No. 01-55182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CITY OF LOS ANGELES, BOARD OF POLICE COMMISSIONERS,
LOS ANGELES POLICE DEPARTMENT,

Applicant in Intervention-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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UNITED STATES OF AMERICA,

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CITY OF LOS ANGELES, BOARD OF POLICE COMMISSIONERS,
LOS ANGELES POLICE DEPARTMENT,

Defendants-Appellees

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JURISDICTIONAL STATEMENT

The district court has jurisdiction over the underlying action pursuant to 28 U.S.C. 1331. The district court denied the Appellant's motion to intervene on January 5, 2001. The Appellant filed a timely notice of appeal on January 17, 2001. Fed. R. App. P. 4. The denial of a motion to intervene as of right is a final appealable order, *Donnelly* v. *Glickman*, 159 F.3d 405, 409 (9th Cir. 1998), and this Court therefore has jurisdiction to hear the appeal on that issue pursuant to 28 U.S.C. 1291. The denial of a motion for permissive intervention is appealable only

if the district court abused its discretion in denying the motion to intervene. *Donnelly*, 159 F.3d at 411.

ISSUE PRESENTED

Whether the district court erred in denying the Appellant's motion for intervention as of right and for permissive intervention.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. This case arises out of a suit filed on November 3, 2000, by the United States Department of Justice against the City of Los Angeles, California, the Los Angeles Board of Police Commissioners, and the Los Angeles Police Department ("LAPD"). The suit alleges that the defendants engage in a pattern or practice of depriving individuals of constitutional rights through the use of excessive force, false arrests, and improper searches and seizures (R. 1, Complaint, at 2).[1] The suit was filed under 42 U.S.C. 14141, which makes it unlawful for "any governmental authority * * * to engage in a pattern or practice of conduct by law enforcement officers * * * that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," and gives the Attorney General of the United States the power to bring a civil action to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."

The parties opted to settle the dispute through the mechanism of a consent decree, which they lodged in the district court the same day the United States filed

[1] References to "R. _" are to the docket number of documents filed in the district court. References to "Br. _" are to pages in the Appellant's opening brief.

the complaint. The stated purpose of the consent decree is to "provide for the expeditious implementation of remedial measures, to promote the use of the best available practices and procedures for police management, and to resolve the United States' claims without resort to adversarial litigation" (R. 3, Decree, at ¶ 6). The district court has not yet entered the decree.

2. The proposed consent decree does not enjoin the League or any specific police officers from engaging in any behavior. The decree enjoins the LAPD and the City to adopt and implement certain management practices and procedures that will stem the pattern or practice of constitutional violations identified by the United States (R. 3, Decree, ¶¶ 1-2).

The decree specifically protects the League's bargained-for and bargaining rights. Paragraph 8 of the proposed decree states:

> Nothing in this Agreement is intended to: (a) alter the existing collective bargaining agreements between the City * * * and LAPD employee bargaining units; or (b) impair the collective bargaining rights of employees in those units under state and local law. The parties acknowledge that as a matter of state and local law the implementation by the City of certain provisions of this Agreement may require compliance with the meet and confer process or consulting process. The City shall comply with any such legal requirements and shall do so with a goal of concluding any such processes in a manner that will permit the City's timely implementation of this Agreement. The City shall give appropriate notice of this Agreement to affected employee bargaining units to allow such processes to begin as to this Agreement as filed with the Court.

(R. 3, Decree, at ¶ 8). Paragraph 184 of the proposed decree further explicates the manner in which the decree honors the state and local law that protects the collective bargaining rights of LAPD bargaining unit employees. Initially,

paragraph 184(a) explains the procedures by which the City and the League shall determine whether specific provisions of the proposed decree are subject to the "meet and confer" or "consulting" processes mandated by state labor law (R. 3, Decree, at ¶ 184(a); see Cal. Gov't Code §§ 3504.5, 3505). As part of that procedure, the proposed decree provides that, if the City and the League cannot reach an agreement on the issue of what provisions are subject to collective bargaining, "the City shall seek declaratory relief from [the district court] to resolve such issue, provided that such bargaining unit shall receive notice and an opportunity to be heard by the Court on this issue" (R. 3, Decree, at ¶ 184(a)). Once the City and the League determine what topics are subject to the "meet and confer" process, the remaining subparts of paragraph 184 instruct that the City "shall continue" with the meet and confer process as mandated by state law.

The decree then provides a mechanism through which the City and the United States may jointly move the district court to modify the consent decree if the collective bargaining process between the League and the City or any agreements reached or actions taken pursuant to that process will "impair the City's ability timely to implement" any provision of the decree (R. 3, Decree, at ¶ 184(c)). Paragraph 184 further provides that, in the event that the collective bargaining process, or any agreements reached or actions taken pursuant to that process, will impair the City's ability timely to implement provisions of the decree, and the City and the United States are unable to agree on a proposed decree modification, "the City shall so report to the [district court] and shall seek appropriate declaratory or

injunctive relief" from the district court (R. 3, Decree, at ¶ 184(c)). The decree instructs that, in resolving such disputes, the district court shall consider "whether the City has satisfied its labor relations obligations under state and local law" (R. 3, Decree, at ¶ 184(d)). Finally, if the results of the collective bargaining process between the League and the City will preclude meaningful implementation of provisions of the consent decree, and the parties are unable to agree on an appropriate decree modification, the United States may move for dissolution of the decree and proceed with the underlying lawsuit (R. 3, Decree, at ¶ 184(e)).

3. On December 9, 2000, the League moved to intervene in this action, claiming a right (1) to dispute the underlying allegations in the Complaint, (2) to protect the collective bargaining agreement between the City and the League against alleged infringement by the decree, and (3) to prevent violations allegedly imposed by the decree of officers' constitutional rights and certain rights under state laws[2] (R. 22, Motion to Intervene, at 12).

After holding a hearing on the motion on December 19, 2000 (R. 47, R. 51), the district court denied the motion to intervene on January 5, 2001 (R. 58, Order Denying the Los Angeles Police Protective League's Motion to Intervene). In that order, the court ruled that the League did not have a right to intervene – as of right

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[2] On November 8, 2000, the League also filed a separate complaint seeking declaratory and injunctive relief invalidating 42 U.S.C. 14141 and preventing the United States, the City of Los Angeles, and the LAPD from entering the proposed decree. The district court dismissed the complaint *sua sponte* for failure to state a claim or controversy, and the appeal from that dismissal is now pending before this Court (No. 01-55084).

or by permission – either in the merits of the underlying litigation or with respect to the adoption and implementation of the proposed consent decree (R. 58 at 11-12). The League filed a notice of appeal on January 17, 2001 (R. 64). On the same day, the League filed a motion for a stay pending appeal in the district court (R. 65), which was denied on February 9, 2001 (R. 86). On February 20, 2001, the district court formally granted the League amicus curiae status and invited it to submit a memorandum to the court "addressing any issue(s) that they see fit regarding the negotiated consent decree" (R. 88, Order re: Amicus Briefing, at 2). The League presented its concerns to the district court in the form of an amicus brief on March 16, 2001 (R. 103). On March 12, 2001, the League filed a motion for a stay pending appeal in this Court. This Court denied that motion on April 16, 2001.

SUMMARY OF ARGUMENT

In order to intervene as of right in an existing lawsuit, a party must demonstrate, *inter alia*, that it has a legally protectable interest that is in danger of being injured in some tangible way if the party is not permitted to intervene to protect that interest. The Los Angeles Police Protective League has failed to demonstrate that it has any legally protectable interest in the merits of the underlying litigation between the United States, the LAPD, and the City of Los Angeles. Moreover, it has failed to demonstrate that any legally protectable interests it has in its existing collective bargaining agreement and in its state law bargaining rights are likely to be harmed in any way by the adoption and implementation of the proposed consent decree in this case. Absent these

showings, the League is not entitled to intervene as of right under Federal Rule of Civil Procedure 24(a) in this action.

Similarly, the League has failed to demonstrate that the district court abused its discretion in denying its motion for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). The district court's determination that allowing such permissive intervention would both unduly delay the litigation and interfere with judicial economy was well within the court's sound discretion.

ARGUMENT

This Court reviews the denial of a motion to intervene as of right de novo. *Donnelly* v. *Glickman*, 159 F.3d 400, 409 (9th Cir. 1998). This Court reviews the denial of a motion for permissive intervention for an abuse of discretion, and must dismiss the appeal if it finds no such abuse. *Id.* at 411.

I. THE LEAGUE IS NOT ENTITLED TO INTERVENE AS OF RIGHT

An applicant wishing to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) must demonstrate that:

> (1) it has a "significant protectable interest" relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

Donnelly v. *Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Although this Court generally interprets these requirements broadly, *ibid.*, the League has failed to

satisfy this standard.[3]

A. *The League Has No Right To Intervene In The Merits Of The Underlying Litigation*

The League claims that it "is foremost seeking intervention based on its right to defend itself against the allegations alleged in the underlying complaint" (Br. 11). However, because the League does not have a significant protectable interest in the merits of the underlying cause of action, it has failed to satisfy its burden of establishing that it is entitled to intervene as of right. This Court has held that an "applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly*, 159 F.3d at 409. The League has failed to assert any protected interest that is implicated by resolution of the lawsuit underlying this action.

No allegations have been leveled against the League and neither it nor its members will be subject to the injunctive powers of the court if the proposed decree is entered. The underlying lawsuit in this case was filed by the United States against the City, the Police Department, and the Board of Police Commissioners; it was not filed against the League or any of the individual officers who are members of the League. Nor does the proposed consent decree run against the League or any individual officers. As the district court found, the proposed

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[3] The United States does not dispute the district court's finding that the League's motion to intervene was timely filed.

decree does not "enjoin the LAPPL or its members from engaging in any activity," and the United States has conceded "that police officers would not be subject to contempt" under the decree (R. 58 at 8 & n.3). Thus, the League has failed to identify any protectable interest implicated by the mere fact that the parties to this lawsuit have opted to settle the suit through the mechanism of a consent decree. See *Donnelly*, 159 F.3d at 410 ("An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant.").

To the extent that the League might have a right to defend individual officers against any allegations of misconduct that could arise in a full trial on the merits, that right is not implicated at this point because the parties intend to settle this litigation with a consent decree, obviating the need to address any actions of individual officers. There is absolutely no danger that any individual officer will be identified, let alone prosecuted, as a wrong-doer in this action, unless the consent decree is not entered and the litigation goes forward. Because such a possibility is purely speculative at this point, the League's claim that its rights are implicated in this suit are premature and unripe. As this Court has held, "[w]hen an applicant's purported interest is so tenuous, intervention is inappropriate." *Donnelly*, 159 F.3d at 411.

B. *The League Has No Right To Intervene In The Implementation Of The Consent Decree*

The League also argues (Br. 15) that, even if it does not have an interest in

the merits of this action, it does have a sufficient interest in the remedy to permit intervention as of right because the proposed consent decree will allegedly interfere with the League's state law bargaining rights and with the League's Memorandum of Understanding (MOU), the collective bargaining agreement governing the terms and conditions of employment of the rank and file members of the LAPD. We agree with the district court that the League has rights, guaranteed by state laws and general contract principles, to negotiate about terms and conditions of employment of rank and file police officers in Los Angeles, and to rely on the collective bargaining agreement that results from those negotiations. See *W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 771 (1983); Cal. Gov't Code 3500, *et seq.* However, those rights do not give rise to a concomitant right to intervene in this case because the League has failed to demonstrate that the entry and implementation of the consent decree will necessarily impair those rights.

To the extent that the League's bargaining and bargained-for rights may, in the abstract, rise to the level of "legally protectable interests" sufficient to justify intervention as of right under Rule 24(a), they do not rise to that level in this case. This Court has held that where "the injunctive relief sought by plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests, that party satisfies the 'interest' test of Fed. R. Civ. P. 24(a)(2)." *Forest Conservation Council* v. *United States Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir, 1995). The proposed consent decree in this case will not have any direct or immediate effect upon the League's rights, and, indeed, will likely never have any

harmful effect upon those rights at all. It is clear that parties to a consent decree may not bargain away the rights of third parties. *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 529 (1986) ("Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement."). The parties to this proposed consent decree have not attempted to harm or dispose of the rights of any third party, particularly collective bargaining agreement signatories like the League, and in fact have endeavored to protect those rights explicitly in the terms of the decree itself.

As explained above (pp. 3-5), according to the very terms of the proposed decree, the League is entitled to participate to the full extent provided under state law in order to safeguard its legally protected collective bargaining rights. The decree expressly states that nothing in the decree "is intended to: (a) alter the existing collective bargaining agreements between the City * * * and LAPD employee bargaining units; or (b) impair the collective bargaining rights of employees in those units under state and local law" (R. 3, Decree, at ¶ 8). In addition, the decree requires that, before any provision in the decree that might affect the terms or conditions of employment of police officers may be implemented, the City must initially work with the League to determine which sections of the decree are subject to the meet and confer process. The City must then continue with the meet and confer process with respect to those provisions of the decree until either the League and City agree on the collective bargaining issues

or the process reaches a point where it will "impair the City's ability timely to implement" any provision of the decree[4] (R. 3, Decree, at ¶ 184(c)). At that point, the City must notify the district court of the situation and seek appropriate declaratory or injunctive relief,[5] at which point the League obviously will be heard as the court considers "whether the City has satisfied its labor relations obligations under state and local law" (R. 3, Decree, at ¶ 184(d)).

As the district court found (R. 58 at 10-11), the League has not shown that the proposed decree would directly modify or invalidate its collective bargaining agreement. The League continues to assert, however, that it "has an interest in the proposed Decree as implementation of the Decree will infringe on rights protected

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[4] In addition, the proposed decree recognizes that *state law itself* provides that if, after meeting and conferring in good faith, the City and the League reach an impasse and then exhaust state law impasse procedures, the City may unilaterally implement a change in a term or condition of employment if that change is the last, best, and final offer the City made during the mandatory bargaining process. Cal. Gov't Code 3505.4, R. 3, Decree at ¶ 184(f).

[5] The League contends (Br. 21) that the proposed decree does "not provide for impasse resolution procedures pursuant to [California Government] Code § 3505 or the City's own Employment Relations Resolution." Again, this unsupported and speculative allegation misstates the provisions of the consent decree. Paragraph 184 of the decree provides that the City shall engage in the meet and confer process until such time as either a resolution is reached or the lack of a resolution will "impair the City's ability timely to implement" any provision of the decree, at which point the City shall seek "appropriate declaratory or injunctive relief" from the district court (R. 3, Decree, at ¶ 184(c)). Nothing in this mechanism instructs the City to forego the state law impasse resolution procedures – if the City and the League are able to employ those procedures in a timely fashion, they will be employed. If not, the issue may be presented to the district court. Any present claim that this process will injure the League is entirely speculative and dependent on numerous contingencies, which may or may not come to pass.

by the MOU and California law" (Br. 16). Throughout this litigation, the League has made repeated vague allegations such as this, which clearly evince the League's lack of understanding of how the proposed decree will operate. Nothing in the proposed decree will in any way impose a unilateral change in a condition of employment governed by the existing MOU.[6]

The only possible scenario under which the City might forego some portion of the bargaining process guaranteed to the League under state law requires a chain of contingencies and hypothetical occurrences. In order for the League to suffer the injury which it seeks to prevent through intervention, several events must take place: (1) the district court must enter the proposed decree, (2) either the City and the League must reach an agreement or the district court must make a determination as to which provisions, if any, of the decree are subject to the collective bargaining process, (3) with respect to those provisions, the City and the League must reach an impasse in their bargaining process, (4) if the United States does not elect to dissolve the decree and proceed with the underlying lawsuit, either the City or the United States must seek appropriate declaratory or injunctive relief from the district court as to that impasse, and (5) the district court must enter an order instructing the City to alter unilaterally some condition of employment that is subject to the meet and confer process without participating in some portion of the

[6] The League also claims (Br. 18) that it has an interest in being involved in any proceeding in which the MOU might be interpreted. This Court has found that such an interest on its own "does not rise to the level of the interest contemplated by Rule 24." *Dilks* v. *Aloha Airlines, Inc.*, 642 F.2d 115, 1157 (9th Cir. 1981).

mandated state law bargaining process. This chain of events – all, some, or none of which might actually occur – is far too speculative to implicate the League's legally protectable rights at this time, as is required for intervention as of right under Rule 24. The League has failed to demonstrate that the adoption and implementation of the proposed decree "poses a 'tangible threat' to their legally cognizable interests" at this time. *Forest Conservation Council* v. *United States Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995); see also *Harris* v. *Pernsley*, 820 F.2d 592, 601 (3d Cir.) ("[T]he applicant [for intervention] must do more than show that his or her interests may be affected in some incidental manner. * * * [He] must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene."), cert. denied, 484 U.S. 947 (1987).

Given the extensive protections provided to the League within the decree, the League's motion to intervene at this point is clearly premature. Any potential danger that the League's rights may be hampered at some time in the future is far too theoretical to warrant intervention now. "An interest that is * * * contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy" Rule 24. *Washington Elec. Coop., Inc.* v. *Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). In addition, the League is not without a voice in the implementation of the proposed decree until such time as this hypothetical danger might materialize. The district court granted the League amicus curiae status and invited the League to submit a brief "addressing any issue(s) that they see fit regarding the negotiated consent decree" (R. 88 at 2),

which the League in fact filed with the district court on March 16, 2001 (R. 103). If the League ultimately believes, at the point at which the provisions of the decree are to be implemented, that its legally protected collective bargaining rights will in fact be jeopardized by implementation of specific provisions in the decree and have not been satisfactorily protected by the district court, it may move to intervene in the action at that time. But because the League cannot demonstrate now that its legally protectable interests in the collective bargaining process and in its existing collective bargaining agreement are in danger of being impaired by implementation of the proposed consent decree, it is not now entitled to intervene as of right in this action.

II. THE LEAGUE IS NOT ENTITLED TO PERMISSIVE INTERVENTION

The League has similarly failed to demonstrate that it is entitled to permissive intervention in this action. An applicant for permissive intervention must prove (1) that the issues it wishes to raise share a common question of law or fact with the main action, (2) that its motion was timely, and (3) that the court has an independent basis for jurisdiction over the applicant's claims. *Donnelly* v. *Glickman*, 159 F.3d 400, 412 (9th Cir. 1998). The district court denied the League's motion for permissive intervention in the merits of the underlying action because "the subject of the main action – whether the City has engaged in a pattern and practice of depriving individuals of constitutional rights – is distinct from the [League's] interest in preserving its contractual and statutory rights." (R. 58 at 12). The district court also denied the League's motion for permissive intervention in

the implementation of the proposed consent decree, noting that "permitting the LAPPL to intervene will unduly delay the main action." (R. 58 at 12). The district court further noted that:

> In requesting permissive intervention, the LAPPL seeks to forgo the meet and confer process found at ¶ 184 and have the Court immediately review the entire Proposed Decree. * * * Efficiency and judicial economy counsel in favor of rejecting the LAPPL's application and instead requiring that the parties meet and confer as mandated by the Proposed Decree before bringing their dispute to the Court.

(R. 58 at 12). As this Court has held, "Rule 24(b) necessarily vests discretion in the district court to determine the fairest and most efficient method of handling a case." *Venegas* v. *Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989) (internal quotation marks omitted). In making that determination, a district court must consider both whether the intervention will unduly delay the litigation and whether permitting intervention will serve judicial economy, and this Court may not disturb the district court's determination absent an abuse of discretion. *Id.* at 529-531.

The League's claims do not present a controversy over which the district court would have an independent basis for jurisdiction, as is required by Rule 24(b). Because the League's alleged injuries are entirely speculative and dependent on a chain of contingencies, any claims the League might have are unripe and therefore not suitable for adjudication.[7] See *Eggar* v. *City of Livingston*,

[7] Indeed, the League filed a separate complaint in the district court seeking declaratory and injunctive relief preventing the implementation of the proposed consent decree in this case. That complaint was dismissed *sua sponte* for failure to (continued...)

40 F.3d 312, 316 (9th Cir. 1994) (stating that both "the Supreme Court and Ninth Circuit have repeatedly found a lack of standing" in claims such as the League alleges, which "rel[y] upon a chain of speculative contingencies"), cert. denied, 515 U.S. 1136 (1995). Moreover, as the district court found, the League's claims regarding their collective bargaining rights do not share common questions of law or fact with the main action, which concerns whether the LAPD has engaged in a pattern or practice of police misconduct.

In addition, even if the League's contentions did satisfy the requirements of permissive intervention under Rule 24(b), it would not automatically be entitled to intervene. *Venegas*, 867 F.2d at 530; see also *Donnelly*, 159 F.3d at 412 ("Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention."). Because the League seeks through intervention to circumvent the state law collective bargaining process that is incorporated in the proposed consent decree, the district court was correct in determining that allowing such intervention would unnecessarily delay the settlement process underway in this lawsuit. The district court in this case did not abuse its discretion in denying

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[7](...continued)
state a claim or controversy, and the appeal from that dismissal is currently pending before this Court (No. 01-55084).

the League's motion for permissive intervention, and the League's appeal from that ruling should therefore be dismissed.

CONCLUSION

This Court should affirm the district court's denial of the League's motion to intervene as of right and dismiss the League's appeal from the district court's denial of permissive intervention.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is aware of two related cases pending before this Court. Both cases either arise out of or are related to *United States* v. *City of Los Angeles, et al.*, No. 00-11769, the suit underlying this appeal. The two related cases are:

- *Los Angeles Police Protective League* v. *United States, et al.*, No. 01-55084, an appeal from a separate complaint filed by the Appellants in this case, and
- *United States* v. *Garcia*, No. 01-55453, an appeal from the denial of a motion to intervene by a different putative intervenor.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points and contains 4,839 words (not more than 14K).

June 4, 2001

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the United States as Appellee was sent by first-class mail, postage pre-paid, to the following counsel of record on this 4th day of June, 2001:

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