No. 99-17551

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, *et al*.,

Plaintiffs-Appellants,

v.

MARY V. KING, *et al*.,

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of California, No. CV-99-04389-MJJ

BRIEF OF PROFESSORS CARL T. BOGUS, SAUL CORNELL, MARIANO-FLORENTINO CUELLAR, ROBERT SPITZER AND ROBERT WEISBERG AS AMICI CURIAE IN OPPOSITION TO APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INTEREST OF THE AMICI CURIAE

This brief is being submitted on behalf of Professors Carl Bogus, Saul Cornell, Mariano-Florentino Cuellar, Robert Spitzer and Robert Weisberg. The amici are law, political science and history professors who all have expertise on the Second Amendment. Their curriculum vitae are attached as Appendix A to this brief. Amici believe their insights can assist this Court.

Despite the heavy toll that firearm violence imposes on our nation, several well funded lobbying organizations have argued strenuously in recent years that firearm regulations should be relaxed, rather than heightened. See Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 8-10 (2000) (describing the link between gun rights organizations and recent Second Amendment scholarship endorsing an individual right perspective). In this effort, these gun control opponents routinely assert that firearm possession for private use is a fundamental right guaranteed by the Second Amendment. In this litigation, and specifically in their rehearing petition, appellants seized upon this "individual right" interpretation of the Second Amendment in challenging the Alameda County ordinance prohibiting possession of firearms on county property.

Even if appellants' historical interpretation had merit, *en banc* review would be inappropriate in this case because the individual right view is contrary to the Supreme Court's longstanding interpretation of the Second Amendment. But ap-

pellants' interpretation of the Second Amendment ignores the historical record, which confirms that the Amendment was not intended to confer an individual right to possess and use firearms aside from citizen service in a militia.

Because appellants (and Judge Gould's concurring opinion) rely heavily on academic articles espousing this erroneous view, a brief response from the academy highlighting appellants' most glaring historical and legal errors is in order and shows why the panel's decision is correct and does not warrant *en banc* reconsideration. If this Court nevertheless decides to rehear the case, we will at that time provide a more detailed exposition of the historical record.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Amendment states that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. AMEND. II. The language of the initial clause indicates that the Amendment does not confer an individual right to keep and bear arms for purposes unrelated to the maintenance of a well-regulated militia. Thus, the Supreme Court expounded this militia-based interpretation of the Second Amendment in *United States* v. *Miller*, 307 U.S. 174 (1939), which found in the Amendment no individual right to keep and bear arms except as there is "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* at 178. As the Court explained, the "obvious purpose" of the Second

Amendment was to "assure the continuation and render possible the effectiveness of such [militia] forces," and the text must therefore "be interpreted and applied with that end in view." *Ibid.*

Many prominent scholars have endorsed this militia-based view after careful analysis of the text and the historical context of the Amendment. See, *e.g.*, Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000); Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000); Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221 (1999); WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999); Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 376 n. 318 (1998); Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988); Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940); Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915).

To be sure, proponents of the individual right approach have weighed in on the Second Amendment debate with numerous articles arguing that a private right to own firearms was a central concern of the Founders.[1] See, *e.g.*, Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981). To shore up their position, these authors turn to a small set of historical references. However, as discussed below, a careful sifting of the historical record shows that discussions regarding the Second Amendment were inextricably linked with Anti-Federalist concerns about ensuring that the state militia were well armed and well trained. It is only by quoting materials out of context and by "pepper[ing] their quotations with the tell-tale ellipses that invite critical readers to check what has been omitted" that individual right proponents can create the historical illusion of a population preoccupied with the private ownership of firearms. Rakove, at 161.

For all this sound and fury, nothing in Second Amendment history or law has changed to justify a revisionist legal history. This academic sparring has not replicated itself in the courts, where only one case in recent memory has found (in

[1] In recent years, individual right scholars have touted the vast number of articles that support their position – but the number of articles does not reflect the number of scholars that support that view. Indeed, there is "virtual parity" in the Second Amendment debate among scholars. See Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 771 (2002).

dictum) an individual Second Amendment right. See *United States* v. *Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002); see also Bogus, 31 U.C. DAVIS L. REV. at 311. This Court, too, has uniformly declined to recognize an individual right to arms under the Second Amendment. See, *e.g.*, *Hickman* v. *Block*, 81 F.3d 98 (9th Cir. 1996). Moreover, consistent with *Miller*, other courts of appeals have repeatedly rejected attempts by gun-rights advocates and criminals to expand the reach of the Second Amendment to individual protection for private use. See, *e.g.*, *United States* v. *Price*, 2003 App. LEXIS 9453 (7th Cir. May 16, 2003). *Farmer* v. *Higgins*, 907 F.2d 1041 (11th Cir. 1990); *United States* v. *Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988).

Appellants provide no legal support for their contention that this Court should abandon *Miller*, but they now urge this Court to ignore its duty as an intermediate court and reject long-established Supreme Court precedent. But even were this Court to ignore *Miller* and its progeny, it is clear that the Founders never intended the Second Amendment to provide an individual right to own arms for private use. Accordingly, this Court should deny the petition for rehearing *en banc*.

ARGUMENT

I. APPELLANTS' SECOND AMENDMENT ARGUMENT IS FORECLOSED BY THE SUPREME COURT'S DECISION IN *UNITED STATES* v. *MILLER.*

Appellants' complaint that the Second Amendment is in danger of becoming "vestigial" (Pet. 19), even if true,[2] does not justify *en banc* review. Although this court may invoke the *en banc* process to reverse its own prior decisions (see *Morton* v. *De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993)), only the Supreme Court may overrule its precedent. *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). Thus, "'[i]f a precedent of [the Supreme] Court has direct application in a case, * * * the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'" *Agostini* v. *Felton*, 521 U.S. 203, 237-238 (1997) (quoting *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)) (first alteration in *Agostini*); see also *McDonald* v. *Means*, 309 F.3d 530, 533 (9th Cir. 2002). This is true even if that precedent "appears to rest on reasons rejected in some other line of decisions" (*Rodriguez*, 490 U.S. at 484) or is otherwise questionable. See, *e.g.*, *Kahn* v. *State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996)

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[2] This argument ignores that the Second Amendment "cannot be read in our new century without a frank assessment of the extent to which a well-regulated militia is today necessary to the security of a free state." UVILLER & MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 4 (2002).

(Posner, C.J.) (following Supreme Court antitrust decision "despite all its infirmities [and] its increasingly wobbly, moth-eaten foundations" because "the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court") (overruled on the merits, for the reasons explained by Judge Posner, 522 U.S. 3 (1997)).

Thus, this Court must reject appellants' historical argument out of hand and follow *Miller*, regardless of the merits of the argument. The Supreme Court's Second Amendment jurisprudence, while not extensive, has been entirely consistent: the Court has never recognized an unqualified, individual right under the Second Amendment to bear arms, and has consistently linked rights under the Second Amendment to the state militia.

For example, *Miller* – the Court's most direct analysis of the Second Amendment – involved a challenge to a provision of the National Firearms Act of 1934. The Court held that without evidence that private possession of the firearm in question had "some reasonable relationship to the preservation or efficiency *of a well regulated militia*," there was no Second Amendment "right to keep and bear such an instrument." 307 U.S. at 178 (emphasis added). The Court continued by noting that the purpose of the Second Amendment was to "assure the continuation and render possible the effectiveness" of militia forces, as outlined in Article I, Section 8 of the Constitution. *Ibid.* At no point did *Miller* mention any individual

Second Amendment guarantees unrelated to the militia; rather, the Court stressed that the Amendment must "be interpreted and applied" in light of its focus on protecting the militia. *Ibid.*

Miller does not stand alone. Before *Miller*, the Court repeatedly held that the Second Amendment does not apply to state laws, which itself renders appellants' case meritless whether or not they correctly understand the Second Amendment. See *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1875) ("The second amendment declares that [the right to keep and bear arms] shall not be infringed; but this * * * means no more than that it shall not be infringed *by Congress.*") (emphasis added); *Presser* v. *Illinois*, 116 U.S. 252, 264-265 (1886) (same). Given the genesis of the Second Amendment as a protection of state power against federal encroachment, it would be especially ironic to include it among the provisions selectively incorporated against state power.

The Court has not deviated from *Miller* in the last 60 years. For example, in *Lewis* v. *United States*, 445 U.S. 55, 65 n. 8 (1980), the Court cited *Miller* favorably in determining that legislative firearm restrictions "are neither based upon constitutionally suspect criteria, nor do they trench upon *any* constitutionally protected liberties." (emphasis added). See also, *e.g.*, *Adams* v. *Williams*, 407 U.S. 143, 150-151 (1972) (Douglas, J. dissenting) (reiterating the *Miller* holding that the Second Amendment "must be interpreted and applied with the view of maintaining

a militia") (internal quotation marks omitted). Moreover, the court has reviewed firearm regulations without addressing the Second Amendment at all. See, *e.g.*, *United States* v. *Bean*, 537 U.S. 71 (2002); *United States* v. *Lopez*, 514 U.S. 549 (1995).

In fact, the Supreme Court has *never* upheld an individual's Second Amendment challenge on *any* grounds. And – much to the dismay of individual right scholars (*e.g.* Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1262, n. 296(1992)) – the Supreme Court has denied review in numerous cases raising such challenges. See Spitzer, *The Second Amendment "Right To Bear Arms" And* United States v. Emerson, 77 ST. JOHN'S L. REV. 1, 14 (2003). Thus, it is unlikely that appellants' challenge would succeed before the Supreme Court, which is committed to following its own precedents unless found to embody clear error (see *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854 (1992)). There has since *Miller* been no "evolution of legal principle" or "development of constitutional law" that would make *Miller* "a mere survivor of obsolete constitutional thinking." *Id.* at 857. At best, law review articles have voiced an academic challenge to the *Miller* view – and have in turn been severely criticized by other scholarly work. See Bogus, 76 CHI.-KENT L. REV. at 8-10; Spitzer, *Lost and Found: Researching The Second Amendment*, 76 CHI.-KENT L. REV. 349, 384-401 (2000) (reviewing the recent individual right

scholarship). Even Sanford Levinson now concedes that any claim that individual right scholarship is "standard" is "unwise." See Levinson, *The Historians' Counterattack: Some Reflections on the Historiography of the Second Amendment, in* GUNS, CRIME AND PUNISHMENT IN AMERICA 93 (Harcourt ed. 2003). This academic debate certainly reflects no new consensus on the issue.

In short, there is simply no justification for *en banc* review. As Judge Posner explained, the Supreme Court has been "emphatic" that lower courts not "anticipate an overruling of a decision by the Court." *Kahn*, 93 F.3d at 1363. Thus, this Court's view of appellants' arguments is irrelevant at this stage of the litigation; it is the Supreme Court's exclusive prerogative to overrule itself. In any event, as we next show, appellants' historical arguments are meritless.

II. THE HISTORICAL RECORD CONFIRMS THAT THE PURPOSE OF THE SECOND AMENDMENT WAS TO ENSURE THE PRESERVATION OF THE STATE MILITIAS, NOT TO CONFER AN INDIVIDUAL RIGHT TO OWN FIREARMS FOR PRIVATE PURPOSES.

When placed in historical context, it becomes clear that the Founders intended that the Amendment confer a collective right to resist tyranny through the militia, rather than an individual right to possess firearms for self-defense, to secure a right of revolution, or for any other purpose.[3] In discussing even a few ex-

[3] The suggestion by some, including Judge Kozinski, that the private possession of firearms would have protected against tyranny in situations such as Nazi

amples, it becomes clear that appellants' historical argument is full of holes and essentially ignores the political and social events that influenced the Founders.

A. The English Antecedents To The Second Amendment Do Not Support An Individual Right Interpretation Of The Amendment.

Before turning to the domestic history of the Second Amendment, it is useful to consider its English antecedents, which everyone agrees profoundly influenced the Founders. Although proponents of the individual right view argue that the Declaration of Rights of 1689, the major precursor to the Bill of Rights, established such a right (see, *e.g.*, MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)), that view has been soundly rejected by most scholars, who agree that it did no such thing. See, *e.g.*, Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI-KENT L. REV. 27 (2000); Bogus, 31 U.C. DAVIS L. REV. at 377.

Following the ouster of James II, Parliament declared the throne vacant and negotiated limits on royal power – the Declaration of Rights – in which James's successor, William of Orange, acquiesced. *Id.* at 379. The Declaration of Rights did not concentrate on individuals but instead outlined the relationship between

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Germany (see, *e.g.*, *Silveira* v. *Lockyer*, 328 F.3d 567, 569-570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing *en banc*)) both misses the point – it is not based on an historical analysis of the actual Second Amendment – and is belied by recent experience in such countries as Iraq, where much of the citizenry was, in fact, armed.

Parliament and Crown. See *id*. at 378 n.330; Schwoerer, at 27. Indeed, Parliament itself recognized that the Declaration of Rights granted no new rights to the English people. See Bogus, 31 U.C. DAVIS L. REV. at 378, 408 n. 330 (quoting 2 MACAULAY'S HISTORY OF ENGLAND 377-378 (1906)). Thus, during the debates over the Declaration of Rights, no one complained that individuals were unable to keep arms for personal use. See Schwoerer, at 32.

In fact, any such idea would have seemed strange, given that Parliament itself regulated personal ownership of arms both before and after the Declaration of Rights. See Hardaway *et al*., *The Inconvenient Militia Clause of The Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms*, 16 ST. JOHN'S J. LEG. COMMENT. 41, 74-75 (2002) (collecting statutes). Indeed, within five years of approving the Declaration of Rights, during the debates over the English Game Act of 1693, Parliament considering and rejected out of hand a provision that would have allowed Protestants to keep arms in their homes. See Schwoerer, at 50-51.

Thus, the Founders inherited an English legacy that does not support an individual right interpretation of the Second Amendment. Rather, the issues in England that led to the Declaration of Rights were about the relationship between government bodies and the risks of standing armies – exactly the issues that the militia-based Second Amendment was designed to address.

B. The History Of The Second Amendment Does Not Support An Individual Right To Possess Firearms.

Turning to the domestic history of the Second Amendment, appellants argue that a collective view of that Amendment was "unknown to the Founders." See Pet. at 7. This is simply wrong, and ignores completely the political climate that surrounded adoption of the Second Amendment. The political events leading up to the Bill of Rights do not suggest that the Founders were focused on an individual right to arms for private use. Rather, the events reflect the ongoing tension between the Anti-Federalist desire to protect the interests of states and the Federalist goal of achieving a strong nation. Criticisms of the effectiveness of the militia arising from the experience of the Revolutionary War provided the context in which the Founders acted. As the resulting language of the Second Amendment reflects, they focused on a desire to protect the "security of a free State" by ensuring the availability of firearms to the "well regulated Militia" of the several states.

Ignoring this context, "Second Amendment originalists have created something akin to an alternative history science fiction fantasy, stories about parallel historical universes in which the South won the Civil War or the American Revolution never happened." See Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIS. REV. (forthcoming 2004) (Appendix B). Supporters of the individual right view focus their attention on the voices of rejected texts such as the Dissent of the Anti-Federalist Minority of Pennsylvania, effectively reading the Sec-

ond Amendment as though it were written by the ***losers*** in the great struggle over the Constitution. See Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI-KENT L. REV. 195, 206-209 (2000). They simultaneously dismiss the Founder's strategic decisions to eliminate language that supports their position as editorial oversights. See, *e.g.*, Rakove, at 124-125 (arguing that the Senate's deletion of the phrase "composed of the body of the people" was a substantive part of the ongoing debate between Federalists and Anti-Federalists, not a stylistic maneuver).

The unamended Constitution contemplated a national and state defense system. It provided for a national army controlled by the Executive and Legislative branches and a system of state militias that were subject to Congressional regulation, which included the power to arm and train the militia. See U.S. CONST. ART. I, Sec. 8. The Anti-Federalists objected that these provisions, like many others of the unamended Constitution, created an overly powerful national government; in particular, they voiced concern that, absent some type of constitutional restraint, the federal government might eliminate the state militias and replace them with a standing federal army – a concept they abhorred (see Hardaway, at 76-77).

For example, in the debates between George Mason – an Anti-Federalist who distrusted the standing army – and James Madison, Mason expressed the Anti-Federalists' fear that under the unamended Constitution the national government

would disarm the militia by failing to support it financially, while simultaneously divesting the states of authority to do so. See Rakove, at 138-140 (quoting from the exchange between Mason and Madison found in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1270-1273 (Kaminiski & Saladino eds., 1993)).[4] Thus, the Anti-Federalists preferred that the viability of the militia be the responsibility of the state governments, not the national government. *Ibid.*; see also Finkelman, at 225.

On the other hand, the Federalists stressed the need for a strong constitution that provided for national defense. In light of the inability of state and local militias to quickly put down Shays' Rebellion, the Federalists argued that Congress must have the power to intervene and suppress a rebellion within a state. See *id.* at 196 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (Farrand ed., rev. ed. 1996)); Hardaway, at 85-86.

What these debates show is that Federalist and Anti-Federalist alike assumed that the key issue was the control and arming of the militia. Thus, in FEDERALIST NO. 46, Madison addressed Anti-Federalist fears of a military dictatorship:

> [I]t would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger [of a standing federal army] * * * op-

[4] It is this debate that caused Mason to make the statement – "Who are the militia" – repeatedly cited in its truncated form by proponents of the individual right view. For a broader analysis of Mason's statements see Rakove, at 136-137.

> posed [to which would be] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, ***fighting for their common liberties,*** and ***united and conducted by governments possessing their affections and confidence.*** It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

Federalist No. 46 (emphasis added).[5]

In the end, the Federalists made several concessions to assuage the Anti-Federalists' concerns. First, in Article I, Section 8 of the Constitution itself, Congress was given authority to "organize, arm and discipline" the militia, but the states retained authority to train it and appoint its officers. In addition, under the same clause, the states retained operational control over the militia except during those periods in which the federal government had called upon the militia to enforce the laws of the United States, suppress insurrections, or repel invasions. Finally, a concern raised during various state ratification conventions was that the Constitution did not require the federal government to arm the militia, nor did it expressly authorize the states to do so. Finkelman, at 233-234. The Federalists

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[5] Surprisingly, supporters of an individual interpretation point to FEDERALIST NO. 46 to argue that Madison supported an individual right to bear arms. See Dorf, at 311-312 (listing scholars); see also Letter from John Ashcroft, Attorney General, to James Jay Baker, Executive Director, NRA Institute for Legislative Action (May 17, 2001), reprinted in Nosanchuk, at 799. However, FEDERALIST NO. 46 merely explains that the ***state militia*** will serve as a check on a strong national army. See Finkelman, at 224.

readily concurred that the states should have broad authority to arm and train their militia. *Ibid.* The proposal to reaffirm by constitutional amendment the states' control over their respective militias was not controversial.

Madison authored the initial draft of the Second Amendment. His original proposal read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." See Rakove, at 120. Madison's proposal, like the final text of the Amendment, emphasizes the centrality of militia service to the right conferred by the Second Amendment. The only aspect of Madison's proposed text that was defeated was the clause pertaining to conscientious objectors, which ultimately was deleted. Congressman Elbridge Gerry – the strongest Anti-Federalist voice in Congress – focused his concern squarely on the potential threat to the militia. See Yassky, at 609-610. Had Gerry been concerned that the federal government would disarm individuals, not the militia, he would certainly have addressed this issue in his remarks, but instead he focused entirely on the militia. *Ibid.* Congress also substituted the phrase "free State" for "free Country" to emphasize the central role of the militia in protecting the autonomy of the states. *Ibid.*

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As this brief historical survey demonstrates, the Second Amendment was designed to prevent tyranny, not to protect hunting or the right of a homeowner to use a handgun to shoot an intruder. Appellants' attempt to portray the history otherwise should not be taken seriously. Rather, it is a classic example of historical revisionism, in essence degrading the constitutional right to bear arms and treating it as if it were no different than a right to hunt deer.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition For Rehearing *En Banc* and Panel Rehearing.

Respectfully Submitted.

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STATEMENT OF RELATED CASES

Amici are not aware of any cases in this Court that are related within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF WORD COUNT

I hereby certify that – according to the word-count facility in Microsoft Word – this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 4,198 words, which is fewer than the length specified in amici's motion for leave to file an amicus brief (4,200 words).

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2003, I served two copies of the foregoing amicus brief by overnight delivery on the parties herein, at the following addresses:

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