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 nonprofit corporation, and PAUL WATSON, an individual,

Defendants-Appellees,

and

SEA SHEPHERD CONSERVATION SOCIETY, an Oregon nonprofit 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 Order Denying Motion for Preliminary Injunction and Order Dismissing Claim of Piracy of the U.S. District Court for the Western District of Washington at Seattle
District Court No. 2:11-cv-02043-RAJ
The Honorable Richard A. Jones

APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

Date of Opinion: February 25, 2013
Panel Members: Kozinski; Tashima; M. Smith, CJJ

(Counsel listed on inside cover.)

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INTRODUCTION

Defendants' Petition for Rehearing En Banc (Dkt. No. 62) ("Petition") does not identify how the panel's *unanimous* decision[1] to reverse the district court's denial of plaintiffs' motion for preliminary injunction to ensure their safety in the Southern Ocean conflicts with any decision of the United States Supreme Court or of this Court. Nor does the Petition state any "question of exceptional importance." Consequently, the Petition fails to satisfy the exacting standards of Fed. R. App. P. 35(a) and (b) and should be denied.

ARGUMENT

Plaintiffs will address each argument of the Petition in the order presented in the Petition.

I. The panel's reversal of the district court's "piracy" ruling does not conflict with any decision of any appellate court and was derived through application of settled principles of law.

In exercising de novo review of the district court's interpretation of the controlling language of the applicable treaties,[2] the panel concluded that the

[1] Throughout the Petition, defendants erroneously characterize the decision of the panel on the merits of the appeal as the "majority's treatment" or the "majority disregarded." *E.g.*, Petition at 1 (first and third sentences). While one member of the panel dissented on the issue whether to transfer the case on remand to a different district court judge, the decision of the panel on the merits of the appeal was unanimous.

[2] United Nations Convention on the Law of the Sea ("UNCLOS"), art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397; Convention on the High Seas ("High Seas Convention"), art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

evidence before the district court established that defendants committed acts of "violence" for "private ends" in contravention of the treaties. The panel engaged in a standard interpretive analysis and relied upon numerous legal authorities. Opinion (Dkt. No. 50) at 3-6. Defendants do not address or distinguish those legal authorities, other than to casually dismiss them as "hardly evidence of an internationally accepted definition." Petition at 6. This does not comport with Fed. R. App. P. 35(a)'s command that a petition show how the panel's decision "conflicts" with controlling authority in a manner that requires en banc consideration to "secure or maintain uniformity of the court's decisions."

Instead of demonstrating a "conflict" with controlling authority, defendants argue that the standard the panel should have employed in interpreting the applicable treaties is "to consider whether the people generally would consider defendants enemies of all humankind." Petition at 6. The notion that "opinion polls" should be the new standard for treaty interpretation is unsupported by citation to any authority.

Defendants' complaint that they have been branded as pirates "without a doubt" or "effectively convicted" of piracy (Petition at 7) is both exaggerated and taken out of context. The panel only reversed the district court's refusal to grant a preliminary injunction, despite being presented with evidence of acts constituting

piracy under international law. If they want it, defendants will still have their "day in court" on remand with a trial on the merits of plaintiffs' claims.

II. The panel did not "disregard" *Winter v. NRDC*.

Defendants' argument that the panel "disregarded" *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (Petition at 7-9), is merely a reprise of an argument that the panel already considered and rejected. *See* Opinion at 10. Relying on uncontradicted evidence that plaintiffs' ships could be immobilized in dangerous waters as a result of defendants' tactics, the panel concluded, unremarkably, that "A dangerous act, if committed often enough, will inevitably lead to harm, which could easily be irreparable." *Id.* In reaching this conclusion, the panel applied settled Supreme Court authority that establishes that a party seeking a preliminary injunction need not have been injured to obtain injunctive relief. *See Helling v. McKinney*, 509 U.S. 25, 33-34, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event.").

The panel's "common sense" conclusion that repeated performance of a dangerous act "will inevitably lead to harm" is but an application of *Winter*'s

"likely" harm standard. Defendants say the panel ignored the "laws of probability." Petition at 9. To the contrary, the panel's assessment of probability based on the findings of the district court about "obvious hazard[s]" and "highly likely" collisions differed from that of the district court. Opinion at 10.

This Court is often called upon to apply the *Winter* standard, a standard that is fact- and context-dependent, as this case demonstrates. Every application of *Winter* is subject to the claim that it should be applied differently, but that does not satisfy the requirements for en banc review. Defendants simply do not show how the panel's decision "conflicts" with controlling authority in a manner that requires en banc consideration to "secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a).

III. The panel did not "misapply" the doctrine of comity.

Defendants argue that the panel "misapplied" the doctrine of comity, that its analysis was "incorrect from the start," and that it applied "an overly simplistic view of the comity doctrine." Petition at 9-10. Again, these *arguments* do not satisfy Fed. R. App. P. 35.

Defendants fail to address or to contest the panel's core conclusion that comity did not apply because the United States does not recognize Australia's claim to sovereignty over the waters at issue. Opinion at 13. Defendants relegate to a footnote (Petition at 11 n.3) that they opposed the panel's taking judicial notice

of the fact that the United States does not recognize Australia's claim to sovereignty over the waters at issue. Then defendants claim the panel "did not rule on, or even mention, the merits of that motion" in its decision. *Id.* Perhaps the panel did not do so (explicitly) because defendants' counsel conceded the point at oral argument.[3]

In any event, defendants do not now claim (nor could they) that the panel's conclusion that the district court's decision "implicitly recognize[d] Australia's jurisdiction, in contravention of the stated position of our government" (Opinion at 13) "conflicts" with any controlling authority. Instead, defendants argue only that the panel might have reached a different conclusion because "sometimes" courts do. Petition at 13.[4] Moreover, even assuming that defendants'

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[3] COURT: But we also do not recognize Australia's jurisdiction over that area, do we?

HARRIS: We do not recognize Australia's jurisdiction over that entire area. We do recognize Australia's jurisdiction over part of it.

Oral Argument at 30:28, Institute of Cetacean Research, et al. v. Sea Shepherd Conservation Soci, et al. (Oct. 9, 2012) (No. 12-35266), *available at* http://www.ca9.uscourts.gov/media/view.php?pk_id=0000009597.

[4] The only case defendants cite for their argument is *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006). There, a sharply divided en banc panel discussed whether a French injunction was capable of enforcement under California law under a "repugnancy" standard, a matter left undecided in the case. The issue the panel decided in this case was not whether the Australian judgment was "repugnant" to any domestic law but, rather, whether a U.S. court could give recognition of *any* kind or degree to a decision of an Australian court if to do so would give recognition to Australia's sovereignty over

assertion were legally correct, it would still show that courts could "sometimes" reach the conclusion the panel did. That sort of decision does not warrant en banc review.

IV. A discretionary decision to transfer this action to a new district judge on remand does not warrant en banc review.

Defendants argue that the panel majority did not apply "any" standard in determining that this action should be transferred to a different district judge on remand. Petition at 14. To the contrary, the panel majority determined that the "district judge's numerous, serious and obvious errors identified in our opinion raise doubts as to whether he will be perceived as impartial in presiding over this high-profile case. *The appearance of justice* would be served if the case were transferred . . . ." Opinion at 15 (emphasis added). The "appearance of justice" standard is the applicable standard. *United States v. Wolf Child*, 699 F.3d 1082, 1102 (9th Cir. 2012). Defendants disagree not with the standard applied but with the majority's discretionary application of that standard. That is not a basis for en banc review. Fed. R. App. P. 35(a).

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waters that the United States has determined are waters over which Australia has no sovereignty. On that issue, the law applied by the panel is settled and *not* questioned by defendants.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

DATED: March 20, 2013

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s/ John Neupert

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CERTIFICATE OF COMPLIANCE WITH PAGE OR TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the page or type-volume limitation of Ninth Circuit Order Docket No. 63 because it does not exceed 15 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

s/ John Neupert
John F. Neupert, P.C.
Of Attorneys for Plaintiffs-Appellants

Dated: March 20, 2013

9th Circuit Case Number(s): 12-35266

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s/ John Neupert
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