No. 04-55732

In the United States Court of Appeals for the Ninth Circuit

BARNES-WALLACE, *ET AL.*,
Plaintiffs-Appellants/ Cross-Appellees,

v.

BOY SCOUTS OF AMERICA, *ET AL.*,
Defendants-Appellees/ Cross-Appellants.

On Appeal from the United States District Court for the Southern District of California

BRIEF OF THE STATES OF TEXAS, ALABAMA, KANSAS, OKLAHOMA, SOUTH DAKOTA AND VIRGINIA AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLEES/CROSS-APPELLANTS

GREG ABBOTT
Attorney General of Texas

R. TED CRUZ
Solicitor General

BARRY R. McBEE
First Assistant Attorney General

MATTHEW F. STOWE
Deputy Solicitor General

EDWARD D. BURBACH
Deputy Attorney General,
Litigation

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] 512/936-1822
[Fax] 512/474-2697

ATTORNEYS FOR AMICI CURIAE

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

Troy King
Attorney General of Alabama

Phill Kline
Attorney General of Kansas

W.A. Drew Edmondson
Attorney General of Oklahoma

Lawrence E. Long
Attorney General of South Dakota

Judith William Jagdmann
Attorney General of Virginia

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INTEREST OF *AMICI CURIAE*

The State of Texas and the other *amici* States have a strong interest in being able to engage in noncompetitive value-for-value leases. Such leases often allow for public lands to be developed for the enjoyment of all citizens at virtually no cost to the State, to the benefit of all concerned. The State of Texas and the other *amici* States are major proprietors of public property, and have long had broad discretion to engage in value-for-value leases of public lands with organizations such as the Boy Scouts of America, without having to concern themselves as to whether the leases were awarded on a competitive or noncompetitive basis. The court below held that providing a value-for-value lease to an organization with some religious aspects on a noncompetitive basis was providing aid to religion generally, in violation of the neutrality principle of the Establishment Clause. Should this faulty logic be adopted by other courts, the State of Texas and the other *amici* States may lose their discretion to award non-competitive value-for-value leases to civic organizations that arguably possess some religious aspects. The *amici* States have a strong interest in ensuring this does not happen, and that States retain wide discretion to engage in value-for-value leases to promote the development of public lands in the manner they believe best serves the public interest.

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TO THE HONORABLE COURT OF APPEALS FOR THE NINTH CIRCUIT:

The District Court in this case ruled that a City's decision to provide two leases to the Boy Scouts Association of America on non-competitive basis violated the Establishment Clause of the United States Constitution. The court below reached this conclusion by erroneously holding that the Boy Scouts is a religious organization for purposes of Establishment Clause analysis, and by misreading the applicable Supreme Court precedent to require that all government value-for-value contracts provided to

arguably religious organizations also be offered to secular organizations on similar terms. The decision below unnecessarily constrains the discretion of state and local governments to award value-for-value contracts on a non-competitive basis to organizations that possess religious aspects when it is in the public interest to do so, and violates the very principle of government neutrality towards religion that it purports to uphold. For these reasons, the decision of the court below should be reversed.

STATEMENT OF THE ISSUES

Whether the Establishment Clause forbids state and local governments from awarding value-for-value leases of public lands to the Boy Scouts of America and similar non-profit organizations on a noncompetitive basis.

STATEMENT OF THE CASE

The City of San Diego, like many state and local governments, has a history of awarding value-for-value leases to a diverse group of nonprofit organizations. These nonprofit organizations generally offer little or no cash in return for the lease. Instead, the lessees assist the City by developing and maintaining the property, generally for public use. Many lessees are religious groups, but many others are organizations based on common ethnicity, country of origin, or cultural heritage. In this case, the City awarded two value-for-value leases to the Boy Scouts Association

of America ("Boy Scouts"). The City did so on a noncompetitive basis. In one case, the Fiesta Island lease, the City reached its decision based on the fact that the Boy Scouts had been identified by a dedicated committee as the organization best positioned to improve the property in question, and in the other, the City simply decided to renew an existing lease based on its positive prior experience in dealing with the Boy Scouts as a lessee. In the case of the lease for Fiesta Island, the terms of the lease required the Boy Scouts to provide funds for the construction and maintenance of a community water park, and to run its operations. In the case of the Balboa facility, the lease required the Boy Scouts to spend at least $1.7 million over the next several years on improvements. Both leases required the Boy Scouts to allow all members of the public to have access to the facilities in question, and prohibited the Boy Scouts from engaging in discrimination in access to the properties based on scouting membership, religion, or sexual orientation.

The District Court struck down both leases under the Establishment Clause.[1] The District Court first concluded that the Boy Scouts is a religious organization. *See Barnes-Wallace v. Boy Scouts of Am.*, 275 F.Supp.2d 1259, 1270-73 (S.D. Cal. 2003); *Barnes-Wallace v. Boy Scouts of Am.*, No. 00CV1726-J, slip op. at 6 n.2 (S.D. Cal. Apr. 12, 2004) (Order Granting in Part and Denying in Part Further Cross-Motions for Summary Judgment) ("Slip Op."). It then concluded that the neutrality principle of the Establishment Clause prohibits the granting of leases to religious organizations on a noncompetitive basis; the court explained that "aid is [only] neutral if the religious, irreligious, and areligious are equally eligible." Slip Op. at 6; *see also Barnes-Wallace*, 275 F. Supp. 2d at 1267. Because noncompetitive leases are (virtually by definition) not offered to "a broad range of recipients," the District Court

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1. The first of the District Court's two opinions commenced neither with the usual summarizing of the opinion that follows, nor by reciting the facts of the case or its procedural history. Instead, the District Court began by summarizing and criticizing an unrelated Supreme Court case—*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), in which the Supreme Court upheld the constitutional right of the Boy Scouts as a private, expressive organization to exclude gay members from leadership roles. *See Barnes-Wallace*, 275 F.Supp.2d at 1263. This decision had no bearing on validity of the plaintiffs' Establishment Clause claim, or any other issue then before the District Court. In its ensuing discussion, the District Court expressly attacked the Boy Scouts' policy of excluding homosexuals and atheists from its leadership positions (a policy that was not before the court) by proclaiming that "it is clear that the Boy Scouts of America's strongly held private, discriminatory beliefs are at odds with values requiring tolerance and inclusion in the public realm. . . ." *Id.* Thereafter, the District Court expressly linked the current lawsuit with the unrelated Supreme Court decision, by explaining that "lawsuits like this one are the predictable fallout from the Boy Scouts' victory before the Supreme Court." *Id.* By publishing this unnecessary criticism of the Supreme Court, the court below created the unfortunate impression that its disagreement with the outcome of *Dale* may have played a role in its decision-making in the case at bar.

concluded that the reasonable observer would conclude that the leases were meant to endorse the Boy Scout's "inherently religious program and practices." Slip Op. at 6, 13 (internal quotation omitted); *see also Barnes-Wallace*, 275 F.Supp.2d at 1274-1276. The Boy Scouts timely appealed.

SUMMARY OF ARGUMENT

The District Court erred in the concluding that state and local governments cannot offer the Boy Scouts (or similarly-situated nonprofit organizations) a noncompetitive value-for-value lease, for at least two independent reasons. First, contrary to the District Court's conclusion, the Boy Scouts of America is not an inherently religious organization. The Boy Scouts of America is a nonprofit organization that promotes good civic, mental, physical and emotional health among its members, and does so in a way that is consistent with, rather than in opposition to, any religious teaching that its members may receive from other sources. The Establishment Clause does not mandate State-sponsored atheism, and consequently secular activity is not converted into sectarian activity simply because the secular activity in question is done in a way that is consistent with any private sectarian teaching that an individual may happen to receive elsewhere. The District Court's determination that the Boy Scouts is a religious organization is inconsistent with both the record in the case and Supreme Court precedent.

Second, the District Court erroneously concluded that the neutrality principle of the Establishment Clause could be satisfied only if any leases between the City and the Boy Scouts were competitive, and only if the City offered to allow interested secular parties to lease the property in question on the same terms as those offered to the Boy Scouts. The District Court reached this erroneous conclusion by making the following mistake of logic: the United States Supreme Court has held "if A, then not B." Therefore, the District Court concluded, "if not A, then the court must hold B." To wit, the District Court correctly recognized that the Supreme Court has held that the Establishment Clause's principle of neutrality is not violated where government financial aid "is made available by the government to both religious and secular beneficiaries on a nondiscriminatory basis." However, this holding does not imply, much less require (as the district court erroneously concluded, *see* Slip Op. at 6), that the reverse is also true—that all government aid which is *not* made available to both religious and secular beneficiaries on a nondiscriminatory basis *necessarily violates* the Establishment Clause (or as the district court phrased it, "aid is neutral if the religious, irreligious, and areligious are equally eligible." *Id*.). As a result of having misread the applicable Supreme Court precedent, the District Court issued a decision that is tantamount to a bright-line rule that state and local governments may never award noncompetitive contracts to organizations that might have some religious

aspect, because noncompetitive contracts are almost by definition not offered to others (whether they be secular or religious) on equal terms. This form of discrimination against religious organizations in the kinds of contracts they may receive is not only not *required* by the Establishment Clause, but in fact violates the very neutrality principle it purports to implement. The neutrality principle, as developed by the Supreme Court, would require any State offering noncompetitive contracts to secular groups to extend the same "benefit" to religious organizations as well. For these reasons, the judgment of the court below should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THAT THE BOY SCOUTS IS A RELIGIOUS ORGANIZATION.

The District Court erred in concluding that the Boy Scouts is a religious organization for purposes of Establishment Clause analysis. The Boy Scouts is not a church. Its leaders are not religious figures. The Boy Scouts does not promise any benefits in the afterlife (or supernatural benefits in this life) to anyone who strictly follows its teachings. The Boy Scouts and its members do not proselytize. Virtually all of the activities its members engage in are secular in nature—swimming, hiking, camping, and the like. To be sure, the Boy Scouts tries to conduct these activities in a manner that is consistent with, not in opposition to, any religious instruction its

members may receive from other sources. But while submerging itself in America's broad religious tradition, rather than fighting against it, may make the Boy Scouts unique in an increasingly secular society, it does not by and of itself transform the Boy Scouts into a religious organization.

The record in this case amply supports the conclusion that the District Court simply ignored the important distinction between being a "religious" and "religion-friendly" organization. The members of the Boy Scouts do not practice the "Boy Scouts" religion. As the District Court observed, the Boy Scouts does not require members to engage in daily religious practices. Instead, the program "offers *opportunities* for the daily practice of religion by each individual." *Barnes-Wallace*, 275 F. Supp.2d at 1270 (emphasis added). Scout activities are not themselves religious activities. Instead, Scout activities are supposed to "include an opportunity for members to meet their [own] religious obligations." *Id.* at 1271. While Scouts have the opportunity to join in prayer at mealtime, "no one individual is compelled to participate." *Id.* Scouts have the opportunity to, but are not compelled to, wear their own private religious emblem on their uniform. *See id.*

Members of the Boy Scouts are required to take an oath that requires them to uphold their duty to God and the country. But every President takes an oath before taking office, yet the federal government could hardly be called a religious

organization. Similarly, Scout Masters occasionally meet with members of religious communities to discuss ways in which to make Scouting consistent with a variety of religious lifestyles. *See id.* The Boy Scouts also occasionally helps organize nondenominational worship services for its members who desire to participate. *See id.* at 1272. Yet various branches of the United States Armed Forces also have similar programs to assist their members who wish to pursue their own religion within the context of these organizations, but one would be hard pressed to label the United States Army as a religious organization. The United States Constitution does not require the Boy Scouts to eliminate these aspects of its program, nor does it require the Boy Scouts to schedule mandatory activities on the morning of the Sabbath, immediately commence eating when food is served without an opportunity for prayer, or to prohibit its members from wearing religious insignia on their uniforms, in order to avoid being deemed a "religious organization" for Establishment Clause purposes.

And aside from these preceding facts which show only more than that the Boy Scouts designs its programs to be religion-friendly, not religious in their own right—and there is nothing left to support the District Court's conclusion that the Boy Scouts is a religious organization, with the exception of a few statements made by the Boy Scouts in the course of this litigation, statements which the District Court improperly interpreted as all but concessions by the Boy Scouts that it was a religious

organization. *See id.* at 1270. But the District Court used these statements entirely out of context. When the Boy Scouts discussed things like its "religious purpose" and "faith-based mission to serve young people and their families," *id.*, it did not thereby concede the central issue of the case. These statements, like numerous others, must be read in the context of the Boy Scouts as a civic organization that conducts its programs in a manner consistent with the private religious beliefs of its members. Stripped of this support, the District Court's determination that the Boy Scouts is a religious organization is contrary to the evidence and should be reversed.

The District Court's determination that the Boy Scouts is a "religious" organization for purposes of an Establishment Clause analysis is also inconsistent with the Supreme Court's treatment of the Boy Scouts in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In *Dale*, the Supreme Court rejected a claim brought by an openly gay man that a state anti-discrimination law prevented the Boy Scouts from withholding a leadership position from him on the grounds of his sexual orientation. The Supreme Court did so by finding, after a lengthy analysis, that the Boy Scouts was an "expressive organization" and that "the forced inclusion of Dale would significantly alter [that] expression." *Id.* at 656. None of this discussion would have been necessary, and the court of appeals in *Dale* could have been summarily reversed, if the Boy Scouts were a religious organization; religious organizations have a well-

established right to make employment decisions with respect to their leaders consistent with the Free Exercise Clause. *See, e.g., Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."). If the Boy Scouts is not a religious organization for purposes of the protection of the Free Exercise Clause, it cannot be one for purposes of being subject to the rigors of the Establishment Clause, because if the two are not co-extensive, then if anything it is the definition of religion contained within the Free Exercise Clause that has the broader reach. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW at 827-28 (1978). The decision of the District Court that the Boy Scouts is a religious organization is inconsistent with the Supreme Court's decision in *Dale*, and should be reversed accordingly.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE ESTABLISHMENT CLAUSE FORBIDS STATE AND LOCAL GOVERNMENTS FROM OFFERING NON-COMPETITIVE LEASES TO ORGANIZATIONS WITH RELIGIOUS ASPECTS.

The District Court erroneously read Supreme Court precedent as forbidding state and local governments from offering non-competitive leases to organizations with religious aspects. As the District Court explained its decision, "[b]y entering into exclusive negotiations with the BSA-DPC without affording others a real

opportunity to compete, the City effectively prevented any secular groups from having an opportunity to obtain the benefit." *Barnes-Wallace*, 275 F.Supp.2d at 1276. Of course, the same can be said with respect to any noncompetitive contract a state or local government might enter into with an organization with religious aspects. By definition, a noncompetitive contract is not offered on the same terms to other entities, whether they be secular or sectarian. Consequently, to hold that the leases that are the subject of the present lawsuit are unconstitutional because other secular groups were not able to compete on the same terms as the Boy Scouts is simply to hold that state and local governments are forbidden by the Establishment Clause from providing groups like the Boy Scouts with noncompetitive contracts. Noncompetitive contracts offered to religious organizations will never be "religion neutral," *see id.* at 1273, as that term is understood by the District Court, and as a result offering a contract to a religious organization on a less than competitive basis will always violate the Establishment Clause under the District Court's view. But the Establishment Clause imposes no such categorical bar.

The District Court erroneously prevented the City from offering non-competitive lease contracts to the Boy Scouts because it misread the applicable Supreme Court precedent. Contrary to the District Court's impression, the Establishment Clause does not prevent state and local governments from offering

leases, even to religious organizations, unless "the leases have been made available on a neutral basis" as a result of an open and competitive selection process. *Id*. at 1269-70. That new requirement was on grafted on to the Establishment Clause as a result of the District Court's misreading of the Supreme Court's decision in *Mitchell v. Helms*, 530 U.S. 793 (2000), in which the Court upheld a federal program providing public funds to parochial schools. In that case, the plurality explained that the appropriate Establishment Clause test is whether or not the program results in indoctrination that is attributable to the state. In the context of the public funding of parochial schools at issue in that case, the plurality observed that "if the religious, irreligious, and areligious are all alike eligible for governmental aide, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Id.* at 809. The majority did not, however, make the corresponding contra-positive statement—that any aid by the government that is *not* available to religious, irreligious, and areligious groups on equal terms *would necessarily* violate the Establishment Clause. Rather, the natural implication of the Court's statement is that there may be many ways in which the government might avoid being perceived, in the mind of the reasonable observer, as not being responsible for any indoctrination that is conducted by the organization that is benefitting from the government's aid. A decision by the government to cast a broad

net, and distribute aid to a wide variety of secular and sectarian beneficiaries, is but one of a panoply of ways by which the government may avoid any attribution of indoctrination. As the Court explained, the "attribution of indoctrination is a relative question." *Id.* The plurality even provided a concrete example of another way by which the government can avoid such attribution: By ensuring that "any governmental aid that goes to a religious organization does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id*. at 810 (*quoting Agostini v. Felton*, 521 U.S. 203, 226 (1997)). But in the opinion below, any corresponding inquiry as to whether the government has avoided attribution by other means is entirely lacking.

Moreover, Justice O'Connor's concurrence in *Mitchell*, which is controlling on the issue, is even more clear with respect to this point than was the plurality. Justice O'Connor's concurrence explained that prior case law had established that "scrutiny of the manner in which a government-aid program identifies its recipients is *important* because 'the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination.'" *Mitchell*, 530 U.S. at 845 (O'Connor, J., concurring) (emphasis added) (*quoting Agostini*, 521 U.S. at 231). By using the word "important" rather than "dispositive" or "decisive," Justice O'Connor made clear that choosing recipients based on neutral,

secular criteria was not an absolute requirement of the Establishment Clause. Moreover, Justice O'Connor made quite clear that the rationale behind examining the basis on which a government program selects its recipients was to ensure that the program was creating no financial incentive to undertake religious indoctrination. That concern is not present in the facts of the instant case. On its face, the City's decision to give these two leases to the Boy Scouts on a noncompetitive basis creates no financial incentive for any particular individual to study religion.

Consequently, although the District Court was correct in concluding that government aid that is allocated on the basis of neutral, secular criteria is constitutional, it was incorrect in concluding that this form of neutrality "is a threshold factor that must be met when the government awards aid to religious organization [sic]." *Id.* at 1269. The District Court was likewise incorrect to conclude, "[w]hether a reasonable observer would perceive an advancement of religion as a result of the leases depends on whether the leases have been made available on a neutral basis." *Id.* at 1269-70. This test is flawed because noncompetitive contracts are never "made available on a neutral basis"—any constitutional analysis done using this test is over as quickly as it begins. Far from neutral, noncompetitive contracts are almost always made available on the basis of some rare or unique attribute or quality that is possessed by the lessee. That special

quality may be having a long-standing relationship with the lessor, a good history as a tenant, possessing a wide variety of resources that uniquely situate the lessee to develop the property, or any one of a seemingly innumerable host of tangible or intangible qualities that make providing a contract to a lessee on a noncompetitive basis more desirable than awarding the contract to a stranger as a result of a fully competitive free-enterprise system, as lessors would be inclined to do in normal circumstances. Under the rule developed by the District Court, the United States Constitution forbids state and local governments from reaching a reasoned decision to award a noncompetitive contract to any religious organization or organization with sane religious aspects. In many situations, such as where the government has a long-standing beneficial relationship with the organization in question, such a rule would be detrimental to the public interest. Regardless, it is simply not the test that has been developed by the Supreme Court.

The controlling test is the one articulated by Justice O'Connor in *Mitchell*: whether a reasonable observer would perceive that the two leases will "result[] in governmental indoctrination." *Mitchell*, 530 U.S. at 846 (O'Connor, J., concurring). Under that test, the two leases granted by the city to the Boy Scouts are entirely constitutional. The reasonable observer who understood that the City had entered into these value-for-value leases with the Boy Scouts would believe that the City did

so for purposes of encouraging the public to engage in aquatic activities and other nature-related endeavors. One reasonable observer would believe that the government had chosen the Boy Scouts as their lessee with respect to these two leases because the Boy Scouts is in the best position to develop those properties for use by the public for those various leisure activities. Moreover, as discussed above, the record in this case would not support a finding that the Boy Scouts itself is responsible for conducting any religious indoctrination—rather, the record would at most support a finding that the Boy Scouts conducts its activities in a manner not inconsistent with the religious faiths of its members. If the Boy Scouts themselves do not engage in religious indoctrination, it follows *a fortiorari* that the government does not engage in any indoctrination by providing assistance to the Boy Scouts in their scouting endeavors.

The rule developed by the District Court, categorically preventing the government from providing leases to religious organizations or organizations with religious aspects, is flawed for the additional reason that it violates the very neutrality principle it purports to uphold. Under the District Court's test, it is unconstitutional for a state or local government to provide noncompetitive contracts to religious organizations because it is not also offering those same contracts to non-religious organizations. But the District Court would impose no such ban on a state or local

governments offering such contracts to non-religious organizations. Assuming for purposes of argument that the District Court is correct in labeling these sorts of noncompetitive contracts as a government benefit, the District Court has perversely created a rule that would allow this government benefit to flow only to secular organizations. Withholding the access of religious groups, but not non-religious ones, to noncompetitive contracts "leave[s] an impermissible perception that religious activities are disfavored." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring). And this rule is no less pernicious in effect than a rule whereby a school district makes its rooms available for extracurricular use only to secular organizations, and not to religious ones. The Supreme Court has previously held that the latter rule violates the neutrality principle of the Establishment Clause, *see*, *e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), and the District Court's proposed constitutional rule is equally unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General, Litigation

R. TED CRUZ
Solicitor General

MATTHEW F. STOWE
Deputy Solicitor General
Texas Bar No. 24013583

Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
[Tel.] 512/936-1700
[Fax] 512/474-2697

COUNSEL FOR THE STATE AS
AMICI CURIAE

CERTIFICATE OF SERVICE

The undersigned counsel of record does hereby certify that a true and correct copy of the Brief of the State as Amici Curiae was served via UPS (Next Day Air Delivery), on February 22, 2005, to:

Jordan C. Budd
Elvira Cacciavillani
ACLU Foundation of San Diego
& Imperial Counties
P.O. Box 87131
San Diego, California 92138-7131

John Peter Mullen
San Diego City Attorney's Office
1200 Third Avenue, Suite 1200
San Diego, California 92101

Charles Avrith
Alicia Mew
Hughes, Hubbard & Reed LLP
350 South Grand Avenue, 36th Floor
Los Angeles, California 90071-3442

George A. Davidson
Carla A. Kerr
Hughes, Hubbard & Reed LLP
One Battery Park Plaza
New York, New York 10004-1482

Scott Christensen
Hughes, Hubbard & Reed LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401

Counsel also certifies that on February 22, 2005, 15 copies the Brief of the State as Amici Curiae was dispatched to the clerk, as addressed below, via UPS (Next Day Air Delivery):

Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

_____
Matthew F. Stowe

CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for
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1. I certify that:

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Matthew F. Stowe

ATTORNEY FOR THE STATE AS
AMICI CURIAE

Dated: February 22, 2005