ORAL ARGUMENT HELD ON DECEMBER 4, 2008
DECISION ISSUED ON FEBRUARY 20, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5080

SCOTT TOOLEY, Plaintiff/Appellant,

v.

JANET NAPOLITANO, Homeland Security Secretary, in Her Official Capacity, *et al.*, Defendants/Appellees.

On Appeal from the United States District Court for the District of Columbia

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AMICUS CURIAE'S RESPONSE TO APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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DATED: May 8, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

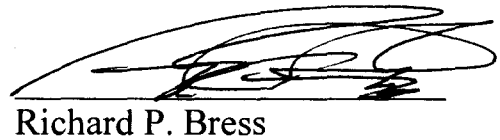
Pursuant to D.C. Cir. R. 28(a)(1), Amicus Curiae certifies as follows:

A. Parties and Amici. Plaintiff/Appellant in this civil action is Scott Tooley. His suit initially named Defendants George W. Bush, President; Richard B. Cheney, Vice President; Alberto Gonzales, Attorney General; Michael Chertoff, Homeland Security Secretary; Kip Hawley, Administrator of the Transportation Security Administration; Michael Hayden, Lieutenant General, Director, National Security Agency; and Michael B. Mukasey, Attorney General. On appeal, the only remaining Defendants are Janet Napolitano, in her official capacity as Secretary of Homeland Security; Gale Rossides, in her official capacity as Acting Administrator of the Transportation Security Administration; and Eric D. Holder, in his official capacity as Attorney General of the United States.

This Court has appointed Cassandra S. Bernstein to serve as Amicus Curiae counsel to Plaintiff/Appellant Tooley for the purposes of this appeal.

B. Ruling Under Review. The ruling under review is the panel opinion filed on February 20, 2009.

C. Related Cases. Counsel is not aware of any pending related cases.



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GLOSSARY

FOIA	Freedom of Information Act
TSA	Transportation Security Administration

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SUMMARY

The Government's Petition for Rehearing or Rehearing *En Banc* should be denied, as it seeks only to reargue the same fact-bound issues that the panel considered and properly resolved under the governing pleading standards recently clarified by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Tooley v. Napolitano*, 556 F.3d 836 (D.C. Cir. 2009). This routine panel opinion finding standing for Plaintiff-Appellant to assert his constitutional claims is fully consistent with precedent and in no way "exceptional." Fed. R. App. P. 35(a). Nor has the panel "overlooked or misapprehended" any point of fact or law. Fed. R. App. P. 40(a)(2). Even the dissent acknowledged that the majority correctly described the facts and the law. *Tooley*, 556 F.3d at 842 (Sentelle, J., dissenting) (recognizing that the majority "correctly describe[d] the case . . . and correctly identifie[d] the controlling authorities"). The only dispute was over the application of the law to the facts of this case. The Government of course is unhappy that it lost. But this Court does not disturb the finality of its decisions to revisit fact-bound disputes.

More particularly, contrary to the Government's argument, the panel opinion properly found that Tooley has standing at this preliminary stage of the litigation, while cautioning that future stages will pose more formidable hurdles and that the district court will retain wide discretion to oversee discovery and guard against

abuses. In so doing, the panel applied the controlling precedents, including *Twombly* and *Aktieselskabet AF 21 November 2001 v. Fame Jeans, Inc.*, 525 F.3d 8 (D.C. Cir. 2008), and nothing since has altered the governing law. Because the panel's holding was limited to applying the governing pleading standards to the specific facts of this case, it will have no "exceptional" impact on future cases or result in a flood of new and unwarranted discovery. The case therefore meets none of the predicates for panel or *en banc* review.

This Court should also decline as unnecessary the Government's extraordinary suggestion that it "hold" the rehearing petition pending the Supreme Court's decision in *Ashcroft v. Iqbal*, No. 07-1015. In the unlikely event that the Court announces a new pleading standard in *Iqbal*, the Government can seek an order from the Supreme Court summarily granting certiorari, vacating the judgment, and remanding for reconsideration.

For all of these reasons, this case does not warrant rehearing, and the Government's petition should be denied.

I. THE PANEL OPINION PROPERLY FOUND STANDING

The panel correctly determined that Tooley has standing at this preliminary stage in the litigation under the notice pleading standards codified in Federal Rule of Civil Procedure 8. As the Supreme Court and this Court have recently explained, these standards merely require the plaintiff to advance allegations that,

when accepted as true, set forth a "plausible" scenario. *Twombly*, 550 U.S. at 566; *Fame Jeans*, 525 F.3d at 17. Further, the panel properly distinguished *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), and *Laird v. Tatum*, 408 U.S. 1 (1972), finding Tooley's allegations more concrete. And, contrary to the government's argument, Tooley's allegations are a far cry from the category of "patently insubstantial" complaints that warrant summary dismissal for lack of subject matter jurisdiction.

As the panel explained, Tooley alleges a number of facts that taken together paint a "plausible" picture of illegal government surveillance.[1] *Tooley*, 556 F.3d at 837-39. In a phone conversation with a Southwest Airlines representative, Tooley mentioned that, after 9/11, Southwest should screen all baggage because someone could put a bomb on board a plane. The agent became agitated, stated that Tooley "said the 'b' word," and then put him on hold for 20 minutes, until Tooley gave up waiting. Tooley alleges that, as a result of this conversation, the government placed him on several watch lists and also placed him and his family under physical and electronic surveillance. Tooley claims that he is searched every time he goes to the airport; that he has continued to have phone difficulties (including clicking noises) indicative of wiretapping; that a government agent was parked in

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[1] *See generally* Eric Lichtblau, *Justice Dept. Finds Flaws in F.B.I. Terror List*, N.Y. Times, May 7, 2009, at A22; Eric Lichtblau and James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 16, 2009, at A1.

front of his house every day for two weeks, in advance of a presidential visit; that the government placed a Radio Frequency Identification Tag on his vehicle; and that he possesses other evidence of government surveillance. Even if, as the panel acknowledged, these allegations are "thin" and recovery is "'very remote and unlikely,'" the panel properly found that these allegations establish standing at this preliminary stage of litigation. *Id.* at 838, 839 (quoting *Twombly*, 550 U.S. at 556).

A. The Panel Opinion Properly Applied Controlling Precedent

The Government's primary argument is that a Supreme Court decision issued after the panel's opinion changed the governing pleading standard. Reh'g Pet. 9 (citing *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1123 (2009)). The Government is mistaken. *LinkLine* in no way changed the pleading standard, as articulated in the Federal Rules and interpreted in *Twombly* and *Fame Jeans*.

Federal Rule of Civil Procedure 8(a) provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a short and plain statement of the grounds for the court's jurisdiction." *Twombly* held that an old gloss on that standard—*Conley*'s "no set of facts" language—had "earned its retirement." *Twombly*, 550 U.S. at 562-63. Instead, *Twombly* explained, Rule 8 should be understood to require a complaint to provide "plausible grounds to infer" that the plaintiff is entitled to relief. *Id.* at 556.

Twombly made clear, however, that under Rule 8's lenient pleading standard a complaint "does not need detailed factual allegations," *id.* at 555, and emphasized that it was not "apply[ing] any 'heightened' pleading standard" or revising the fundamental principles of notice pleading, "which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 569 n.14 (citation omitted).

Based on these clarifications, this Court held in *Fame Jeans* that, even though the Supreme Court had discarded the *Conley* gloss on Rule 8 in favor of a "plausibility" gloss, *Twombly* "leaves the long-standing fundamentals of notice pleading intact." *Fame Jeans*, 525 F.3d at 15. This Court reached that conclusion by carefully examining *Twombly*'s language and a later Supreme Court case holding that "'specific facts are not necessary,' and a complaint need only give the defendant fair notice of the claims." *Id.* at 16 (quoting *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)). In turn, the panel here appropriately analyzed Tooley's claims in light of *Twombly* and *Fame Jeans*, and properly held that Tooley's allegations of "harm from specific events, arguably linked to government conduct," adequately "suggest[ed] a 'plausible' scenario to 'sho[w] that the pleader is entitled to relief.'" *Tooley*, 556 F.3d at 839-40 (quoting *Twombly*, 550 U.S. at

557) (alteration in original).[2]

The Supreme Court's recent *LinkLine* decision in no way altered the standard articulated in *Twombly*. In *LinkLine*, where the district court had applied the old *Conley* "no set of facts" standard, the Supreme Court simply remanded to the district court to apply the "new pleading standard" as articulated in *Twombly*—i.e., the "plausibility" gloss. And the panel here applied precisely that "new" *Twombly* standard, as already interpreted by this Court in *Fame Jeans*. The Government cannot seriously maintain that *LinkLine* intended to—or did—change the governing pleading standard. By noting that *Twombly* articulated a "new pleading standard," 129 S. Ct. at 1123, *LinkLine* merely confirmed what both *Fame Jeans* and *Tooley* had already recognized—that *Twombly*'s "plausibility" language superseded *Conley*'s old "no set of facts" language in interpreting the Federal Rules. *See Candiano v. Moore-McCormack Lines, Inc.*, 386 F.2d 444, 449 (2d Cir. 1967) (Moore, J., concurring in the denial of rehearing and explaining that where "intervening cases would only strengthen the conclusion" adopted by the earlier panel, "a rehearing by the Court would serve no useful purpose"). The intervening *LinkLine* decision did not change the law, and it provides no grounds

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[2] The Government posits that this case warrants rehearing because "[t]he courts of appeals 'have disagreed about the import of *Twombly*.'" Reh'g Pet. 10 (quoting *Fame Jeans*, 525 F.3d at 15). Whatever may be the conflict among the circuits (perhaps more a matter of semantics than substance anyway), this Court has already firmly announced its position on *Twombly* in *Fame Jeans*, and the Government has provided no compelling reason to shift that position here.

for rehearing here.

B. The Panel Opinion Properly Distinguished *United Presbyterian* and *Laird*

The panel recognized and distinguished *United Presbyterian* and *Laird* on their facts. *See Tooley*, 556 F.3d at 839-40. The Government's petition argues the that panel's treatment of these cases is "unconvincing" and urges rehearing under the same arguments the panel properly considered and rejected. Reh'g Pet. 11. However unconvinced the Government might be, its recycled arguments cannot form a sufficient basis for rehearing or rehearing *en banc*. *See Jolly v. Listerman*, 675 F.2d 1308, 1309 (D.C. Cir. 1982) (dismissing petitioner's argument that the panel decision disrupted the "'uniformity of the court's decisions'" by explaining that the panel had squarely considered a prior decision and distinguished it, and holding that "[i]t was hardly inconsistent with the prior decision for us also to notice the guidelines raised and, upon taking a close look at their context, to find them inapplicable to Jolly's case") (citation omitted); *see also Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.").

The panel expressly considered the Government's argument that Plaintiff's allegations are "'no more substantial than the allegations'" in *United Presbyterian*. *Tooley*, 556 F.3d at 839 (citation omitted). The Government now repeats that

argument. It again insists that "there is no meaningful distinction in plausibility between" Tooley's allegations and the allegations in *United Presbyterian.* Reh'g Pet. 12.[3] The panel rejected that argument because, unlike the plaintiffs in *United Presbyterian*, "Tooley's claims . . . create links to government surveillance that are more specific than the mere loss of mail." *Tooley*, 556 F.3d at 840. The panel also noted that, in *United Presbyterian*, there was no possible "temporal link between the precipitating event and the alleged surveillance." *Id.* The Government is not convinced by those distinctions, but its petition contains nothing new that would justify disturbing the panel's holding.

The panel also expressly considered the Government's argument that Tooley did not claim a concrete "harm" to his First Amendment rights, but rather the same sort of "chill" on his speech that the Supreme Court rejected in *Laird. Id.* The Government reprises the very same argument in its petition, contending that "Tooley's allegation that he has discontinued expressive activity is precisely the kind of 'subjective chill' that *Laird* held to be insufficient to establish standing." Reh'g Pet. 13. This Court rightly rejected the argument the first time it was

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[3] The Government also now argues for the first time in its petition that the lower court's ruling on the adequacy of the federal agencies' FOIA search should color this Court's evaluation of Tooley's complaint. Reh'g Pet. 9 n.4. The Government has offered no "exceptional circumstances" that might justify the Court's consideration of this late-breaking argument. *See Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 605-06 (D.C. Cir. 1998) (explaining that this Court generally does not "consider new arguments for appeal . . . in the absence of 'exceptional circumstances'") (citation omitted).

presented. *Tooley*, 556 F.3d at 840. The panel recognized that *Laird* differentiated between the "subjective chill" felt by the *Laird* plaintiffs and the "'specific present objective harm or a threat of specific future harm'" that could survive a standing challenge. *Id.* (citation omitted). The panel correctly found that Tooley's allegations of "harm from specific events, arguably linked to government conduct," fall into the latter category. *Id.* The panel therefore appropriately distinguished *Laird* on its facts, and the Government has provided no new arguments that would justify revisiting that determination.

C. The Panel Opinion is Consistent with *Neitzke* and Its Progeny

The Government's argument that the panel should have dismissed Tooley's complaint under *Neitzke v. Williams*, 490 U.S. 319 (1989), is meritless and provides no basis for rehearing. Under *Neitzke*, a "patently insubstantial complaint" may be dismissed for want of subject-matter jurisdiction. *Id.* at 327 n.6. However, Tooley's allegations are a far cry from the sorts of fanciful allegations in complaints that are typically dismissed as "patently insubstantial." The standard for dismissal on that ground is that the allegations "must be 'essentially fictitious.'" *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994) (quoting *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974)). Applying that standard, courts have appropriately dismissed assertions of "bizarre conspiracy theories" involving "fantastic government manipulations of their will or mind," or "supernatural

intervention[s]" that epitomize "clearly fanciful claims . . . 'so attenuated and unsubstantial as to be absolutely devoid of merit." *Id.* at 330-31 (quoting *Hagans*, 415 U.S. at 536). In one such case, the plaintiff alleged that "'a Secret Branch of the Federal Government . . . took my Face off of my Head, went into my Scull & Put a Computer Chip of some kind & a Camera System which makes me Project Images or Pitchers, many Feet in Front of me.'" *Id.* at 330 n.3 (sic) (citation omitted).[4] Indeed, even the Government's own example is far more insubstantial that Tooley's claims; in *Richards v. Duke University*, 480 F. Supp. 2d 222 (D.D.C. 2007), the plaintiff alleged that Duke University, the federal government, and

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[4] *See also, e.g., DeGrazia v. FBI*, No. 08-3301, 2009 WL 624068, at *1 (3d Cir. Mar. 12, 2009) (plaintiff alleged that experiment caused his body to "combine with reptile DNA"); *Durham v. United States*, 215 Fed. Appx. 734, 735 (10th Cir. 2007) (plaintiff alleged that defendants "surgically implant[ed] 'optical electron microcircuits' in fillings in his teeth and utilizing the signals broadcast by these devices to monitor [plaintiff's] location and speech"); *Jacobs-Cardenas-Johnson v. City of Washington*, 587 F. Supp. 2d 113, 114 (D.D.C. 2008) (plaintiff alleged that "'[m]y DNA and future Embryo's are to become the United States Aerospace-Aeronautics future Astronauts of the United States of America'") (sic); *Alvarez v. Sept. 11 Comm'n*, No. 08 1819, 2008 U.S. Dist. LEXIS 86753, at *1 (D.D.C. Oct. 3, 2008) (plaintiff sought $999 trillion alleging defendants "tried to kill him by 'using UFO exotic weapons of laser tubs-technologies and military spionage known as ciber electronical brain monitors [] connected to my brain with laser cables'") (sic); *Roum v. Bush*, 461 F. Supp. 2d 40, 46 (D.D.C. 2006) (plaintiff alleged that doctors implanted a "GPS chip, biochip or roving wiretap(s)" into his body and that the FBI attempted to murder him by placing radioactive chemicals on his possessions in his home); *Bestor v. Lieberman*, No. Civ.A. 03-1470(RWR), 2005 WL 681460, at *1 (D.D.C. Mar. 11, 2005) (plaintiff alleged that "a system of neuroprosthetics was implanted in [plaintiff's] skull and brain" consisting of "'microscopic wires'" allowing remote operators to "induce image . . . sequences in plaintiff's brain," including images of Senators Kennedy and Lieberman).

various other institutions conspired to steal her ideas, move books around in her apartment, and alter her law review article "to make it appear that plaintiff was in fact homosexual." *Id.* at 228.

The claims dismissed in these cases, which are beyond the realm of scientific possibility and reasonable credulity, cannot seriously be compared to Tooley's allegations, which are grounded in this reality, are based in part on documented government actions, and simply require discovery and further factual development to prove or disprove. Rehearing to address the applicability of *Neitzke* to this case is entirely unwarranted.

II. THE PANEL OPINION WILL NOT HAVE AN EXCEPTIONAL PRACTICAL IMPACT

The Government cannot show that that this case involves a "question of *exceptional* importance" warranting rehearing *en banc*. Fed. R. App. P. 35(a)(2) (emphasis added). *Cf.* Reh'g Pet. 14-15 (arguing that the decision is of "substantial" importance). As the panel explained, the district court has many tools at its disposal to ensure that allowing Tooley to proceed with his claims will not trigger a flood of discovery or drain resources. The unexceptional nature of this case makes it unsuitable for *en banc* review, despite the Government's pleas to the contrary.

First, the panel's standing analysis was highly fact-specific, and its unlikely impact on future cases makes it a poor candidate for rehearing. *See Barbour v.*

Merrill, 68 Fair Empl. Prac. Cas. (BNA) 126, 126 (D.C. Cir. 1995) (Williams, J., concurring in the denial of rehearing *en banc*) ("Although the evidence . . . seems to me thin to the point of virtual invisibility, such an intensely fact-bound issue is unsuitable for *en banc* review."); *see also Doe v. Webster,* 991 F.2d 818, 818 (D.C. Cir. 1993) (statement of Wald, J.) (noting that a "fact-based issue does not normally warrant *en banc* consideration"). The panel acknowledged that, although Tooley's particular allegations taken as a whole satisfy the pleading standards of Rule 8, they lie at the outer bounds of plausibility. *See Tooley*, 556 F.3d at 840. And, of course, district courts retain ample authority to weed out implausible scenarios at the pleading stage and to "'limit the frequency or extent of discovery . . . if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit considering . . . the importance of the issues at stake in the action.'" *Tooley*, 556 F.3d at 841 (quoting Fed. R. Civ. P. 26(b)(2)); *see also Twombly*, 550 U.S. at 558 (concluding that "'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed'") (citation omitted).

Second, the panel stressed that Tooley will need to make more particularized showings as the litigation proceeds past the pleadings stage. "The burden on the plaintiff to show each element grows increasingly stringent at each successive stage of the litigation." *Tooley*, 556 F.3d at 838 (citing *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 561 (1992)). The panel reminded the Government that, "at the summary judgment stage, . . . the plaintiff can no longer rest on . . . mere allegations but must set forth specific facts by affidavit or other evidence." *Id.* (internal citations and quotation marks omitted). Therefore, the Government will be able to put Tooley's allegations to his proof as the litigation progresses.

Third, the panel acknowledged that, to the extent the government is concerned that discovery in these cases may reveal sensitive information, it can assert the state secrets privilege to limit discovery where appropriate. *See id.* at 841. The Government protests that "forcing the Executive Branch" to assert the privilege will prove too burdensome and unworkable, Reh'g Pet. 15, but its suggestion that this Court should cure that problem by changing the pleading standards is completely inappropriate. The Government's observation that asserting the state secrets privilege requires a "'formal claim of privilege,'" *id.* (citation omitted), demonstrates that the privilege is not supposed to be invoked casually, and the government should not be permitted to evade the formal invocation requirement by urging tighter pleading standards in particular cases. If the Government b elieves that it should be relieved of the burden of formally asserting the privilege in state secrets cases, that is a matter for Congress, not this Court, to consider.

In short, the Government's fear of excessive discovery burden is both

overblown and irrelevant to the pleading standard. Reh'g Pet. 14.

III. THIS COURT NEED NOT DELAY ITS RESOLUTION OF THIS PETITION

The Government further suggests that this Court stay its consideration of the petition pending the outcome of *Ashcroft v. Iqbal*, a case currently before the Supreme Court, on the off-chance that the Supreme Court will revisit the pleading standards. Reh'g Pet. at 3, 15. It is unlikely that the Supreme Court in *Iqbal* will overhaul the very standards it addressed two terms ago in *Twombly*, given that the petitioners in *Iqbal* have merely asked the Court to "apply the plausibility standard faithfully." Brief for Petitioners at 27, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Aug. 29, 2008). Even if *Iqbal*, which involves an assertion of qualified immunity, articulates a new standard to be applied in qualified immunity cases, such a standard would not apply here, because this case does not raise the same immunity-from-suit concerns.

In any event, whatever the outcome of *Iqbal*, its effect need not concern this Court in its consideration of the Government's petition. If *Iqbal* leaves the *Twombly* standard intact, there is no cause for rehearing. If, on the other hand, *Iqbal* announces a sea change in the pleading standards, the Government can always seek an order from the Supreme Court summarily granting certiorari, vacating the judgment, and remanding for reconsideration ("GVR"). *See, e.g.*, *Stutson v. United States*, 516 U.S. 193, 197 (1996) ("[A] GVR order guarantees to

the petitioner full and fair consideration of his rights in light of all pertinent considerations [and also] promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it."); *United States v. Vanorden*, 414 F.3d 1321, 1322-23 (11th Cir. 2005) (granting the government's GVR in light of *United States v. Booker*, 543 U.S. 220 (2005)). Finally, as a general matter, the possibility always exists that subsequent Supreme Court opinions will change course. If and when that happens, this Court will have ample opportunity in future cases to conform to the Supreme Court's new path.[5]

CONCLUSION

For the forgoing reasons, the Government's Petition for Rehearing or Rehearing *En Banc* should be denied.

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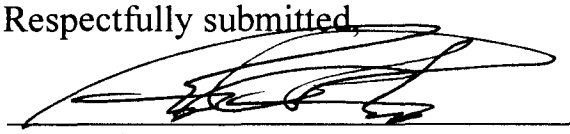
[5] The Government also argues—in a footnote—that the Court "should make clear that the district court is free to hold that Tooley's non-TSA watchlist claims are inextricably intertwined with TSA orders such that they belong in the court of appeals in the first instance." Reh'g Pet. 15 n.7. However, this Court should not grant rehearing merely to offer dicta.

DATED: May 8, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the original and nineteen (19) copies of the foregoing document described as:

AMICUS CURIAE'S RESPONSE TO APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

were hand-delivered to the Clerk of the Court.

Copies of the Amicus Curiae's Response to Appellees' Petition for Panel Rehearing and Rehearing En Banc were served by Federal Express (next business-day delivery), and courtesy copies of the Response were also sent by email, to the following:

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