Case No. 12-35266

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE INSTITUTE OF CETACEAN RESEARCH, a Japanese research foundation; KYODO SENPAKU KAISHA, LTD, a Japanese corporation; TOMOYUKI OGAWA, an individual; and TOSHIYUKI MIURA, an individual;

Plaintiffs-Appellants,

v.

SEA SHEPHERD CONSERVATION SOCIETY, an Oregon non-profit corporation; and Paul Watson, an individual,

Defendants-Appellees,

And,

SEA SHEPHERD CONSERVATION SOCIETY, an Oregon non-profit corporation,

Counterplaintiff,

v.

THE INSTITUTE OF CETACEAN RESEARCH, a Japanese research foundation; KYODO SENPAKU KAISHA, LTD, a Japanese corporation; and HIROYUKI KOMURA, an individual,

Counterdefendants.

Appeal from the United States District Court
for the Western District of Washington at Seattle
No. 2:11-cv-02043-RAJ
The Honorable Richard A. Jones

DEFENDANTS-APPELLEES'
PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION

Chief among the reasons to grant rehearing *en banc* is the majority's treatment of the issue of piracy in this case. From the opening sentences of its opinion, the majority condemned defendants as "pirates" – a task it was not asked to undertake. In so doing, the majority disregarded the issues presented for appeal, and contravened U.S. Supreme Court and Ninth Circuit law describing its "limited" duty to assess the sufficiency of plaintiffs' piracy claim. In effect, the majority assumed the role of fact finder, conclusively determining that defendants' acts constitute "piracy." In addition to rectifying these inconsistencies, rehearing *en banc* also provides the Court an opportunity to fully consider the proper scope of piracy claims. Piracy has gained increasing attention in the federal courts, and courts would benefit from additional guidance on this issue of national importance.

Rehearing *en banc* is also necessary to bring the disposition of this appeal into alignment with Supreme Court precedent concerning the four-part test for preliminary injunctive relief. In *Winter v. NRDC, Inc.* the high court clarified that a plaintiff must demonstrate a *likelihood* of irreparable harm, rejecting this Circuit's "possibility" threshold. 555 U.S. 7, 22 (2009). The majority ignored *Winter*, holding that plaintiffs met their burden by demonstrating defendants' acts "could" create a risk of danger. This holding muddies the waters of preliminary injunction jurisprudence and should be corrected to reflect *Winter*'s heightened standard.

Additionally, the majority misapprehended the implications of the doctrine of international comity on this case. That doctrine, as set forth in *Hilton v. Guyot,* 159 U.S. 113 (1895), gives the district court discretion to afford varying degrees of recognition to a foreign judgment. The majority refused to acknowledge the import of an injunction issued against plaintiffs-appellees by the Federal Court of Australia, without any finding of repugnancy or prejudice. This sharp rebuke of the doctrine of comity provides an additional basis for rehearing *en banc*.

Finally, and as recognized by Judge Smith in dissent, the majority's instruction that the case be reassigned on remand is inconsistent with this circuit's precedent in *United States v. Quach*, 302 F.3d 1096 (9th Cir. 2002), a decision in accord with other circuits. The majority failed to provide analysis of any "unusual circumstances" justifying reassignment under *Quach.* Uniformity among the circuits regarding reassignment is necessary to ensure the even administration of justice throughout the United States.

For these reasons, and in accordance with Fed. R. App. P. 35, defendants-appellants Sea Shepherd Conservation Society and Paul Watson (collectively "defendants") respectfully request rehearing by this Court *en banc*.

II. BACKGROUND

Paul Watson founded Sea Shepherd Conservation Society, an Oregon non-profit organization, in 1981. SER 11, 118. Sea Shepherd is dedicated to the

protection and preservation of marine wildlife around the world. SER 118-119. Among Sea Shepherd's conservation activities are its annual anti-whaling campaigns in the Southern Ocean, in which it seeks to interfere with plaintiffs-appellants' ("the Whalers") whaling operations. SER 119 ¶ 3. The Whalers claim their hunts are conducted for scientific research purposes and are permissible under Article VIII of the International Convention for the Regulation of Whaling.[1] ER 251-277; CR 1, Ex. 1. Defendants, along with many others around the world, dispute the need for lethal research methods and the value of the Whalers' "scientific" contributions, contending that the Whalers' hunt is conducted for commercial purposes. Defendants also dispute that the purpose of this lawsuit is to further safety at sea; rather, they maintain that the Whalers are motivated by a desire to continue whaling with impunity.

The Whalers sought a preliminary injunction in the district court on the basis of their freedom of navigation and freedom from piracy claims. CR 13. Defendants concurrently sought dismissal of the Whalers' claims under FRCP 12(b). CR 29. The district court concluded that the Alien Tort Statute, (28 U.S.C. § 1350), conferred jurisdiction over the Whalers' claims rooted in customary international

[1] The IWC, or International Whaling Commission is a global intergovernmental body charged with the conservation of whales and the management of whaling pursuant to the Convention. *www.iwc.int*. In 1986, the IWC imposed a global moratorium on all commercial whaling, but contracting member states may issue research permits authorizing lethal takings.

law and international conventions, but found it unlikely the Whalers will prove defendants have ever injured a member of their crew "or that Sea Shepherd is likely to injure a crew member in the future." The lower court also found the Whalers' piracy allegations were not within the scope the accepted definition of "violence" committed for "private ends," and dismissed that claim. This appeal followed.

III. ARGUMENT

Review of a decision regarding a preliminary injunction is "limited" and "deferential." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). The court does not review the underlying merits of the case. *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995). The majority's opinion presents little indication of deference or restraint, yet another factor weighing in favor of *en banc* review.

A. The majority failed to exercise any restraint in considering a 12(b) dismissal, contravening long-standing principals of appellate review.

The parameters of *de novo* review of a Rule 12(b) dismissal have long been established. The court of appeals' "limited task" is to determine whether the complaint states a claim upon which relief can be granted. *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 960 (9th Cir. 2009) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)) (internal quotations omitted). Plaintiff's allegations of material fact are taken as true, and are construed in the light most favorable to the

non-moving party. *Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1196 (9th Cir. 1998). The issue "is ***not*** whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer*, 416 U.S. at 236 (emphasis added). In other words, the *legal* sufficiency of a claim is tested. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). *See also Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1088 (9th Cir. 1976) (warning that the majority's factual determinations in reviewing a 12(b) motion to dismiss were "premature" and "unwarranted") (Browning, J., dissenting).

Here, the majority prematurely passed judgment on defendants, brazenly labeling them "pirates" before even stating the applicable standard of review. Slip Op. at 2. The majority's rash conclusions were made without due consideration for the seriousness of the piracy allegation or the complicated history of piracy claims under the ATS and the defining conventions.

The majority and district courts agreed that the United Nations Convention on the Law of the Sea ("UNCLOS"), art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397, and the Convention on the High Seas, art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 each provide that "piracy" is defined as illegal acts of violence committed for private ends. Slip Op. at 4. Beyond that, there is little authority regarding what constitutes "violence" or "private ends." Indeed, the Whalers failed

to even present a suggested definition for these terms in the district court. Appellees' Answering Brief, DKT #17, p. 48. The majority looked to those terms' ordinary meaning, stating that private ends are those "not taken on behalf of a state," (principally relying on journal articles), and also cited a thirty-year-old case from Belgium finding that environmental activism qualifies as a private end. *Id.* at 5. These authorities are hardly evidence of an internationally accepted definition.

When construing international agreements, such as the conventions at issue here, the court must consider context. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.") (citing 1 Restatement (Third) of Foreign Relations Law of the United States § 325(1) (1986)). There is no evidence the drafters of the High Seas Convention or UNCLOS had activities such as defendants' in mind when including piracy among those conventions' provisions.

Pirates have historically been described as *hostis humani generis*, or "an enemy of the human race." *U.S. v. Lei Shi*, 525 F.3d 709, 723 (9th Cir. 2008) (citing 4 Blackstone's Commentaries *71, 73). Thus, it is useful to consider whether the people generally would consider defendants enemies of all humankind. Defendants submit the likely answer to that question is "no." The majority concludes that private ends "include those pursued on personal, moral, or

philosophical grounds, such as Sea Shepherd's professed environmental goals." Slip Op. at 5. But those narrow "private ends" are seemingly at odds with the notion of *hostis humani generis*, since such ends may be pursued without targeting any particular enemy, or only one specific opponent, such as the Whalers.

The Fourth Circuit recently resolved a split within one of its districts regarding the proper scope of piracy claims. *U.S. v. Abdi Wali Dire*, 680 F.3d 446 (4th Cir. 2012). That court noted that the UNCLOS definition of piracy has been "reaffirmed" in recent years. 680 F.3d at 469. But that court's further discussion centered only on piracy as armed robbery at sea. *Id.* Even under the *Dire* court's more expansive view of piracy, it seems plain that defendants' activities fall outside the common understanding of piracy.

Moreover, and most troubling, the majority's opinion effectively convicted defendants of a crime without any due process or trial whatsoever. Domestic piracy crimes and actions under the ATS are both defined according to the law of nations. *See* 18 U.S.C. § 1651; 28 U.S.C. § 1350. The majority's judgment that defendants are pirates "without a doubt," under the law of nations definition paves the way for criminal sanction against defendants, a penalty normally imposed only after a trial by jury. This extreme action should be reversed on rehearing *en banc*.

B. The majority disregarded the second prong of *Winter v. NRDC*

In 2008, the U.S. Supreme Court reversed a decision of this Circuit affirming the grant of a preliminary injunction where the plaintiff had demonstrated only a "possibility" of irreparable harm. *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008). Deeming that standard "too lenient," the Court reiterated its standard that a plaintiff must show that "irreparable harm is *likely* in the absence of an injunction. *Id.* (emphasis original). *Winter* has since been adopted and applied in the Ninth Circuit. *See McDermott ex rel. NLRB v. Ampersand Publishing, LLC*, 593 F.3d 950, 957 (9th Cir. 2010) (noting that the court must follow *Winter* and describing its pre-*Winter* precedent as "defunct"); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (holding that "[t]o the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable."). Based upon the single finding that Sea Shepherd's tactics "could immobilize Cetacean's ships," the panel found the Whalers met the likelihood of irreparable harm prong, contravening *Winter*'s admonishment that a plaintiff must show irreparable injury is *likely*.

The majority cited *Harris v. Bd. of Supervisors of L.A. County*, 366 F.3d 754, 766 (9th Cir. 2004), to support its contention that "[a] dangerous act, if committed often enough, will inevitably lead to harm, which could easily be irreparable." Slip Op. at 10. But that reliance is misplaced. That passage of *Harris* referred to plaintiffs' allegations of harm to establish *standing* to bring their claims,

an inquiry which examines whether a plaintiff has alleged a concrete and particularized "injury in fact" coupled with claims of actual or imminent harm. 366 F.3d at 760. Additionally, the facts of *Harris* present a much clearer picture of potential injury. Plaintiffs in that case had demonstrated that the County's plan to close a county hospital and reduce beds in another facility would necessarily decrease plaintiffs' access to treatment for their chronic conditions. *Id.* at 756-57. Here, defendants do not dispute that bodily injury may constitute irreparable harm. Rather, they contend that the risk of that harm is simply far too remote to justify the extraordinary remedy of injunctive relief. Indeed, the district court explicitly found there was no credible evidence of injury resulting from Sea Shepherd's use of butyric acid (ER 43), flares or smoke bombs (ER 44), prop fouling ropes (ER 45), or from the physical contact between the Whalers' and SSCS's vessels (ER 45). While the majority found this history irrelevant, that view clearly ignores the laws of probability and *Winter*'s mandate that irreparable harm must at least be likely. If irreparable harm to the Whalers were truly likely, they could have demonstrated some incidence of injury occurring in the past ten years. But no such injury exists. *Cf. Winter*, 555 U.S. at 33 (noting that the fact the Navy had conducted sonar training for 40 years without a documented case of injury to a marine mammal counseled against injunctive relief).

C. The majority misapplied the doctrine of international comity as defined in *Hilton v. Guyot* and Ninth Circuit cases construing *Hilton*.

A district court's extension of comity to a foreign judgment is reviewed for abuse of discretion. *Avesta v. Petroutsas*, 580 F.3d 1000, 1009 (9th Cir. 2009). Having failed to identify any standard of review, the majority's examination of the district court's comity determination was incorrect from the start.

At issue was the district court's treatment of an injunction entered by the Federal Court of Australia against the Whalers,[2] enjoining them from hunting or otherwise harassing cetaceans in the Australian Whale Sanctuary. The Whalers have admittedly violated this injunction, but contend the injunction is of no effect because the United States does not recognize Australia's sovereignty claim over portions of the Sanctuary. Appellants' Opening Br., DKT #10, p. 44. The majority agreed, stating that the district court "misunderstood the Australian judgment, which addressed the legality of Cetacean's activities, not Sea Shepherd's" and that "It is for Australia, not Sea Shepherd, to police Australia's court orders." Slip Op. at 13. But the majority misapprehends the district court's comity analysis, and applies an overly simplistic view of the comity doctrine.

The history and application of comity was exhaustively discussed in *Hilton v. Guyot*, 159 U.S. 113 (1895). The doctrine is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."

[2] *See Humane Soc'y Int'l v. Kyodo Senpaku Kaisha, Ltd.*, 2008 FCA 3 (FCR January 15, 2008). SER 25.

Id. at 163-164. It is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience…." *Id.* at 164. This Court has recognized *Hilton's* admonishment that "[t]he merits of [a foreign judgment] should not, in an action brought in this country upon the judgment, be tried afresh." *Avesta*, 580 F.3d at 1011. But that is exactly what the majority did – it adjudged the Australian action according to U.S. law and various diplomatic statements.[3]

Instead, the majority should have focused on the process and judgment of the foreign court. *Hilton* at 202-203. The record in *Humane Soc'y* reveals plaintiff's efforts to make service of process upon Kyodo Senpaku, notes that the court was satisfied Kyodo was made aware of the suit, and states that Humane Society did not seek default, but proved all elements of its claim. SER 36-37. Therefore, the Australian suit met the procedural and due process prerequisites described in *Hilton.* 159 U.S. at 202-203.

The district court did not contravene or compromise any U.S. diplomatic positions as suggested by the majority.[4] Rather, it only gave a degree of "regard"

[3] These diplomatic materials (*see* Slip Op. p. 13) were the subject of the Whalers' Motion to Take Judicial Notice, DKT #11, May 5, 2012. Defendants opposed that motion. DKT #15. The majority did not rule on, or even mention, the merits of that motion in its opinion.

[4] In fact, it was the district court that inserted itself into matters of U.S. foreign policy, the exclusive territory of the executive branch. The majority relies upon the joint statements endorsed by the U.S. State Department and diplomatic notes as

for the Australian injunction and the Whalers' lack of respect for it. On this basis, the district court determined the Whalers' flouting of the injunction was an "impediment" to their request for equitable relief.[5] ER 39, 41, 47-48. Despite the majority's opposite view that comity amounts to full "deference" to the foreign judgment, precedents of this Court and the U.S. Supreme Court unmistakably contemplate such a judgment may be given varying degrees of effect. *See Hilton*, 159 U.S. at 227 ("The reasonable, if not necessary, conclusion appears to be that judgments rendered in France … are not entitled to full credit and conclusive effect … but are prima facie evidence only….); *Avesta*, 580 F.3d at 1010 ("The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by the 'comity of nations.'") (internal citation omitted); *Dependable Hwy. Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067 (9th Cir. 2007) ("The term 'summarizes in a brief word a complex and elusive concept--the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding….'") (citing *Laker Airways Ltd. v.*

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evidence of the U.S.'s position regarding defendants' anti-whaling activities. Slip Op. at 12-13. But the majority also ignores portions of the statements condemning the Whalers' "so-called" research whaling and noting that lethal methods are not necessary. By selectively seizing upon only portions of these documents, and affirmatively finding the legality of the Whalers' activities irrelevant, the majority takes a position contrary to that of the Executive, effectively creating its own foreign policy position.

[5] The Whalers' utter disregard for the Australian injunction also figured into the district court's unclean hands analysis. (*See* ER 46-48).

Sabena Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984)). Clearly comity is not an "all or nothing" proposition.

Contrary to the majority's opinion, affording the Australian injunction a degree of regard does not implicitly recognize Australia's jurisdiction. Slip Op. at 13. Even if it did, this Court recognized in *Yahoo! v. La Ligue Contre Le Racisme* that American courts sometimes enforce judgments that conflict with American public policy. 433 F.3d 1199, 1215 (9th Cir. 2006). Unless the underlying substantive law of the foreign judgment is so "repugnant to fundamental principles of what is decent and just" that it is prejudicial, comity applies. *Id.* There are no allegations of prejudice here; comity should apply.

The majority's overly narrow view of the comity doctrine invites disharmony among nations and between litigants relying upon valid foreign judgments in U.S. litigation. An *en banc* court should reexamine the majority's treatment of this issue.

D. Contrary to the requirements of this and other circuits, the majority did not find "unusual circumstances" justifying reassignment.

The Ninth Circuit employs a three-part analysis to determine whether to remand a case to a different district judge:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would

> entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

U.S. v. Wolf Child, 699 F.3d 1082, 1102 (9th Cir. 2002). Other circuits apply the same rule.[6] The majority did not cite or apply *Quach* or any similar standard, concluding only that "The district judge's numerous, serious and obvious errors … raise doubts as to whether he will be perceived as impartial…." and that "[t]he appearance of justice would be served if the case were transferred…." Slip Op. at 15. Dissenting, Judge Smith correctly observed that reassignment was previously reserved "for only the most egregious cases." *Id. and see* note 1.

The district court's reasoned order denying the Whalers' motion for preliminary injunction reveals no suggestion of any undue sympathy to defendants. Indeed, Judge Smith found "no evidence" to suggest the district court found for Sea Shepherd for an improper purpose such as bias or prejudice. Slip Op. at 16. In fact, the district court had strong words for defendants, noting that their methods are the "target of international scorn" and are condemned by the IWC and IMO, (ER14-15), sternly cautioning that "the court suggests no approval of Sea Shepherd's methods or its mission." ER 48).

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[6] *See, e.g., U.S. v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir. 1991); *Hamad v. Woodcrest Condo Ass'n*, 328 F.3d 224, 239 (6th Cir. 2003);; *U.S. v. Awadallah*, 436 F.3d 125, 135 (2d Cir. 2006); *Sovereign Mil. Hospitaller Order of St. John v. The Fla. Priory of the Knights*, 702 F.3d 1279, 1297 (11th Cir. 2012).

Moreover, reassignment would no doubt create significant waste on remand. This case, in the district court's estimation, is "extremely complicated" -- unlike any other he has witnessed from the bench. SER 126. The district court specifically noted that the motion for preliminary injunction and motion to dismiss alone consumed nearly two weeks' of the court's time and resources (ER 16). Consequently, reassignment would require a great investment of time and effort by the new judge to become acquainted with the parties, facts, and claims.

Because the record is devoid of evidence the district judge will be unable to properly apply the law on remand, there is no sound reason to remove him from this case. As written, the opinion opens the door to reassignment on a whim, which could result in significant disruption and delay in the adjudication of civil and criminal matters in the U.S. district courts. Additionally, the majority's relaxed "appearance of justice" rule creates the potential for disparate standards in individual circuits and districts, and therefore the possibility of forum shopping. Rehearing should be granted to correct the majority's unfounded reassignment.

IV. CONCLUSION

Put simply, the majority went far beyond appellate review, substituting its own view about the proper outcome of this dispute. Assuming the role of fact finder, the majority contravened firmly established rules regarding the test for preliminary injunctions and the proper inquiry on 12(b) dismissals. The majority

further overstepped its bounds by cavalierly labeling defendants "pirates" without due consideration for the proper definition of that term or the repercussions of its judgment. For these reasons, and those set forth more fully above, defendants-appellees Paul Watson and Sea Shepherd Conservation Society respectfully request rehearing *en banc*.

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 11, 2013

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