Nos. 00-55532, 00-55666, 00-55789

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA SCOTT, et al.,

Plaintiffs-Appellees

v.

PASADENA UNIFIED SCHOOL DISTRICT, et al.,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

The United States has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of public schools, see 42 U.S.C. 2000c-6, and for the enforcement of Title VI of the Civil Rights Act, 42 U.S.C. 2000d, which prohibits discrimination on the basis of race and national origin by recipients of federal funds, including local school authorities. It thus has an interest in the orderly development of the law regarding the use of race, ethnicity, and gender in a wide variety of educational contexts. It is especially important, in this sensitive area, that litigation proceed on a full factual record, with parties who have a concrete interest in the outcome.

STATEMENT OF THE ISSUES PRESENTED

The United States will address the following issues:

1. Whether the plaintiffs had standing to challenge the defendant school district's admissions policy for voluntary schools.

2. Whether the district court erred in concluding, on summary judgment, that the school district's selection policy for the voluntary schools was unconstitutional.

3. Whether the district court erred in enjoining the school district from considering race, ethnicity, or gender in determining admissions to any schools when only the validity of the selection policy for the voluntary schools was litigated.

STATEMENT OF THE CASE

1. This case involves a challenge to the Pasadena Unified School District's (PUSD) admissions policy for three "voluntary" schools. While most students in the PUSD are assigned to schools based upon their home address, students from throughout the district may apply to the voluntary schools: Don Benito Fundamental School (Don Benito), with students in kindergarten through fifth grade; Norma Coombs Alternative School (Norma Coombs), with kindergarten through eighth grade; and Marshall Fundamental School (Marshall), with grades six through twelve (E.R. 84, 126).[1/] Plaintiffs asserted claims under 42 U.S.C. -2-

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[1/] Citations to "E.R. __" refer to pages in the Appellants' Excerpts of Record. Citations to "R. __ at __" refer to documents in the record, by docket number and page. Citations to "PUSD Br. __" refer to pages in the appellants' opening brief.

1983, 42 U.S.C. 1985, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and alleged that the district's admissions policy for the voluntary schools violated the Fifth and Fourteenth Amendments to United States Constitution and Article I, Section 7 of the California Constitution (E.R. 10-22). Plaintiffs sought declaratory and injunctive relief against all defendants and damages against the individual defendants (E.R. 21-22).

The voluntary school policy was implemented for the first time in the spring of 1999 for the 1999-2000 school year (E.R. 126-127). The policy provides that when there are more applicants than places available for a voluntary school, students for that school will be selected by lottery (E.R. 126). As summarized by the district court, the policy also permits the school district to give consideration to "one or more of several factors, including race, ethnicity, and gender but only if necessary to create an integrated setting, because students with such characteristics were significantly under-represented in the application pool" (E.R. 126-127).

When the selections were actually made for the 1999-2000 school year, there were sufficient spaces to admit all of the applicants to Marshall, and no lottery was held for that school (E.R. 87, 127). There were more applicants than spaces for the other two schools, Don Benito and Norma Coombs. But school district officials determined that the applicant pool for both schools was sufficiently diverse under the school district's

plan, and students for these schools were selected by random lottery, in which no consideration was given to race, ethnicity, or gender (E.R. 85-86, 91, 95, 127). Accordingly, in its findings of fact, the district court found that the school district "assigned students to the voluntary schools in a race-neutral manner for the 1999/2000 school year" (R. 71 at 3).

2. The eight minor plaintiffs are students who either applied for admission to one of the voluntary schools for the 1999-2000 school year, or who alleged that they intend to apply in the future (E.R. 10-11, 12).[2/] Two of the plaintiffs, Kayla Hunter and Michaela Reyes, applied and were admitted to Marshall (E.R. 87, 127). Two, Marissa Amy and Camden Amy, alleged that they applied but were not admitted to Norma Coombs (E.R. 85, 97-98, 127).[3/] One, George MacPherson, applied to and was placed on the waiting list for Don Benito Fundamental School (E.R. 127). Three of the minor plaintiffs, Detrick Standmore, Ronald Rucker, and Joycelyn Alva, did not apply to any of the voluntary schools in 1999, but alleged that they would do so in the future (E.R. 62, 127, 137).

3. On cross motions for summary judgment, the district court (a) ruled that the plaintiffs had standing to challenge the

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[2/] According to the first amended complaint (E.R. 12), two of the minor plaintiffs, Michaela Reyes and Jocelyne Alva, are Hispanic. Three, Detrick Standmore, Kayla Hunter, and Ronald Rucker, are black. Two, Camden Rene Amy and Marissa Laraine Amy, are white. One, George MacPherson, is multi-racial.

[3/] There is a dispute as to whether the Amy plaintiffs' applications to Norma Coombs were withdrawn (see E.R. 85, 97-98, 135-136 & n.3).

voluntary schools selection policy (E.R. 132-139); (b) declared that the policy violated both the Equal Protection Clause of the Fourteenth Amendment and the California Constitution (E.R. 139-150); and (c) enjoined the school district from giving "any 'consideration' of any sort to the race, ethnicity or gender of applicants to the lottery for the voluntary schools under any circumstances" (E.R. 150-151 (emphasis in the original)). Subsequently, the court issued findings of fact and conclusions of law (R. 71), and entered orders enjoining the defendants from using race, ethnicity, or gender in selecting students for any of its schools (E.R. 153-154; 182-183).

The court rejected defendants' contention that plaintiffs lacked standing to challenge the voluntary schools policy, holding that "whether or not Plaintiffs actually suffered racial discrimination is immaterial" (E.R. 135). To establish standing, the court ruled, the plaintiffs needed only to establish that they had applied to one of the schools or were able and ready to do so, and "'that a discriminatory policy prevents [them] from doing so on an equal basis'" (E.R. 135, quoting Northeastern Fla. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993)). Thus, the court concluded, all the plaintiffs who had applied to the schools had standing even if they had been admitted to one of the schools or had withdrawn their applications (E.R. 135-136). The court also held that the plaintiffs who had not yet applied to any of the voluntary schools had standing because they were "ready and able to apply"

(E.R. 137). In its findings of fact, the court found that the school district "assigned students to the voluntary schools in a race-neutral manner for the 1999/2000 school year" (R. 71 at 3). The court nonetheless concluded that the plaintiffs had been denied the opportunity to compete on an equal footing (E.R. 138):

> How can the lotteries be run in a truly race- or gender-neutral manner if Defendants are always keeping an eye on the applicant pool to make sure it is a fair representation of the PUSD's racial, ethnic or gender make-up as a whole? It is logically impossible to do so, even if such monitoring is done by a computer program instead of individuals. The language of Paragraph 8 of BP 0460(d) leads this Court to conclude that Plaintiffs may not compete on equal ground with other students for all of the seats at the three schools in question.

On the merits, the court concluded that the racial and ethnic classifications of the policy were not narrowly tailored to serve a compelling interest, and that the policy's gender classification was not substantially related to important governmental objectives (E.R. 139-149). The court thus held that the policy violated the Equal Protection Clause (E.R. 139-149). The court also concluded that the policy violated Article I, Section 31(a) of the California Constitution (E.R. 149-150).

ARGUMENT

I

PLAINTIFFS LACKED STANDING TO BRING THIS ACTION

None of the plaintiffs suffered any legally cognizable injury as a result of the policy they challenge in this action. Therefore, they lack standing to make that challenge, and the

district court erred when it denied defendants' motion for summary judgment on that ground.

"[T]he irreducible constitutional minimum of standing contains three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). It is the plaintiff's burden to establish each of these elements. Id. at 561. A plaintiff must show (1) that he has suffered an "injury in fact;" (2) that there is a causal relationship between the challenged action and that injury; and (3) that there is a likelihood that the injury will be redressed by a favorable decision. Id. at 560-561. The term "injury in fact" means "an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Id. at 560 (internal citations and footnote omitted). A "concrete and particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." Id. at 560, 561 n.1.

These standing requirements are essential to maintaining the separation between the political and the judicial branches of government. "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." Lewis v. Casey, 518 U.S. 343, 349 (1996). Thus, in the absence of some individualized harm, "merely the status of being subject to" an allegedly illegal

governmental policy does not constitute injury in fact. Id. at 350.

In an action alleging discrimination, the stigma of discrimination alone may constitute an injury sufficient to establish standing, but only for those who have been "'personally denied equal treatment' by the challenged discriminatory conduct." Allen v. Wright, 468 U.S. 737, 755 (1984), quoting Heckler v. Mathews, 465 U.S. 728, 739-740 (1984); see also United States v. Hays, 515 U.S. 737, 743-745 (1995). In an action seeking injunctive relief against an ongoing race-conscious program, the requisite injury to establish standing is "'the inability to compete on an equal footing.'" Texas v. Lesage, 120 S. Ct. 467, 468-469 (1999), quoting Northeastern Fla. Chapter, Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993).

Plaintiffs in this case seek to challenge that aspect of the voluntary schools admission policy that permits defendants to consider race, ethnicity, or gender in the selection of students if necessary to create an integrated enrollment. But none of the minor plaintiffs in this case were "personally denied equal treatment" or denied the opportunity "to compete on an equal footing" as a result of that policy.

Two of the minor plaintiffs, Kayla Hunter and Michaela Reyes, were admitted to Marshall, the voluntary school to which they applied. These two plaintiffs suffered no injury at all, let alone any injury that resulted from the operation of the

policy they seek to challenge. They were not denied any benefit. Nor were they subjected to discriminatory treatment or denied an opportunity to compete on an equal footing.

Three of the plaintiffs, Marissa and Camden Amy, who applied to Norma Coombs, and George McPherson, who applied to Don Benito, were not admitted to those schools. But there was no causal connection between their failure to be admitted and the policy they seek to challenge. Students freely applied to both schools and were selected by a random lottery. Neither race, nor ethnicity, nor gender played any part in the selection process. The voluntary schools policy provides that race, ethnicity, gender, and other factors will be considered in the selection of students for the voluntary schools only "[w]hen necessary to create an integrated setting." In 1999, after the application process was complete, defendants determined that it was not necessary to consider any of these factors when selecting students, and did not do so. Therefore, no applicants, including these plaintiffs, were injured as a result of the policy. Nor could these plaintiffs' "injury" -- their failure to be selected in the lottery -- be redressed by a favorable decision in this case. Indeed, even though the district court invalidated the policy, it did not disturb the results of the 1999 lotteries for either school. Because the lotteries were conducted without any consideration of race, ethnicity, or gender, there was no basis

for altering their results, and plaintiffs obtained no individual relief.[4/]

Three of the plaintiffs did not apply to any of the voluntary schools in 1999. For that reason, they lack standing to challenge the admissions policy. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-168 (1972) (plaintiff who did not apply for membership lacks standing to challenge discriminatory admissions policy). These three allege that they will apply to one of the voluntary schools in the future. And other plaintiffs allege that they will re-apply. But these allegations of possible future injury were insufficient to give any of the plaintiffs standing to challenge the voluntary schools policy in this complaint. Allegations of future injury are sufficient to establish standing only where the plaintiff "'is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury [is] both 'real and immediate,' not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (citations omitted); Lujan, 504 U.S. at 560. Even where plaintiffs have been subjected to unconstitutional practices in the past (and these plaintiffs have not), there is no present case or controversy with respect to injunctive relief unless

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[4/] There is a dispute whether the Amy plaintiffs withdrew their applications to Norma Coombs. See n.3, supra. But resolution of that dispute would not affect their standing to maintain this action. Whether they were not admitted to the school because their applications were withdrawn or because of a race-neutral lottery, their failure to be admitted did not result from application of the policy they challenge.

there is a "real and immediate" prospect that they will be personally injured by the same policy again. Lyons, 461 U.S. at 102; see Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc).

A plaintiff in this case will be injured by the policy at issue only if (1) he or she applies to one of the voluntary schools in the future; (2) a lottery is used to select students for the school or schools to which he or she has applied; and (3) PUSD determines that it is necessary to take race, ethnicity, or gender into account in such a way as to disadvantage applicants of that plaintiff's race, ethnicity, and/or gender.

It is speculative whether any, let alone all, of these contingencies will occur in the particular years and for the particular schools to which these plaintiffs might apply. After all, in 1999, the only year in which the policy was in place, race, ethnicity, and gender were not factors in any lottery. Moreover, because of their current grade levels, none of the plaintiffs will qualify for admission to the entry level (kindergarten) at Norma Coombs or Don Benito in the future. Only three of the plaintiffs can still qualify for admission to the entry level (sixth grade) at Marshall, and the first of these plaintiffs will not qualify until 2001 (see PUSD Br. 32-33). In 1999, the defendants admitted all the applicants who applied to Marshall, and did not find it necessary to hold a lottery at all, let alone to take race, ethnicity, or gender into account in the selection of students.

In addition, this group of plaintiffs includes both boys and girls, and members of several racial or ethnic groups (see n.2, supra). There is nothing in the record to indicate which gender or which racial or ethnic groups might be injured and which might benefit from any use of these factors in the selection of students for the voluntary schools in the future. If, for example, the defendants were to weight a future lottery to benefit male applicants, then only female applicants conceivably could be injured. Male applicants would benefit from such a determination and therefore would lack standing to challenge it. Similarly, only white and African-American applicants would have standing to challenge a selection procedure in which a lottery was weighted to benefit Hispanic applicants. Thus, it is impossible now to determine which, if any, of these plaintiffs might be injured and which would benefit from the implementation of the voluntary school policy in the future. Any actual injury to any of these plaintiffs as a result of the policy is purely speculative. Under these circumstances, none of the plaintiffs has standing to challenge the policy at this time.[5/]

[5/] There are circumstances in which discrimination against individuals of one race may injure members of another race. In Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 209-212 (1972), for example, the Supreme Court held that the broad provisions of the Fair Housing Act, 42 U.S.C. 3601 et seq., authorized an action by white plaintiffs to challenge their landlord's policy of discriminating against black applicants, where they alleged that the policy denied them the benefits of interracial association. Plaintiffs here made no such allegations.

II

THE DISTRICT COURT ERRED IN RULING THAT DEFENDANTS VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Even assuming plaintiffs had standing, the district court erred when it ruled that defendants had violated the Equal Protection Clause of the Fourteenth Amendment and granted plaintiffs' motion for summary judgment on that basis. The foundation for this ruling was the court's erroneous conclusion that the school district took discriminatory action, subject to strict scrutiny, when it looked to the composition of the applicant pool in deciding not to take race or other factors into account in the selection of students for the voluntary schools in 1999 (see E.R. 138, 142). That conclusion is inconsistent with well-established Equal Protection principles.

There is no doubt that "the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments". Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 222 (1995), citing City of Richmond v. J.A. Croson, 488 U.S. 469 (1989). But strict scrutiny is invoked only where there has been racially discriminatory action by the governmental entity, and it is the plaintiff's burden to prove that such action has occurred. Miller v. Johnson, 515 U.S. 900, 916 (1995). Only upon such a showing does the burden shift to the governmental entity to justify its actions. Id. at 920.[6/] Because the plaintiffs in

[6/] The Supreme Court has emphasized that strict scrutiny is not "strict in theory, but fatal in fact." Adarand, 515 U.S. at 237 (internal citation omitted). A racial classification should be (continued...)

this case failed to carry their burden of proving that any race-based action had occurred, the district court erred in applying strict scrutiny to the voluntary schools policy. Similarly, because no gender-based action occurred, the district court had no occasion to subject the policy to intermediate scrutiny.

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Washington v. Davis, 426 U.S. 229, 239 (1976). Plaintiffs seeking to establish a violation of the Equal Protection Clause must prove that a public entity intentionally treated them differently on the basis of race, national origin, or gender. Id. at 239-248; Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-265 (1977); Shaw v. Reno, 509 U.S. 630, 642 (1993). Such intentional discrimination may take the form of a facially discriminatory classification (see Croson, 488 U.S. 469 (1989)), the discriminatory application of a neutral provision (see Yick Wo v. Hopkins, 118 U.S. 356 (1886)), or a neutral practice implemented for discriminatory reasons (see Arlington Heights, 429 U.S. at 266-268).

[6/] (...continued)
upheld if it is narrowly tailored to further a compelling governmental interest. Ibid. In our view, the reduction of racial isolation and the promotion of diverse school enrollments are compelling interests, and a properly tailored program designed to further those interests will survive strict scrutiny. See Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978); id. at 311-314 (Powell, J., concurring); Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000). This Court need not reach that question because, as explained in the text, strict scrutiny was not warranted in this case.

In any of these forms, the hallmark of an Equal Protection claim is differential treatment on the basis of race, ethnicity, or gender. Palmer v. Thompson, 403 U.S. 217, 225 (1971) (no violation where there was "no state action affecting blacks differently from whites"); Adarand, 515 U.S. at 213 (Equal Protection Clause guarantees "equal treatment" on the basis of race or ethnicity) (emphasis in the original); id. at 229-230 ("whenever the government treats any person unequally because of his or her race, that person has suffered an injury" that invokes strict scrutiny); id. at 230 ("individual suffers an injury when he or she is disadvantaged by the government because of his or her race").

No such discriminatory treatment occurred here. The evidence on summary judgment indicates that the defendants did not classify or treat plaintiffs (or any applicants) differently based upon their race, ethnicity, or gender in selecting students for the voluntary schools in 1999. Indeed, the district court found that the school district "assigned students to the voluntary schools in a race-neutral manner for the 1999/2000 school year" (R. 71 at 3).

The court nonetheless concluded (see E.R. 15-16), that the school district took discriminatory action, subject to strict scrutiny, when it looked to the composition of the applicant pool in deciding not to take race or other factors into account in the lotteries for Norma Coombs and Don Benito. The school district, however, took no action that either benefitted or burdened any

individual on the basis of his or her race, ethnicity, or gender. It did not subject any applicants to unequal treatment or deny them the opportunity to compete on an equal footing. Merely considering the composition of the applicant pool does not constitute a racial, ethnic, or gender classification. Cf. Bush v. Vera, 517 U.S. 952, 958 (1996) (O'Connor, J.) ("[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race"). And, in the circumstances of this case, where there was no evidence that any of the plaintiffs were deterred from applying to the voluntary schools because of the policy,[7/] the mere existence of a policy authorizing the school district to consider such factors is not subject to strict scrutiny. Where no applicants have been treated differently, none have been injured by the policy, and strict scrutiny is not required. Cf. Adarand, 515 U.S. at 229-230 (person is injured when he or she is treated differently or disadvantaged because of race).

Indeed, the school district's policy of measuring its success in attracting a diverse applicant pool through race-neutral means is wholly consistent with the Supreme Court's admonition that governmental entities examine "the efficacy of alternative remedies" before adopting a race-conscious selection policy. Croson, 488 U.S. at 507, citing United States v. Paradise, 480 U.S. 149, 171 (1987); cf. Croson, 488 U.S. at 509-510 (O'Connor, J., concurring) (even in absence of past

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[7/] Cf. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

discrimination, city may take race-neutral steps to increase minority participation in municipal contracting); Coral Constr. Co. v. King County, 941 F.2d 910, 922-923 (9th Cir. 1991) (strict scrutiny requires consideration of race-neutral means of increasing minority participation before implementing race-conscious selection practice).

Because defendants did not intentionally discriminate against plaintiffs (or any other voluntary school applicants) on the basis of race, ethnicity, or gender, the district court erred in subjecting the voluntary schools policy to either strict or intermediate constitutional scrutiny, and in ruling that the policy violates the Equal Protection Clause.

III

THE DISTRICT COURT ERRED IN ISSUING AN INJUNCTION AFFECTING ALL OF PUSD'S SCHOOLS

Finally, the district court erred in issuing a broad injunction barring the use of race, ethnicity, or gender in assigning students to any of the defendants' schools. The record indicates that the school district has a policy limiting transfers to schools where the enrollment of students of any racial or ethnic group varies by more than 20% from the district-wide percentage (see R. 71 at 2). But the focus of this litigation was the selection policy for the voluntary schools. There was no evidence that any of the plaintiffs were affected by the transfer policy, or even that the defendants had found it necessary to limit transfers to any schools in accordance with that policy. The plaintiffs did not seek summary judgment on the

validity of the transfer policy (see E.R. 63-69). Nor did the district court make any findings of fact or conclusions of law regarding the actual operation of this policy (see R. 71). The court therefore erred in issuing an injunction that went beyond the selection policies for the voluntary schools.

First, because plaintiffs did not establish that they had suffered any injuries stemming from the transfer policy, they lacked standing to challenge it, and the district court erred in entering relief relating to that policy. Moose Lodge No. 107 v. Irvis, 407 U.S. 165, 166-168 (1972) (district court erred in enjoining discriminatory membership policy where plaintiff had been injured only by discriminatory guest policy).

Second, the district court did not find, and had no basis for finding, that the defendants had violated the Equal Protection Clause by limiting transfers to neighborhood schools. Because there was no evidence that the transfer policy had been implemented, there was no factual foundation for a determination that the defendants had classified transfer applicants on an impermissible basis, treated any transfer applicants differently based upon race, ethnicity, or gender, or otherwise denied any transfer applicants the opportunity to compete on an equal footing. For the reasons set forth in Part II above (pp. 13-16, supra) there was therefore no basis for finding a violation of the Equal Protection Clause.

Finally, where the district court found only that the voluntary school policy was unconstitutional, it was an abuse of

discretion to enter an order that governed any other aspect of the school district's operations. "[T]he scope of the remedy is determined by the nature and extent of the constitutional violation." Milliken v. Bradley, 418 U.S. 717, 744 (1974) (Milliken I). This principle "means simply that federal-court decrees must directly address and relate to the constitutional violation itself." Milliken v. Bradley, 433 U.S. 267, 282 (1977) (Milliken II). Here, even assuming the district court was correct in finding that the voluntary schools policy was unconstitutional (but see pp. 13-17, supra), it had the authority to address only that policy in its remedial order.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is monospaced, has 10.5 or fewer characters per inch and contains not more than 7000 words or 650 lines of text.

_____ _____

Date LINDA F. THOME
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CERTIFICATE OF SERVICE

I certify that the foregoing brief for the United States as amicus curiae was sent by first class mail to the following counsel of record, this 13th day of July, 2000:

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