No. 09-519

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

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EDWARD ALAMEIDA, WARDEN, ***Petitioner***

vs.

KEVIN PHELPS, ***Respondent***

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented For Review

Whether this Court's opinion in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), stands for the proposition that a supervening change in the law can never, under any circumstances, support a grant of relief from an erroneous judgment pursuant to Federal Rule of Civil Procedure 60(b)(6).

Parties to the Proceeding

Petitioner Edward Alameida is named herein in his official capacity, as a prison warden; the underlying party in interest is the State of California. Petitioner will accordingly be referred to as "the State" throughout this brief.

Respondent is not aware of any other potential parties to this proceeding.

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The district court, deciding an unsettled issue of law, held that Respondent Kevin Phelps was 15 days late in filing his habeas corpus petition under 28 U.S.C. §2254. As the Court of Appeals subsequently (and decisively) determined, the district court was wrong, and the petition actually was filed with 15 days to spare. But at the same time that a Ninth Circuit panel first clarified the law on that point, a different Ninth Circuit panel affirmed the district court's erroneous denial of Respondent's petition. Respondent sought relief pursuant to Federal Rule of Civil Procedure 60(b), but the district court denied it on the (again erroneous) ground that the Rule 60(b) motion constituted an unauthorized "successive habeas petition." After this Court made *that* error clear, in *Gonzalez v. Crosby*, 545 U.S. 524, 535-36 (1005), Respondent again sought Rule 60(b)(6) relief. He was again denied.

At that point, after more than a decade had passed without any hearing whatever on the merits of Respondent's habeas petition, the Ninth Circuit finally decided that what had

happened in this case was, frankly, a travesty. Paying very careful attention to the well-established principle that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6),"[1] the Court of Appeal concluded that this was, indeed the rare case in which "intervening developments in the law" – combined with other factors – justified relief under the Rule. Specifically, the Ninth Circuit looked at the factors emphasized in *Gonzalez v. Crosby*, and noted that the "intervening development" involved hitherto unsettled law (and *not* a change of an established rule), and that Respondent had been impeccably diligent in pressing his request for relief from the erroneous judgment. *Phelps v. Alameida*, 569 F.3d 1120, 1136-37 (9th Cir. 2009);[2] discussing, *Gonzalez v. Crosby*, 545 U.S. at 536-37.

The Ninth Circuit's opinion was unanimous, and not a single judge of the entire court voted to grant the State's "Petition for Rehearing *En Banc*."

The thesis of the State's *certiorari* petition is that the Ninth Circuit's ruling directly conflicted with this Court's precedent and the opinions of various other federal circuits because it premised Rule 60(b) relief, in part, on an intervening change in the law. But the only way in which the appellate opinion in this case is inconsistent with *Crosby* and its antecedents, or with the other comparable federal court opinions, is that the specific *outcome* was different – necessarily so, because it was based on the very specific and indeed

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[1] *Agostini v. Felton*, 521 U.S. 203, 239 (1997).

[2] The Ninth Circuit's opinion is set out in the "Appendix to Petition for Writ of Certiorari" (which we will cite as "App. at ___"), at pp. 1 -37.

extraordinary history of events in this particular case.

There is nothing about that unique, case-specific result that is worthy of this Court's attention, or the expenditure of this Court's time and resources. Even the arcane procedural question that gave rise to the entire dispute – the question of when certain state court determinations become final in *habeas* cases – has since been rendered moot by amendments to the state Rules of Court. See, Cal. Rule of Court 8.532 (replacing former Rule 24).

In fact, the only sense in which this case involves a conflict in the interpretation of federal law is that the approach to Rule 60(b)(6), put forward by the State, is a radical departure from the interpretation of that Rule reflected in this Court's precedent and adopted by the federal appellate courts. The State insists that the real meaning of the formulation "intervening developments in the law by themselves rarely constitute . . . extraordinary circumstances" is that such intervening developments can *never,* even in combination with other factors, support the provision of relief under Rule 60(b)(6).[3]

there is no support for the State's *per se* approach to such determinations in this Court's precedent – which has always emphasized a careful, case-specific inquiry into the circumstances presented by a Rule 60(b)(6) motion – and it certainly is neither compelled nor even commended by the opinion on which it is purportedly based, namely *Gonzalez v. Crosby*. It also conflicts with the opinions of every federal circuit court that has actually

[3]At various points in its petition, the State quotes the formulation set forth in *Agostini*, or other, similar statements regarding "extraordinary circumstances." But the petition, fairly read, does not propose anything short of a categorical, *per se* rule forbidding Rule 60(b) relief when it is premised, in whole or in part, on an intervening change in law.

considered the matter, and is impossible to square with the policies underlying the Rule.

Because the instant case involves the application of a settled rule to a truly unusual, and likely unique, set of circumstances, this is not an appropriate case for review on *certiorari.* Because the pending petition for writ of *certiorari* is not supported by the premises it invokes, either in policy or precedent, it should be denied. Because, in framing its petition, the State has not fairly recounted the proceedings in this case, and has misstated the federal appellate decisions on which it purports to rely, this Brief in Opposition is necessary under Supreme Court Rule 15.2.

Statement of the Case [4]

1. Respondent filed the underlying *habeas corpus* action in 1998, asserting that his conviction and consequent life sentence offended several provisions of the United States Constitution. Those claims have yet to be heard. The district court dismissed the case as untimely, based on its own, unprecedented interpretation of state court finality rules. Specifically, the district court concluded that, when the California Supreme Court denied a *habeas corpus* petition, such a denial was final upon filing, which meant that Respondent's federal *habeas* petition was filed 15 days late under the AEDPA statute of limitations.[5]

A panel of the Ninth Circuit approved the district court's interpretation and affirmed

[4]The procedural history of the case is reviewed in detail in the Ninth Circuit's opinion, App. at 5-13. It is briefly summarized here, for the Court's convenience.

[5]"AEDPA" is the popular name for the "Antiterrorism and Effective Death Penalty Act of 1996." Its statute of limitations is codified at 28 U.S.C. § 2244(d).

the dismissal in an unpublished opinion – but at almost exactly the same time a different Ninth Circuit panel reached the opposite conclusion and reversed a *habeas* dismissal on precisely the same issue. Another Ninth Circuit panel adopted Respondent's interpretation in reversing yet another *habeas* dismissal a few months later – but four days later the Court of Appeals nonetheless denied Respondent's petition for rehearing and suggestion of rehearing *en banc*. Some months after that, the Ninth Circuit adopted Respondent's interpretation in a published (and thus binding) opinion in yet another case, and that interpretation was subsequently adopted by the Ninth Circuit *en banc*. Thus, to the extent that there has ever been a *settled* federal interpretation of the question, it has been the one that Respondent advanced from the beginning: "the California Supreme Court's denial of a petition for collateral relief does not become final until thirty days after the denial is issued." *Allen v. Lewis*, 295 F.3d 1046 (9th Cir. 2002) (*en banc*) (*per curiam*).

Still, the fact that Respondent was right all along about an (initially) unsettled question of law did him no good. Nor did his extraordinarily diligent efforts to correct the error. To recount just some of the highlights of Respondent's endeavors: This Court denied his petition for *certiorari*. When he brought a motion seeking relief pursuant to Federal Rule of Civil Procedure 60(b), the district court denied it – again erroneously – as being an unauthorized successive habeas petition. The Ninth Circuit denied Respondent's appeal from that order, and denied his request for *en banc* review. After this Court held – in *Gonzalez v. Crosby*, 545 U.S. 524 (2005) – that a Rule 60(b) motion is *not* a "successive petition," Respondent renewed his Rule 60(b) motion in the district court, but was denied

again, and refused a certificate of appealability.

Finally, the Ninth Circuit granted a certificate of appealability, heard Respondent's appeal, and reversed the district court. The Court of Appeals held that – given there had not been any settled law to support the initial dismissal of his petition; given that the affirmance of that dismissal can be ascribed to nothing more than random happenstance (Respondent's sheer bad luck in drawing the one appellate panel that got the law wrong at the same time that other panels of the same court were getting it right); and given that Respondent himself had been unfailingly diligent in pressing the issue – Respondent's case presented the "exceptional circumstances" that warranted relief under Rule 60(b)(6).

In an unusual procedural move, the State did not petition the appellate panel for rehearing but instead appealed directly to the entire Ninth Circuit to grant rehearing *en banc*[6]. The State attacked the panel's opinion, asserting that it not only contravened this Court's opinions, but improperly overturned settled Ninth Circuit precedent and negated the holdings of the other circuit panels that had earlier ruled in this case.[7] The State's "Petition for Rehearing En Banc" was denied without any Ninth Circuit judge voting to grant it. (App. at 38).

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[6]The assertion in the State's *ceriorari* petition, that it sought and was denied "panel rehearing," is inaccurate. (See, Cert. Pet. at 8).

[7]The State pointedly singled out for opprobrium the circuit judge who authored the panel opinion – a tactic that it repeats in its *certiorari* petition, at pp. 6, 7, and 10.

2. A few aspects of the tendentious "Statement of the Case" set out in the State's *certiorari* petition bear comment. *First*, while the State devotes some paragraphs to discussing the underlying state criminal case in which Respondent was convicted – details that are of course immaterial to the procedural issues which were before the Ninth Circuit and are now tendered to this Court – it does so selectively. The State never mentions, for instance, that Respondent was tried *three* times on the underlying charges, or that the first two trials resulted in hung juries. And the State makes no mention whatever of the substantial federal constitutional claims contained in Respondent's federal *habeas* petition – claims which, if sustained, would demonstrate the unreliability of his conviction in that third trial. (See, App. at 5-6).

Second, in recounting the course of events in the Ninth Circuit, the State manages to omit that the initial (unpublished) disposition in that court, affirming the dismissal of Respondent's federal *habeas* petition, was decided at the same time that a different panel of the same court was considering precisely the same issue, and reached the opposite result. (See App. at 8-9, comparing *Phelps v. Alameida*, No. 99-15493 (9th Cir. May 8, 2000), *cert. denied*, 531 U.S. 1073 (2001); with *Washington v. Lindsey*, No. 99-55149 (9th Cir. May 4, 2008). Nor does the State deign to mention that (to quote the Ninth Circuit) "[t]hree months later, yet another panel of our court reached the same conclusions, also in an unpublished memorandum disposition." (App. at 9, citing, *Morgan v. Fairman*, No.99-55446 (9th Cir. Aug. 15, 2000). All of that activity pre-dated by a few months the first *published* Ninth Circuit decision on the issue – which again adopted the interpretation which rendered

Respondent's petition timely, and which was itself confirmed the following year by the *en banc* court. (App. at 9 & 15, discussing *Bunney v. Mitchell*, 262 F.3d 973; and *Allen v. Lewis*, *supra*).

This full history is significant, for it demonstrates that what happened in Respondent's case bears less resemblance to the orderly and reasoned process of adjudication on which the federal courts pride themselves, than it does to the outcome of a sloppy game of craps played in a cheap casino.

Third, the State tries to portray Respondent's Rule 60 motion as having presented a novel premise because it equated (for finality purposes) the "petition for review of denial of *habeas corpus*" filed by Respondent in the California Supreme Court with the "original petitions for writ of *habeas corpus*" filed in that court in the *Allen* and *Bunney* cases. (See, Cert. Pet. at 5). The State omits to mention that the state and federal courts – including, most notably, *this* Court – have treated those two procedural vehicles as having no discernable difference; in effect, they are two labels for the same thing. See, *Carey v. Saffold*, 536 U.S. 214, 224-25 (2002); discussing *In re Reed*, 33 Cal.3d 914, 918, n.2 (1983); accord, *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert denied* 529 U.S. 1104 (2000). The State also omits to mention that the Ninth Circuit specifically held, years ago, that there is no difference between the two vehicles for finality purposes.[8] *Biggs v. Duncan*, 339 F.3d 1045, 1047 (9th Cir. 2003). But the most significant omission from the State's statement of the

[8]The subsequent amendments to the California Rules of Court specify that the two vehicles are treated the same in regard to finality dates. Cal. Rule of Court 8.532(b)(2).

"facts" in this regard is that, in this very case, the State itself repeatedly insisted that the two different procedures "'*differ in name only*,'" and that "'the California Supreme Court treats them as *identical for all purposes*.'" (App. at 16-17 (quoting the State's briefs and argument in the district court) [emphasis by the Court of Appeals]). It is thus disingenuous for the State to pretend that the underlying finality issue in this case is any sense different from the issue presented to the various other Ninth Circuit panels and the Ninth Circuit *en banc* – all of which adopted the interpretation of the finality rule advanced by Respondent.

Why the Writ Should Be Denied

1. The underlying issue in this case involves the federal courts' interpretation of a California procedural rule that has since been repealed. More specifically, this appears to be the *only* case in which the Ninth Circuit interpreted that rule in the manner it did; in several identical cases (including some under consideration at the same time as this case) the same court adopted the opposite interpretation of the same procedural rule. The result can only be described as arbitrary and anomalous in the context of the contemporaneous and subsequent adjudication of the same issue in other Ninth Circuit cases. That the Ninth Circuit (belatedly) decided to bring the aberrant result in this case into line with the entire remaining body of its case law is hardly a matter of national interest – particularly since the only effect of that decision is that the *habeas* case will *begin* to be heard on its merits.

The State's argument, that this case is worthy of *certiorari* review, rests on a fiction – namely, that the Ninth Circuit deviated from established precedent by even considering whether the circumstances of this case were so extraordinary as to warrant relief under Rule

60(b). As noted above, and as will be discussed more thoroughly, there was nothing novel about the rule of decision or the analytical method employed by the Ninth Circuit in granting relief in this case. In truth, the State has nothing to complain about except that the appellate court, applying a mode of analysis well established in precedent, reached a *result* in this case that is different from the results reached on the facts of other, roughly similar (but clearly distinguishable) cases.

That simply is not a reason for this Court to devote its limited resources to reviewing the case – even if this Court would have reached a different result (and Respondent is confident that it would not). It is a commonplace that the Court does not accept cases merely for "error correction." See, *e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 422, n.1 (1995).

2. The core, and arguably the entirety, of the State's *certiorari* petition is its insistence that relief from an erroneous judgment, under Federal Rule of Civil Procedure 60(b)(6), can *never* be predicated on an intervening change (or clarification) of the law.

The State divines this rule from the second portion of *Gonzalez v. Crosby*, in which the Court considered whether it was appropriate to grant Rule 60(b)(6) relief to a *habeas* petitioner whose case had been dismissed on the basis of an interpretation of the pertinent statute of limitations, given that the interpretation in question was subsequently rejected by this Court in a different case. 545 U.S. at 536. The Court held that the subsequent change in the law was not sufficient, in and of itself, to justify Rule 60(b)(6) relief given (a) that the judgment had been "by all appearances correct under the Eleventh Circuit's then-prevailing

interpretation" of the pertinent law, and (b) Gonzalez's "lack of diligence in pursuing review of the statute-of-limitations issue."[9] *Id*. at 536-38.

It seems obvious that, if the State were correct, and an intervening change in the law could *never* support Rule 60(b)(6) relief, the Court would have just said so. Instead, the Court went on to discuss thoroughly the circumstances and history of that particular case, and to explain why those specific facts did not present "extraordinary circumstances" adequate to justify relief in that case. Under the State's reading of *Gonzalez*, the last few pages of Justice Scalia's opinion for the Court were merely *obiter dicta* – or, put more plainly, meaningless palaver.

Aside from this misbegotten attempt to invoke precedent that in fact does not support its position, the State offers no cogent explanation for why the *per se* rule it proposes is an appropriate interpretation of Rule 60(b)(6). As this Court has repeatedly taught: "The Rule does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,' while also cautioning that it should only be applied in 'extraordinary circumstances.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)); quoting, *Klapprott v. United States*, 335 U.S. 601, 614-615 (1949); and *Ackermann v. United States*, 340 U.S. 193 (1950). The State's *per se* approach would effectively eliminate that sensitive, balanced analysis in an entire class of cases – including

[9]In discussing *Gonzalez*, the State ignores the first factor (the extent to which the initial determination seemed clearly to be correct), and treats the second (regarding the diligence shown by the movant) and nothing more than a lengthy aside.

those, like this one, where there really are "extraordinary circumstances" that justify relief

The State offers no explanation as to *why* the Court should adopt the *per se* restriction on which the State insists, other than generally to invoke the policies of "finality" and "comity." But as the Court responded in *Gonzalez*, after reviewing the various pertinent portions of Rule 60(b):

> "The mere recitation of these provisions shows why we give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality. The issue here is whether the text of Rule 60(b) itself, or of some other provision of law, limits its application in a manner relevant to the case before us."

Gonzalez v. Crosby, 545 U.S. at 529. And the interest in comity is not served by the preservation of a judgment forever barring a state prisoner from presenting his federal constitutional claims, when that judgment was erroneous *ab initio* and functionally illegitimate. *See*, *Williams v. Taylor*, 529 U.S. 420, 437 (2000) [comity not served by improperly dismissing federal *habeas* petition as defaulted].

3. The last arrow in the State's quiver is the argument that the Ninth Circuit's opinion "stands alone" in its interpretation of Rule 60(b)(6), and conflicts with the interpretations essayed by all other federal appellate courts. The argument is simply not true.

The Ninth Circuit carefully surveyed the decisions of the other federal appellate courts, and harmonized its opinion with those decisions. (See, App. at 22-23 & nn. 16 & 17). Significantly, several of the precedents from those other Courts of Appeals helped mold the opinion issued in this case. See, App. at 29-34 (discussing, *Ritter v. Smith*, 811 F.2d

1398 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987); and *Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007)). Indeed, the guiding principal for the Ninth Circuit was the admonition in a Sixth Circuit case (yet another of those erroneously cited by the State), that:

> "'[while] a change in decisional law is *usually* not, by itself, an "extraordinary circumstance" meriting Rule 60(b)(6) relief . . . the decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the "incessant command of the court's conscience that justice be done in light of all the facts."'"

Stokes v. Williams, 475 F.3d 732, 736 (6th Cir. 2007) [original emphasis; citations omitted].

Similarly, the Eleventh Circuit considered and *explicitly rejected* the *per se* rule now advanced by the State – *i.e.*, "that a supervening change in the law can never present a sufficient basis for Rule 60(b)(6) relief," – and concluded instead that the pertinent "cases plainly allow Rule 60(b)(6) relief where there has been a clear-cut change in the law, [but] it is also clear that a change in the law will not *always* provide the truly extraordinary circumstances necessary to reopen a case." *Ritter v. Smith*, 811 F.2d at 1401 (emphasis by the court) [surveying cases]. Thus, the *Ritter* court looked to a number of factors to ascertain whether, *on the specific facts of that case*, Rule 60(b)(6) relief was appropriate. *Id*. at 1402-05. The Ninth Circuit specifically examined and applied those same factors – as well as the two outlined by this Court in *Gonzalez* – in determining that the standard for Rule 60(b)(6) relief was met here. (App. at 29-34).

To be sure, the results in the cited cases were different from the result in this case: In *Stokes*, the appellate court concluded that the appellant petitioner simply had failed to show "extraordinary circumstances" above and beyond the mere fact of a supervening change in

the law, while in *Ritter*, the court actually granted Rule 60(b)(6) relief – but granted it to the *state* in a capital case. But surely what is important in reviewing those cases is not their specific outcomes; rather it is the principles applied to reach those outcomes. And there is no principled basis for concluding that the Rule 60(b)(6) analysis applied in *Stokes* and *Ritter* would have precluded relief in the case at bench.

The other cases cited by the State do not make out the conflict that it proclaims. The principal opinion cited by the State, *Omar-Muhammad v. Williams*, 484 F.3d 1262 (10th Cir. 2007) simply denied Rule 60(b)(6) relief because the court could not perceive any basis in the facts and history of that case on which to distinguish it from *Gonzalez*. *Id*. at 1264-65. No *per se* rule was discussed, much less adopted. *Outler v. United States*, 485 F.3d 1273 (11th Cir. 2007) did not involve Rule 60(b) at all; rather, it merely held (by analogy) "that a mere change of law" did not in itself require equitable tolling of the AEDPA statute of limitations. *Id.* at 1281. The other case discussed by the State – *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007) – was inapposite for a mirror-image reason; although it did involve the application of Rule 60(b(6), it did not involve a supervening change in law, but merely cited *Gonzalez* in passing *dictum*.

None of those cases, and indeed none of the post-*Gonzalez* cases cited by the State, even considered adopting the rule that the State claims is required by *Gonzalez* – namely, that a subsequent change in the law can never constitute "extraordinary circumstances" for purposes of Rule 60(b)(6) relief. The issue, as such was never posed to those courts, and it is elementary that "[q]uestions which merely lurk in the record, neither brought to the

attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries v. Aviall Services*, 543 U.S. 157, 171 (2004); quoting, *Webster v. Fall*, 266 U.S. 507, 511 (1925).

To the limited extent that the lower federal courts have actually considered the matter since this Court decided *Gonzalez v. Crosby*, they have uniformly taken the view that there is no hard-and-fast rule against granting Rule 60(b)(6) relief on the basis of what this Court termed "intervening developments in the law." Rather, they have held, as the Ninth Circuit held in this case, that such developments can – very occasionally, and only under truly exceptional circumstances – warrant the relief afforded by the Rule.

That understanding of the law is congruent not only with *Gonzalez v. Crosby*, but with the entire arc of this Court's Rule 60(b) jurisprudence going back to shortly after the adoption of the Rule, more than sixty years ago. As the Court held then, and has frequently reiterated since:

> "In simple English, the language of the 'other reason' clause . . . vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Klapprott v. United States, 335 U.S. at 614-15. The artificial and arbitrary limitation that the State insists should be placed on that power is not compelled by the Court's decision in *Gonzalez*, is not justified by any pertinent public policy, and is not championed by any federal appellate decision. There is no conflict in the pertinent case law such as to require this Court's intervention.

Conclusion

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Dated: November 27, 2009

Respectfully submitted,

AJ KUTCHINS
Attorney for Respondent Kevin Phelps

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

EDWARD ALAMEIDA, Warden,

***Petitioner*,**

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KEVIN PHELPS,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I am a member of the United States Supreme Court bar. Pursuant to Supreme Court Rule 33.1(h), I hereby certify that the accompanying Brief in Opposition to Petition for Writ of Certiorari contains 4,488 words, excluding those parts described in Rule 33.1(d).

Executed on November 30, 2009, at Berkeley, California.

AJ Kutchins