Appeal Nos. 13-17430, 14-15108

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA, et al.,

Plaintiffs-Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of California
The Honorable Claudia Wilken
District Court Case No. 4:09-cv-00037-CW

APPELLANTS'/CROSS-APPELLEES' OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

JAMES P. BENNETT
EUGENE ILLOVSKY
STACEY M. SPRENKEL
BEN PATTERSON
GRANT C. SCHRADER
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000

Attorneys for Plaintiffs-Appellants Vietnam Veterans of America, et al.

TABLE OF CONTENTS

Page

INTRODUCTION 1

DISCUSSION 1

I. THE PANEL CORRECTLY REVERSED THE DISTRICT COURT'S REFUSAL TO COMPEL THE ARMY TO COMPLY WITH ITS REGULATION AND PROVIDE MEDICAL TREATMENT 1

A. The Panel Did Not "Ignore" Binding Circuit Precedent or Create a Circuit Split 1

B. The Panel Correctly Found That the Availability of Medical Care From the DVA Was Not an Obstacle to Relief 4

1. The DVA Is Irrelevant to Whether the District Court Must Compel the Army to Comply With Its Duties 4

2. The Army Has No Basis for Speculating That the District Court Will Engage in a "Systemic Evaluation of VA Benefits Programs." 5

II. THE COURT CORRECTLY HELD THAT AR 70-25 IMPOSES A NON-DISCRETIONARY DUTY TO PERFORM DISCRETE AGENCY ACTION 6

A. The Panel Followed AR 70-25's Plain and Natural Meaning and Owed No Deference to the Army's Convenient Litigation Position 6

B. The Panel Correctly Held That Provision of Medical Treatment Is "Discrete" Agency Action 10

C. The Army's Recycled Statutory Authorization Arguments Do Not Merit En Banc Review 12

III. THE UNANIMOUS PANEL PROPERLY AFFIRMED THE INJUNCTION REQUIRING THE ARMY TO PROVIDE NOTICE 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Biodiversity Legal Found. v. Badgley,
309 F.3d 1166 (9th Cir. 2002) 2

Chase Bank USA, N.A. v. McCoy,
131 S. Ct. 871 (2011).....7, 8

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012).....8

Ctr. for Biological Diversity v. Norton,
254 F.3d 833 (9th Cir. 2001) 3, 4

Firebaugh Canal Co. v. United States,
203 F.3d 568 (9th Cir. 2000) 2

Forest Guardians v. Babbitt,
174 F.3d 1178 (10th Cir. 1999) 3

Hells Canyon Pres. Council v. U.S. Forest Serv.,
593 F.3d 923 (9th Cir. 2010) 11, 12

In re Barr Labs.,
930 F.2d 72 (D.C. Cir. 1991).....3

Independence Mining Co. v. Babbitt,
105 F.3d 502 (9th Cir. 1997) 7

Norton v. S. Utah Wilderness Alliance,
542 U.S. 55 (2004).....11

Rosemere Neighborhood Ass'n v. EPA,
581 F.3d 1169 (9th Cir. 2009) 4

Safe Air for Everyone v. EPA,
488 F.3d 1088 (9th Cir. 2007) 13, 14

Talk Am., Inc. v. Michigan Bell Tel. Co.,
131 S. Ct. 2254 (2011).....7, 8

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Monsanto,
491 U.S. 600 (1989) 2

Veterans for Common Sense v. Shinseki,
678 F.3d 1013 (2012) (en banc) 5

STATUTES, RULES, & REGULATIONS

5 U.S.C.
§ 706(1) ..... *passim*
§ 706(2) 2

10 U.S.C.
§ 1074 ..... 11, 12
§ 1074(a)(2)(A) 9
§ 1074(c)(1) 12, 13
§ 3013 12
§ 4503 12

Fed. R. App. P.
35(a)(1) 1
35(b)(1)(A) 1
40(a)(2) 1

9th Cir. Rule 35-1 1

32 C.F.R. § 108.4 ..... 12, 13

Army Regulation 70-25 (1962) 10

Army Regulation 70-25 (1974) 10

Army Regulation 70-25 (1988) 10, 12

Army Regulation 70-25 (1990) ..... *passim*

DoD Instruction No. 6025.23 § 4(i) 13

INTRODUCTION

The Army's petition should be denied. It attacks almost everything the panel did—but most of its ammunition is simply a re-argument of points it already exhaustively made and lost. This case should not be reheard. The Army does not convincingly show an important "point of law or fact" that the panel "overlooked or misapprehended." Fed. R. App. P. 40(a)(2). Nor has the Army shown a good reason for en banc consideration. It has not shown that the panel's decision, involving one Army regulation applicable to a relatively small subset of veterans, "directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity." 9th Cir. R. 35-1. It has not shown that "the panel decision conflicts with a decision of the United States Supreme Court." Fed. R. App. P. 35(b)(1)(A). Nor has it shown that en banc review is "necessary to secure or maintain uniformity of [this Court's] decisions." Fed. R. App. P. 35(a)(1).

DISCUSSION

I. THE PANEL CORRECTLY REVERSED THE DISTRICT COURT'S REFUSAL TO COMPEL THE ARMY TO COMPLY WITH ITS REGULATION AND PROVIDE MEDICAL TREATMENT.

A. The Panel Did Not "Ignore" Binding Circuit Precedent or Create a Circuit Split.

Applying an established rule of statutory construction, the panel held that Congress's use of the word "shall" in section 706(1) of the Administrative

Procedure Act ("APA") "requires a reviewing court to issue injunctive relief whenever it finds that an agency action has been unlawfully withheld." (Op. 28.) In holding that "shall" means "shall," the panel adhered to a tenet the Ninth Circuit and Supreme Court have long repeatedly affirmed. *See, e.g.*, *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using "shall," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory"); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573-74 (9th Cir. 2000) ("[T]he rules of statutory construction presume that ['shall'] is used in its ordinary sense unless there is clear evidence to the contrary.").

The Army wrongly claims that this holding "directly conflicts" with *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002), because the Court there said that "a statutory violation does not always lead to the automatic issuance of an injunction." (Pet. 11-12.) There is no conflict. Unlike this case, which was brought under section 706(1), the *Biodiversity* panel applied the *section 706(2)* standard. *See Biodiversity*, 309 F.3d at 1176-77 (quoting *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078 (9th Cir. 2001)). *Biodiversity* therefore simply does not support the Army's assertion that section 706(1) uses "shall" in a permissive rather than mandatory sense—in fact, *Biodiversity* is not relevant to the interpretation of section 706(1) at all. The panel

appropriately followed the reasoning of the most pertinent section 706(1) case: *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999). (Op. 28.)

The Army then insists that en banc review is warranted because the panel's decision and *Forest Guardians* conflict with a D.C. Circuit decision the Army maintains "has held that a court retains equitable discretion when deciding whether to issue an injunction under Section 706(1)." (Pet. 11-12.) But the D.C. Circuit case the Army cites, for the first time in their petition—*In re Barr Laboratories*, 930 F.2d 72 (D.C. Cir. 1991)—is not an APA case and did not involve a decision to "issue an injunction under Section 706(1)," as the Army suggests. It was a case involving mandamus, where courts necessarily retain equitable discretion. *Id.* at 75. The APA's statutory mandate contrasts with that traditional discretionary mandamus power. *See, e.g.*, *Forest Guardians*, 174 F.3d at 1187-88.

Nevertheless, even assuming there was a conflict between *In re Barr* and *Forest Guardians*, in the absence of binding Ninth Circuit authority, a panel is free to adopt the reasoning of either court—or neither—without triggering a need for en banc consideration. The panel was more than justified in endorsing the Tenth Circuit's persuasive and careful analysis of section 706(1)'s text, rather than the non-APA *In re Barr* decision.[1]

---

[1] The Court has previously cited favorably the "shall means shall" principle of *Forest Guardians*. *See, e.g.*, *Ctr. for Biological Diversity v. Norton*, 254 F.3d

B. The Panel Correctly Found That the Availability of Medical Care From the DVA Was Not an Obstacle to Relief.

1. The DVA Is Irrelevant to Whether the District Court Must Compel the Army to Comply With Its Duties.

The panel concluded that the district court did not have discretion to "categorically deny injunctive relief" under section 706(1) just because "some former [test] subjects may be entitled to receive medical care" from the Department of Veterans Affairs ("DVA"). (Op. 29.) The Army now claims the panel failed to address its argument that injunctive relief is improper because the provision of medical care by the DVA is an "adequate alternative remedy" for Plaintiffs' medical treatment claim. (Pet. 12.) This attack on the panel lacks merit.

The panel considered the Army's argument and rightly rejected it because "there is nothing in the record upon which to base a conclusion that the medical care available from the VA would be equal in scope and quality to the medical care that Plaintiffs claim is owed to them by the Army." (Op. 28-29.) Indeed, Plaintiffs' injury stemmed from the *Army*'s unlawful failure to abide by its own regulation's requirement that it provide medical treatment. So it is unremarkable for the panel to hold that such an injury can be remedied only by requiring the *Army* to act and to

---

833, 837-38 (9th Cir. 2001); *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1172 n.2 (9th Cir. 2009) (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("*SUWA*") and *Forest Guardians* for principle that section 706 "prescribes standards for judicial review and demarcates what relief a court may (or *must*) order" (emphasis added)).

follow its own regulation. (Op. 29.) The Army provides no authority supporting its position that it may shirk its own duties simply because another government agency provides a benefit that overlaps with one it is obligated to provide. The Army's attempts to re-argue this issue should be rejected.

2. The Army Has No Basis for Speculating That the District Court Will Engage in a "Systemic Evaluation of VA Benefits Programs."

The Army next argues that the panel's decision improperly allows the district court to engage in a "systemic evaluation" of the DVA on remand, something it says was forbidden in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (2012) (en banc). (Pet. 12-13.) The panel supposedly did this by "declaring" the district could take the DVA's provision of medical care into account when fashioning an injunction. (*Id.*) This is a straw-man argument.

The panel's decision did not invite any such "systemic evaluation." In fact, the panel *explicitly* declined to take a position on what the district court should do. (*See* Op. 29 ("[W]e do not address whether and in what manner the district court might nonetheless take the VA's provision of medical care into account . . . .").) As the panel's holding makes clear, the district court must issue an injunction against the *Army* and could do so without giving the DVA *any* consideration whatsoever. The Army's speculation provides no basis for a rehearing or en banc review.

II. THE COURT CORRECTLY HELD THAT AR 70-25 IMPOSES A NON-DISCRETIONARY DUTY TO PERFORM DISCRETE AGENCY ACTION.

A. The Panel Followed AR 70-25's Plain and Natural Meaning and Owed No Deference to the Army's Convenient Litigation Position.

The panel held "as did the district court, that 'AR 70-25 entitles [Plaintiffs] to medical care for disabilities, injuries or illnesses caused by their participation in government experiments,' not only during the course of the experiment but also after the experiment has ended." (Op. 27.) This holding was based on the plain meaning of AR 70-25. (*Id.* 25-27.)

The Army argues that the panel erroneously "rejected the Army's reading of its own regulation" and should have deferred to the Army, which "construes Section 3-1(k) to govern medical care only during a volunteer's participation in testing." (Pet. 7.) But the Army is owed no deference, for the numerous reasons already argued to the panel. Its purported construction of the regulation—which was offered for the first time, years after promulgation, during a deposition in this case—would render the medical treatment provisions of AR 70-25 superfluous. AR 70-25's plain meaning is clear: it creates an enforceable, non-discretionary duty to provide medical treatment "for injury or disease" that is a "proximate result" of "participation in research." The command is unequivocal. Nothing in the regulation denies treatment to a test subject whose resultant injury manifests, for example, the day after his "participation in testing."

The panel's succinct discussion of AR 70-25's notice provision explained why the district court was correct not to defer to the Army's interpretation of the regulation. (Op. 18-19.) The Army admits its temporal-limitation argument—that AR 70-25 imposes an obligation to provide medical treatment only during the period of testing—was advanced for the first time in this litigation. (*Id.* 19.) But it argues that the panel ignored Ninth Circuit authority, and insists that "this Court has held that the proposition that interpretations advanced in litigation are not entitled to deference does not apply in Section 706(1) cases," citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511-12 (9th Cir. 1997). (Pet. 2.) *Independence Mining*, however, did not so hold. Rather, the court merely explained that "the district court was not prohibited from considering [supplemental evidence such as an agency declaration], especially where the court permitted both sides to submit supplemental evidence." *Independence Mining*, 105 F.3d at 511-12. The district court there was not required to defer to the agency's litigation position, but was not prohibited from considering it.

The Supreme Court cases the Army cites actually undercut its position. In both *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011), and *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254 (2011), deference was given to *non-party* agencies *invited by the Court* to offer their interpretation. *See Chase Bank*, 131 S. Ct. at 881 ("[t]he Board is not a party to this case," but submitted an

amicus brief at the Court's request, and "there is no reason to believe [its] interpretation . . . is a '*post hoc* rationalization' taken as a litigation position"); *Talk Am.*, 131 S. Ct. at 2263 (deferring to interpretation in invited amicus brief because "[w]e are not faced with a *post-hoc* rationalization . . . of agency action that is under judicial review"). By contrast, the Army's post-hoc rationalization and convenient litigation argument here is entitled to no deference, and "does not reflect the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

The panel also properly found that the Army's proffered reading of the regulation is "inconsistent with the plain text of subsection (k)," which contains no language that "states or even suggests a temporal restriction on volunteers' entitlement to receive medical care." (Op. 26.) Such a limitation "makes little sense," moreover, as the panel found: "If the Army is right, volunteers were entitled to medical care if they became sick during the actual experiment, but not if they fell sick as a result of the experiment the day after it ended." (*Id.* 26-27.) Unlike the Army's proposed reading of AR 70-25, nothing in the panel's reading of the regulation conflicts with Supreme Court or Ninth Circuit precedent.

The Army also takes issue with the panel's reading of the word "authorized" in AR 70-25, which it claims "does not constitute an 'unequivocal command' to the

Army to provide such care." (Pet. 8.) In other words, medical treatment may be "authorized," but that does not mean it actually has to be provided. But the panel analyzed that word carefully and considered the natural meaning of the word in the context of the regulation. The panel's analysis of "authorized" included this: "when a collective bargaining agreement says that an employee is authorized a certain amount of sick leave, the employee is entitled to that leave. She must show that she is actually sick—just as test subjects must show they suffer from diseases that are a proximate result of their participation in government experiments—but if she can do so, she is entitled to take time off for sick leave." (Op. 25.) The panel correctly found that "[t]he meaning of 'authorized' is no different here." (*Id.*)[2] And reading the regulation as a whole, the operative provision leaves no discretion to the Army to decide *whether* to provide medical treatment in the circumstances the regulation specifies—i.e., "for injury or disease" that is a "proximate result" of "participation in research."

The panel's finding of a discrete, non-discretionary obligation to provide treatment was supported not only by the regulation's plain text but also by its prior

[2] The Army's reading would also render the relevant provision superfluous. Active military service members are already entitled to medical care while in service, 10 U.S.C. § 1074(a)(2)(A), including treatment during a test while the service member is on active duty. If AR 70-25 were not read to require medical treatment for proximately caused injuries even if manifesting after service, the medical treatment provision would serve no purpose.

iterations. In the 1962 and 1974 versions of AR 70-25, the Army "pledged to provide medical care," stating, for example, "that '[r]equired medical treatment and hospitalization will be provided for all casualties,' and that '[a] physician approved by The Surgeon General [of the Army] will be responsible for the medical care of volunteers.'" (Op. 25.) Note the mandatory language—medical treatment "*will* be provided." (*Id.* 25 (emphasis added).) As the panel found, when that language was replaced in 1988 with subsection (k), there was no indication of an about-face in the Army's duty: "If the Army intended to go back on its pledge to provide medical care, it would hardly have done so by providing that 'volunteers are authorized' to receive medical care." (*Id.*) The Army's petition offers nothing to shake this analysis, much less show that the panel disregarded circuit or Supreme Court precedent, such that rehearing or en banc review is appropriate.

B. The Panel Correctly Held That Provision of Medical Treatment Is "Discrete" Agency Action.

The Army further argues, again, that AR 70-25 does not impose an obligation to perform a "discrete" agency action enforceable under the APA. It insists that the regulation lacks "specific directives" on certain logistical issues, and "the panel majority was not free to fill in the blanks and order the Army to establish a new program of medical care." (Pet. 10.) This argument confuses the issues, while mischaracterizing the record and the panel's decision.

The order enforcing the regulation does not require a broad programmatic restructuring. It does not dictate the creation of new programs[3] or involve the Court in the Army's day-to-day operations. The panel's explanation on the notice issue applies equally here: the "precise efforts Defendants must take . . . necessarily entail some discretionary judgment," but having "discretion in the manner in which the Defendants' duty may be carried out does not mean that the Defendants do not have a duty to perform a 'discrete action' within the meaning of . . . *SUWA*." (Op. 21 (citing *SUWA*, 542 U.S. at 65; *Firebaugh Canal*, 203 F.3d at 578).) As the Supreme Court stated, "when an agency is compelled by law to act . . . but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *SUWA*, 542 U.S. at 65. The panel's decision was consistent with *SUWA*. It did not "fill in the blanks," as the Army argues, but correctly left logistical decisions to the Army's discretion.

The Army's own citation further supports this discreteness analysis, as the Court in *Hells Canyon* made clear that "a court can compel [an] agency to act"—there it was to establish the wilderness area boundary required by statute—but cannot "specify what the action must be." *Hells Canyon Pres. Council v. U.S.*

---

[3] The Army's overwrought claim that it is being required to create "new programs" and "new mechanisms" disregards the well-established DOD Tricare system and Army military hospitals and facilities already in place to provide medical care to veterans. *See* 10 U.S.C. § 1074; (Open. Br. 23).

Forest Service, 593 F.3d 923, 933 (9th Cir. 2010) (quoting *SUWA*, 542 U.S. at 65). Similarly, the panel has compelled the Army to comply with its duty to provide medical treatment to a definite class of people, as specified in its regulation. The Court has not told the Army *how* to go about providing that treatment.

C. The Army's Recycled Statutory Authorization Arguments Do Not Merit En Banc Review.

As it has argued before, the Army claims that the panel's reading of section 3-1(k) is "inconsistent" with the Army's statutory authority to provide medical care. (Pet. 9.) Plaintiffs' briefs before the panel showed the several reasons why that argument is wrong. (Third Br. at 8-11.) First, 10 U.S.C. § 1074 is not the only statute authorizing military care. In rejecting the Army's argument, the district court thoroughly analyzed the issue and correctly found that 10 U.S.C. §§ 3013 and 4503—the authorizing statutes for AR 70-25 (1990)—separately authorize the provision of such care. (E.R. 32-38.)

Second, even under 10 U.S.C. § 1074, the Army has authority to provide medical treatment to Plaintiffs. As test subjects, they are "persons entitled to such care by law or *regulations*," 10 U.S.C. § 1074(c)(1) (emphasis added)—namely AR 70-25, as the panel held. (Op. 24-27.) The Army also asserts that 32 C.F.R. § 108.4, which was promulgated 26 years after section 1074(c)(1), 22 years after AR 70-25 (1988), and almost two years after Plaintiffs filed suit, is the sole means by which a military department can authorize medical care. (Pet. 9 (also citing even

more recent DoD Instruction No. 6025.23 § 4(i)).) But the Army provides no authority for that statement, and in any event, it is at odds with the plain language of section 1074(c)(1) and AR 70-25.[4] Nor does the Army explain why the requirements for rehearing or en banc review are satisfied.

III. THE UNANIMOUS PANEL PROPERLY AFFIRMED THE INJUNCTION REQUIRING THE ARMY TO PROVIDE NOTICE.

The panel unanimously upheld the district court's ruling that AR 70-25 requires the Army to provide ongoing notice to service members who have participated in the military's testing programs. (Op. 20.) The Army argues that: (1) the panel should have deferred to the Army's interpretation of AR 70-25 "given the conceded ambiguity on the question whether AR 70-25 even applies to testing programs terminated long before the current version of that regulation was adopted"; and (2) Plaintiffs are really impermissibly challenging the sufficiency of the government's prior notice efforts. (Pet. 13-14.) Neither recycled argument warrants rehearing or en banc review.

First, deference comes into play only if the Army's regulation is ambiguous. *See, e.g.*, *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) (An

---

[4] The Army's argument also renders the medical treatment provision of AR 70-25 (1990) meaningless until the promulgation of 32 C.F.R. § 108.4 in 2010, which makes little sense. As Judge Wallace's dissent acknowledges, "the authorization in subsection (k) certainly removes a barrier to volunteers' receipt of medical care—making it clear, at least, that volunteers should not be denied medical care for lack of authorization." (Op. 34.)

agency's interpretation of a regulation "should not be considered when the regulation has a plain meaning."). AR 70-25 is not ambiguous. The panel expressly held there is "no ambiguity in the text of subsection (h)," so the Army's statement that ambiguity was somehow "conceded" is wrong.[5] (Op. 19; Pet. 13.) The panel's holding was based on a careful analysis of the regulation, which applies to all test subjects "who have participated" in tests, regardless of the time period in which those tests took place. (Op. 16-18.) The panel correctly noted that the lack of ambiguity obviates any deference to the Army's reading.[6] (*Id.* 19.)

Next, the Army asserts that the panel was wrong to affirm the injunction because Plaintiffs are really improperly challenging the sufficiency of the government's prior notice efforts. The Army argues that the panel "completely ignored" those prior notice efforts and also "apparently believed" they were inadequate. (Pet. 13-14.) This criticism of the panel misses the point. Plaintiffs do not challenge the "sufficiency" of the Army's action, but rather its failure to follow

---

[5] To the extent the Army is referring to the district court's order, it overstates its case. The district court never found AR 70-25 ambiguous. It found the "duty to warn [is] manifestly and unambiguously forward looking in nature," and noted by comparison that "[i]t is less clear whether this ongoing duty is owed to individuals who participated in experiments before 1988." (E.R. 43-44.)

[6] The panel went on to find that even if the regulation were ambiguous, deference would *still* be inappropriate because the Army's proposed interpretation is merely a "convenient litigating position." (Op. 19.) The Army takes issue with this finding, but as discussed in section II.A, *supra*, that objection is without merit.

or even acknowledge its *ongoing* duty to *all* test subjects. As the district court found, "[t]here is no material dispute of fact that the Army is not [providing notice] on an ongoing basis." (E.R. 54.) And as Judge Wallace wrote in his concurrence, "the Army has 'unlawfully withheld' agency action by *denying* that it owes this duty to certain past volunteers." (Op. 30 (emphasis added).) The district court narrowly tailored the injunction to this ongoing duty to provide notice by limiting the scope of the injunction to "newly acquired information" post-dating these prior efforts. (E.R. 10, 55.) The panel correctly affirmed it, and the Army does not demonstrate why rehearing or en banc review is necessary.

CONCLUSION

For the foregoing reasons, the panel should not rehear this case, and there is no reason for the Court to grant en banc review.

Dated: October 8, 2015

JAMES P. BENNETT
EUGENE ILLOVSKY
STACEY M. SPRENKEL
BEN PATTERSON
GRANT C. SCHRADER
MORRISON & FOERSTER LLP

By: /s/ Eugene Illovsky
EUGENE ILLOVSKY

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 35-4 and 40-1, counsel hereby certifies that the attached Appellants'/Cross-Appellees' Opposition to Petition for Rehearing and Rehearing En Banc does not exceed 15 pages and is in compliance with Fed. R. App. P. 32(c) and the Court's September 24, 2015 order.

Dated: October 8, 2015

JAMES P. BENNETT
EUGENE ILLOVSKY
STACEY M. SPRENKEL
BEN PATTERSON
GRANT C. SCHRADER
MORRISON & FOERSTER LLP

By: /s/ Eugene Illovsky
EUGENE ILLOVSKY

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2015, I electronically filed the foregoing Appellants'/Cross-Appellees' Opposition to Petition for Rehearing and Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Robin Sexton
Robin Sexton

sf-3581681