantless home entries by ICE agents emerged almost immediately after Myers and Torres's policy decisions, and "describe[] in some detail in their pleading" the way that the unconstitutional raids of Plaintiffs' homes fell squarely within that pattern. *Id.* at 9-11.

Plaintiffs allege that the Supervisory Defendants were repeatedly put on notice – through dozens of national and New Jersey media reports, express congressional and NGO reprimands, warnings from the Agency's Office of Inspector General, and even multiple lawsuits naming Myers and Torres – that ICE

officers implementing the Supervisors' home raids policies were engaging in widespread unconstitutional home entries and seizures of the kind that Plaintiffs subsequently suffered. *Argueta*, slip op. at 14-15. As the panel correctly observed, the Complaint "did reference an *impressive amount of documentation* that allegedly provided notice to Appellants of their subordinates' unconstitutional conduct." *Id.* at 31 (emphasis added).

Notice included, but was not limited to: (1) reports alleging that raids "and related misconduct" were "especially prevalent in New Jersey," *Id.* at 13; (2) "a number of newspaper articles" describing ICE misconduct in New Jersey, *id*.; (3) five federal civil rights lawsuits, three naming Myers and/or Torres as defendants, and four alleging nonconsensual, warrantless home raids such as Plaintiffs describe here, *id*. at 12-13[3]; *all* of these litigations predated at least three of the raids suffered by Plaintiffs in this case; (4) criticisms in June 2007, by the Connecticut congressional delegation and the New Haven Mayor directed at and/or answered by Myers and Torres, complaining of abusive ICE raids practices, *id*. at 14-15, which predated at least three of the raids identified in Plaintiffs' Complaint; (5) a 2007 report by the Department of Homeland Security's Office of Inspector General

[3] *Aguilar v. ICE*, No. 07-cv-8224 (S.D.N.Y. Sept. 20, 2007) (naming Myers and/or Torres and alleging home raids); *Flores-Morales v. George*, No. 07-cv-0050 (M.D. Tenn. July 5, 2007) (same); *Mancha v. ICE*, No. 06-cv-2650 (N.D. Ga. Nov. 1, 2006) (same); *Arias v. ICE*, No. 07-1959 (D. Minn. Apr. 19, 2007) (same, but not cited in Plaintiffs' Complaint); *Reyes v. Alcantar*, No. 07-cv-2271 (N.D. Cal. Apr. 26, 2007) (alleging home raid but not naming Myers and Torres).

identifying 50% inaccuracy rates in ICE databases and highlighting inadequate or (in some cases) non-existent law enforcement training for ICE agents, *Argueta*, slip op. at 8-9, which predated at least three of the raids identified in the Complaint; and (6) criticism by New Jersey Senator Menendez, directed at Myers, about overzealous and unconstitutional ICE enforcement practices in New Jersey, *id*. at 15 n.5, which predated at least one of the raids in the Complaint.

Under Supreme Court and Third Circuit precedent, these "detail[ed]" and "impressive[ly] . . . document[ed]" allegations, *id.* at 13, 31, are not conclusory, must be presumed true, and plainly permit a court to "draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 129 S. Ct. at 1949. Yet, there are several ways in which the panel radically departed from the Supreme Court's and this Court's pleading standards.

A. The Panel Erroneously Disregarded the Supreme Court's *Matrixx* Decision.

In *Matrixx v. Siracusano*, 131 S. Ct. 1309 (2011), the Supreme Court unanimously held that scattered allegations – far more sparse than those made by Plaintiffs – regarding corporate officers' knowledge of a drug's side effects were sufficiently plausible to support an inference of liability for securities fraud, even under the *heightened* pleading requirements of the Private Securities Litigation

Reform Act ("PSLRA").[4] The Court concluded that the volume of complaints need neither be large nor "statistically significant" to support a plausible inference of decision-makers' knowledge, *id.* at 1319-20, and held the limited allegations sufficient to "raise a reasonable expectation that discovery will reveal evidence" supporting the materiality element of securities fraud, *id*. at 1318, 1323 (quoting *Twombly*, 550 U.S. at 556). Plaintiffs' allegations of notice to the Supervisory Defendants far exceed those the unanimous *Matrixx* Court found sufficient to plausibly state a claim of knowledge. The allegations also far exceed the *single* well-pled allegation against each of the supervisory officials in *Iqbal* and in *Santiago* that courts concluded were insufficient to plausibly state a claim for knowledge; they are also quantitatively and qualitatively superior to the allegations lodged against the Pennsylvania Governor and Attorney General in *Rode v. Dellarciprete*, 845 F.2d 1195, 1207-09 (3d Cir. 1998). *Compare Fowler*, 578 F.3d at 211-12 ("Although Fowler's complaint is not as rich with detail as some might prefer, it need only set forth sufficient facts to support plausible claims.").

The panel erroneously dismissed *Matrixx*'s authoritative conclusion regarding the plausible pleading of knowledge by stating, without explanation, that

[4] Allegations of notice consisted of: (i) a complaint lodged with the corporation's customer service department; (ii) an officer's knowledge of "similar complaints" regarding the drug; (iii) four products liability lawsuits against the company; and (iv) knowledge of an independent researcher's academic presentation regarding the drug's side effects. *Matrixx*, 131 S. Ct. at 1322.

the securities fraud claims at issue in *Matrixx* are not the same as the *Bivens* claims at issue here. *Argueta*, slip op. at 36 n.6. Yet, as *Iqbal*'s progeny demonstrates, procedural rules – especially pleading rules – do not turn on the substantive cause of action asserted. If anything, the expressly *heightened* PSLRA pleading standards considered in *Matrixx* should have more strongly compelled the conclusion that Plaintiffs' allegations were sufficient.

B. The Panel Improperly Engaged in a Technical, Incomplete, and Unreasonable Review of the Allegations.

Despite detailing the breadth of Plaintiffs' non-conclusory allegations over twelve pages, *see Argueta*, slip op. at 5-17, the panel found them "fatally flawed in one way or another," and rejected them in a summary (three paragraph) fashion. *See id.* at 31-33. The panel's analysis produced various critical and precedential errors.

1. In evaluating the sufficiency of the Complaint, the panel disregarded crucial allegations and parsed others almost beyond recognition, contrary to the Supreme Court's instruction to view a complaint "holistically." *Matrixx*, 131 S. Ct. at 1324; *see also Chabal v. Reagan*, 822 F.2d 349, 357 (3d Cir. 1987) (same).

For example, the panel observed that the multiple, prior civil rights lawsuits against Myers and Torres alleging similar ICE abuses – which Plaintiffs allege gave Defendants ample notice of the relevant pattern of misconduct – "did not involve individual capacity claims against Myers and Torres, were filed after at

least *some* of the New Jersey raids . . . or did not even involve Operation Return to Sender." *Argueta*, slip op. at 32 (emphasis added). These distinctions are irrelevant. For the purpose of alerting a supervisor to a pattern of wrongdoing, it makes no difference whether he is sued in his official or individual capacity. Moreover, as the panel implicitly recognized, these lawsuits happened *before* several of the raids at issue in this case (in fact, at least three) and thus, at a minimum, plausibly constitute notice for several Plaintiffs. *See Matrixx*, 131 S. Ct. at 1322 (four products liability lawsuits put defendant on notice about drugs' dangers).[5] Similarly, it is immaterial at the pleading stage whether the complaints in the other cases explicitly mention Operation Return to Sender when four of them allege unconstitutional home raids like those at issue in this appeal. *See supra* note 3.

2. Despite *Fowler*'s command that courts draw all reasonable inferences in Plaintiffs' favor, 578 F.3d at 210 (citing *Iqbal*), the panel repeatedly accepted *Defendants'* characterization of the facts, and ultimately evaluated the allegations under a standard inappropriately "akin to a probability requirement," *see Iqbal*, 129 S. Ct. at 1949 (internal quotations omitted), as if the panel were sitting as a trier of fact. For example, Plaintiffs allege that in June 2007, Myers and Torres were

[5] Similarly, the panel's observation that a 2008 congressional hearing on raids practices and a critical 2008 UN report occurred after most of the raids, *Argueta*, slip op. at 32, implicitly concedes that such notice occurred *before* some of the other raids at issue (in fact, two raids).

repeatedly put on notice – via the Connecticut congressional delegation, the Mayor of New Haven, and a prominent immigrant advocacy group – about unlawful home raids like those at issue here. *Argueta*, slip op. at 13-15. Curiously, the panel categorically disregarded such allegations of notice because they occurred in "other states." *Id.*, slip op. at 32. Yet, notice of illegal practices undertaken pursuant to a *federal policy* surely supports the inference that the federal policy might cause harm when carried out in another state. *See Al-Kidd v. Ashcroft*, 580 F.3d 949, 976 (2010) (publicized abuses of federal material witness program "could have given Ashcroft sufficient notice to require affirmative acts to supervise and correct the actions of his subordinates"), *rev'd on other grounds*, 2011 WL 2119110 (May 31, 2011). The panel's novel intra/interstate distinction finds no support from Supreme Court or Third Circuit law.

Similarly, the panel relied on the facial validity of the Supervisory Defendants' policies and statements to draw the inference that they must have acted in accordance with their own pronouncements:

> [F]ar from adopting a facially unconstitutional policy or expressly ordering ICE agents to engage in unconstitutional home entries and searches, Myers clearly stated . . . that agents were required to obtain consent before entering private residences and that all allegations of misconduct were taken seriously and fully investigated.

Argueta, slip op. at 32-33. But Plaintiffs do not – and need not – allege a facially unconstitutional policy. Rather, they properly allege that the Supervisors

formulated and implemented a policy that resulted in unconstitutional conduct in which Supervisors knowingly acquiesced, rather than taking necessary steps to remediate such conduct. *See Argueta*, slip op. at 16-19, 22.[6] The panel erred in accepting *Defendants*' proposed inference, in the face of dozens of well-pled allegations to the contrary, that the Supervisors acted in furtherance of their own, self-serving statements. To be sure, Plaintiffs' well-pled allegations of acquiescence are plausible on their face. *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990) ("[I]t is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future.").

In addition, by ignoring serious allegations about an official DHS Inspector General report from 2007 directed to Myers, which highlighted ICE agents' incomplete or inadequate training,[7] the panel improperly gave these seemingly

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[6] Again, this is a well established cause of action. *See, e.g.*, *City of Canton v. Harris*, 489 U.S. 378, 387 (1989) (allowing § 1983 failure-to-train claim to proceed and "reject[ing] petitioner's contention that only unconstitutional policies are actionable under the statute."); *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 407 (1997) (policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action" to support § 1983 liability).

[7] In this report, the Inspector General concluded, *inter alia*, that: (1) "the database used to locate fugitive aliens is 'outdated and inaccurate in up to 50% of cases,'" (2) "DRO began hiring 'lower level, less experienced officers for fugitive operations' in 2006," (3) "'some fugitive operations agents have not completed the Fugitive Operations Training Program," and (4) "2004 guidelines allow the agents

damning allegations an interpretation most favorable to Defendants. The panel surmised, without evidence and contrary to the reasonable inference from Plaintiffs' allegations, that adequate training was in fact provided and that such training "presumably" included "basic principles governing . . . entry into a private residence without a judicial warrant." *Argueta*, slip op. at 33.

In effect, the panel weighed competing inferences and, despite the facial plausibility of Plaintiffs' allegations, ultimately sided with the ones it believed more credible. This is wholly improper. *See Fowler*, 578 F.3d at 213, 214 (an "evidentiary standard is not a proper measure of whether a complaint fails to state a claim . . . [S]tandards of pleading are not the same as standards of proof."); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (under Rule 8 courts should not "stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.").

C. The Panel Improperly Demanded Pleading of Specific Facts that Plaintiffs Could Not Know and Are Not Required To Plead.

While recognizing Plaintiffs' allegations that the Supervisors failed to remediate known harms stemming from their arrest quota policy, *see Argueta*, slip op. at 12, the panel faulted Plaintiffs' failure-to-train allegations on the ground that Plaintiffs did not identify "what *exactly* Appellants should have done differently."

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to work for up to two years before receiving necessary training." *Argueta*, slip op. at 9.

Argueta, slip op. at 33 (emphasis added). This pleading requirement contravenes repeated Supreme Court and Third Circuit rulings. *See Twombly*, 550 U.S. at 570 ("[W]e do not require heightened fact pleading of specifics"); *Erikson v. Pardus*, 551 U.S. 81, 93 (2007) ("Specific facts are not necessary.") (citing *Twombly*, 550 U.S. at 555).

In fact, in *Leatherman v. Tarrant County*, 507 U.S. 163 (1993), the Supreme Court unanimously reversed the Fifth Circuit for demanding that civil rights plaintiffs plead specific facts regarding an entity's failure to train. *See also Sample v. Diecks*, 885 F.2d 1099, 1116-17 (3d Cir. 1989) ("the characterization of a particular aspect of supervision" is irrelevant for setting standards of supervisory liability). This is because inadequate training is inherently plausible in the face of a pattern of misconduct. *See Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999) ("[I]f the police often violate rights, a need for further training might be obvious."). It is also because no litigant could possibly plead "exact" allegations about inadequate training or supervision absent discovery. *See id*. at 358 (Plaintiff "surmises, reasonably, that [police] misconduct reflects inadequate training and supervision. He cannot be expected to know, without discovery, exactly what training policies were in place or how they were adopted.").[8]

[8] The cases cited by the panel in support of its specific pleading requirement reveal the panel's error. *See Argueta,* slip op. at 33. Those cases considered *facts*

In sum, the panel's adoption of a heightened pleading standard to evaluate claims of supervisory liability is contrary to *Iqbal* and its Supreme Court and Third Circuit progeny, and poses a nearly insurmountable pleading obstacle to future civil rights plaintiffs. Likewise, the panel's intensive and unreasonable scrutiny of Plaintiffs' "extensive and well-crafted pleading" gives license to district courts in this Circuit to sit as triers-of-fact in carrying out the still-limited function of evaluating the plausibility of well-pled allegations.

II. THIS APPEAL RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE.

First, as with two prior panels of this Court in *Santiago,* 629 F.3d at 130 n.8, and *Bayer,* 577 F.3d at 190 n.5, the panel here declined to reach a question specifically presented by this appeal: whether, as government defendants consistently argue, *Iqbal* categorically eliminated the possibility of supervisory liability in civil rights cases such as this. Because a majority of other courts of appeals have addressed this issue and rejected the government's position, *see supra* note 1, and because defendants will continue to press the issue in this Circuit, the full court should take the opportunity to resolve this pressing question.

Second, the panel's heightened pleading standard imposes insuperable barriers to adequately pleading supervisory liability in this Circuit. As such, the

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set forth at the *summary judgment* stage – *i.e.*, after discovery – not at the pleading stage at issue here.

panel's decision will effectively offer broad immunity to supervisory officials who fail to reasonably remediate the illegal implementation of their own reckless policies. Equally problematic, the decision unreasonably shifts the costs of such illegal implementation to individual officers when liability should also fall on those decision-makers who set the illegality in motion and failed to prevent its spread. As a result of the panel's decision, aggrieved individuals may no longer use our civil rights laws to hold all persons – high and low – accountable for constitutional violations. En banc review is necessary to ensure that the deterrence and accountability functions of our civil rights laws are not this easily cast aside.

CONCLUSION

For the forgoing reasons, Plaintiff-Appellees' petition for rehearing should be granted.

Respectfully submitted,

By: /s/ *Baher Azmy*

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Dated: June 28, 2011

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

By: /s/ Baher Azmy
Baher Azmy, Esq.

Dated: June 28, 2011

CERTIFICATION OF COMPLIANCE

I hereby certify that this Petition complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point font in Times New Roman style.

By: /s/ Baher Azmy
Baher Azmy, Esq.

Dated: June 28, 2011

CERTIFICATION OF VIRUS SCAN

I hereby certify that I have caused to be scanned for viruses the electronic version of Plaintiffs-Appellees' Petition for Rehearing En Banc and that no viruses were detected. The virus scan was conduced using Symantic Endpoint Protection version 11.0.5002.333.

By: /s/ Baher Azmy
Baher Azmy, Esq.

Dated: June 28, 2011

CERTIFICATION OF SERVICE

I hereby certify that on this 28th of June, 2011, a copy of the foregoing Plaintiffs-Appellees' Petition for Rehearing En Banc was served via the Court's ECF system on the following persons:

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By: /s/ Baher Azmy
Baher Azmy, Esq.

Dated: June 28, 2011