

Appeal No. 10-15248

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**E.T.; K.R.; C.B.; G.S.; FRANK DOUGHERTY, ON BEHALF OF
E.T., K.R., C.B. and G.S.,**

Plaintiffs-Appellants,

vs.

**RONALD M. GEORGE, JUDGE, CHAIR OF THE JUDICIAL COUNCIL OF
CALIFORNIA, IN HIS OFFICIAL CAPACITY; WILLIAM C. VICKREY,
ADMINISTRATIVE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURT OF
THE JUDICIAL COUNCIL, IN HIS OFFICIAL CAPACITY; JAMES M. MIZE, PRESIDING
JUDGE OF THE SUPERIOR COURT OF THE COUNTY OF SACRAMENTO, IN HIS
OFFICIAL CAPACITY,**

Defendants-Respondents.

On Appeal From the United States District Court
for the Eastern District of California
Hon. Frank C. Damrell, Jr.
Case No. 2:09-cv-01950-FCD-DAD

**Brief for *Amici Curiae* Voices for America's Children, National
Association of Counsel for Children, Juvenile Law Society, Fostering
Imagination, Juvenile Rights Project, Professor Barbara B. Woodhouse,
and Associate Professor Daniel L. Hatcher in Support of Reversal**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, *amici curiae* Voices for America's Children, National Association of Counsel for Children, Juvenile Law Society, Fostering Imagination, and Juvenile Rights Project state that they are non-profit organizations, they have no parent companies, and they have not issued shares of stock.

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I. STATEMENT OF INTERESTS

This brief is filed on behalf of seven *amici curiae*: Voices for America’s Children, National Association of Counsel for Children, Juvenile Law Society, Fostering Imagination, Juvenile Rights Project, Professor Barbara B. Woodhouse of Emory University, and Associate Professor Daniel L. Hatcher of the University of Baltimore. These *amici curiae* are all child advocates with extensive and varied experience representing children, particularly within legal and foster-care systems. These *amici curiae* have a deep interest in this case and are uniquely positioned to overview how California dependency courts function, to explain how those courts function in a fundamentally different way than traditional civil and criminal courts, and to describe the vital and unique role played by constitutionally required, court-appointed counsel for children in these proceedings.

As explained in the accompanying motion for leave to file this brief under FED. R. APP. P. 29, this background is desirable and relevant to this appeal because apart from the arguments in the appellants’ brief, the *amici curiae*’s unique perspective highlights two of the key problems with the district court’s decision: plaintiffs here are not seeking to enjoin an ongoing state-court proceeding, and dependency-court proceedings fail in any event to present an “adequate opportunity” to raise their federal claims. There accordingly is no basis to abstain on account of those proceedings under the principles announced in *Younger v.*

Harris, 401 U.S. 37 (1971). See *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007).

A. Voices for America's Children

Voices for America's Children is the nation's largest network of multi-issue, child-advocacy organizations. With 60 member organizations located in nearly every state, its nationwide nonpartisan, nonprofit network leads advocacy efforts with administrative and legislative entities at the community, state, and federal levels to improve the lives of all children, especially those who are most vulnerable. The Voices' network makes up the most extensive advocacy group in the nation representing only the interests of children. Voices has a special stake in the rights of foster children and has included a child welfare working group among its activities for many years.

B. National Association of Counsel for Children

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2,200 members representing all 50 states, Washington, D.C., and several foreign countries. NACC's Board and membership includes attorneys who represent children before family and juvenile courts of the nation, judges, physicians, psychologists, social workers, law

professors and other professionals concerned about children. The NACC works to improve the delivery of legal services to children, families, and agencies; advance the rights and interests of children; develop the practice of law for children and families as a sophisticated legal specialty; and, educate public officials about their needs. The NACC works with the American Bar Association, the National Council for Juvenile and Family Court Judges, and others. Over the past twenty years, the NACC Amicus Committee has contributed numerous *amicus curiae* briefs involving the legal interests of children to state and federal appellate courts and the Supreme Court of the United States, sharing the views of its membership with courts facing difficult decisions.¹

C. Juvenile Law Society

The Juvenile Law Society is a national not-for-profit agency dedicated to the principle of access to justice for juveniles. Juvenile Law Society was founded and is directed by Marvin Ventrell, JD, a veteran of the child welfare and juvenile justice systems who served previously as a trial lawyer, child welfare court lawyer, juvenile public defender, and CEO of the National Association of Counsel for Children. The Juvenile Law Society works to ensure that court-involved children

¹ Board members Robert Fellmeth, who is one of the counsel for plaintiffs, and Chris Wu, who is employed by defendant Administrative Office of the Court of the Judicial Council, have recused themselves from voting on the matter of this amicus.

and youth receive system-wide due process and the full benefit of legal counsel as provided for in landmark rulings like *In re Gault*, 387 U.S. 1 (1967).

D. Fostering Imagination

Fostering Imagination is a not-for-profit agency serving current and former foster youth between the ages of thirteen and nineteen. Fostering Imagination was created in 2005 by Executive Director Ilia Jauregui in response to the growing number of foster youth who become destitute when they emancipate from the foster-care system. Fostering Imagination works to empower foster youth and help them make a successful transition to adulthood.

E. Juvenile Rights Project

The Juvenile Rights Project (JRP) is Oregon's leading champion for children and youth in the courtroom and the community. JRP attorneys are appointed by the juvenile court to represent approximately 1,700 children per year in delinquency, dependency, and termination of parental rights cases at the trial and appellate level. In addition to court-appointed representation, JRP advocates for children in a variety of other ways. After identifying system-wide problems, JRP works with partners throughout Oregon to implement policy-level solutions. JRP provides information, individual class representation, administrative and legislative advocacy, technical assistance and training throughout the state. JRP understands both the importance of a zealous advocate for foster youth and the importance of

allowing foster youth access to federal court to cure state violations of their rights. JRP is extremely interested in quality representation for children having participated in numerous work groups and having helped create Oregon state bar performance standards.

F. Professor Barbara B. Woodhouse

Barbara Bennett Woodhouse is L.Q.C. Lamar Professor of Law at Emory University Law School and David H. Levin Chair (emeritus) in Family Law at University of Florida. She clerked for Associate Justice Sandra Day O'Connor before entering law teaching and during the past twenty years she has served as co-founder and/or co-director of three different child law and policy centers: the Center for Children's Policy and Practice and Research (University of Pennsylvania), the Center on Children and Families (University of Florida) and Barton Child Law and Policy Center (Emory University). She was recognized as a hero of children's rights by the American Bar Association's Human Rights Journal based on her scholarship in this area and her book *Hidden in Plain Sight: The Tragedy of Children's Rights from Ben Franklin to Lionel Tate* (Princeton 2008) was named the best human rights book of the year by the American Political Science Association.

G. Associate Professor Daniel L. Hatcher (University of Baltimore)

Daniel L. Hatcher is an associate professor of law and is a co-instructor of the University of Baltimore School of Law's Civil Advocacy Clinic. Professor Hatcher has significant prior experience in civil legal aid work, including advocacy for children in foster-care proceedings. He was a statewide assistant director of advocacy for legal aid offices in Maryland, and he has also worked for a national child-advocacy organization. He has testified before Congress and before state-level legislative committees on a host of issues affecting children and low-income individuals and families and has written extensively in these areas. *See, e.g., Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797 (2006); *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333 (2009). His scholarship and advocacy has attracted national attention, including significant press coverage, congressional testimony, citation in multiple Congressional Research Service reports, requests to draft legislation, and continued participation in national policy reform efforts.

II. ARGUMENT

For California's abused and neglected children, the California dependency system is one of the few (if not the only) refuges from circumstances for which they have no responsibility. Unlike other court proceedings, a child does not voluntarily invoke the jurisdiction of this court. Rather, the child is haled into the

system when a state agency files a petition because a parent or guardian has engaged in actions that threaten the child's well-being or failed to provide care that meets a minimum level of standards. Once a dependency petition is filed, the child subject to that petition has specific and unique interests that can only be served by zealous advocacy, without which the child is denied due process.

The district court accepted that the dependency system is underfunded and overwhelmed by cases. But the court's decision glossed over how the structure of these proceedings differ from typical civil and criminal cases in critical ways. Those differences further illustrate why abstention principles fail to apply in this case.

A. Dependency Courts Do Not Function Like Other American Courts.

The federal and state systems have no shortage of specialty courts. Dependency courts, however, are unique even amongst courts of limited or special jurisdiction. They differ because these courts exist to serve the interests of only one of the parties—the child—who has not joined the proceeding voluntarily. Because of this, dependency court proceedings cannot be analogized mechanically to traditional civil or criminal proceedings.

1. The Core Function Of Dependency Court Is To Care For Abused And Neglected Children.

The statutory purpose of California's dependency court system is to protect the best interest of the child. It is not intended to be solely a neutral forum for the dispassionate resolution of civil disputes between opposing parties. The dependency court itself has an agenda, imposed by statute, and that agenda is "to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." CAL. WELF. & INST. CODE § 300.2. So although dependency-court cases are adversarial and each party can advocate for any desired position, the purpose of dependency court is not primarily to decide which position is right or wrong in a manner identical to civil or criminal court but to determine what will protect and ensure the well-being of a single party.

Dependency cases are also unique because children appear as parties involuntarily. They have not chosen to sue or committed a voluntary act resulting in criminal prosecution. They are parties only because they have been victimized egregiously by people whom they have a right to trust most. Yet they are parties to the proceedings. CAL. WELF. & INST. CODE § 317.5(b). And their rights and interests must be protected. CAL. WELF. & INST. CODE § 317(c).

Among others, California dependency courts have jurisdiction in the following circumstances:

- “The child has suffered, or there is a substantial risk that the child will suffer, *serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian.*” CAL. WELF. & INST. CODE § 300(a) (emphasis added)
- “The child is *suffering serious emotional damage*, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, *as a result of the conduct of the parent or guardian* or who has no parent or guardian capable of providing appropriate care.” CAL. WELF. & INST. CODE § 300(c) (emphases added)
- “The child has been *sexually abused*, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, *by his or her parent or guardian or a member of his or her household*, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.” CAL. WELF. & INST. CODE § 300(d) (emphases added)
- “The child's parent or guardian *caused the death of another child through abuse or neglect.*” CAL. WELF. & INST. CODE § 300(f) (emphasis added)

Because children enter dependency court involuntarily, through no act of their own, under unspeakable circumstances, these children have a constitutional and statutory right to competent representation in these cases.

2. Dependency-Court Hearings Do Not Lend Themselves To Complex Class Action Lawsuits Litigating Issues Such As Inadequate Representation.

Dependency courts not only function differently than typical civil and criminal courts, but they operate to fulfill a unique objective: identifying and attempting to implement what is in a child’s “best interest.”

Aside from the narrow fact finding hearings in the initial dependency and [termination of parental rights] stages, dependency proceedings tend to focus less on past facts and more on the current social, emotional, and medical well-being of children. While there is a body of law that governs these proceedings, the obligations of the agency, and the power of the dependency court to make certain types of orders, advocacy in dispositional and permanency hearings is, for the most part, less about the law and more about the people involved. It is less about standards and more about needs; less about burdens of proof and more about emotional suasion.

Erik S. Pitchal, *Where are all the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL’Y 1, 10–11 (2008; *see also*, Barbara Flicker, *Best Practices in Child Protection Courts*, AMERICAN BAR ASSOCIATION, 13 (May 24, 2005), <http://www.abanet.org/child/rclji/bestpractices.doc> (explaining that for this reason, dependency-court judges must have experience in “[c]hild development, parenting skills, the physiology of drug and alcohol exposure for fetuses, child psychology, family systems and other areas of behavioral sciences”).

Dependency proceedings have motions and hearings, testimony and dispositions, and to be sure, they are adversarial. But these proceedings do not lend themselves well to adjudicating complex, highly charged federal class actions based upon assertions of inadequate legal representation.

Initial Hearing. A social worker typically initiates a dependency case after determining that a child must be removed from the home. Within days, the court must conduct an initial hearing, where it must appoint counsel, advise parents of rights, explain the court process, order visitation, and inquire as to relatives as possible caretakers. CAL. WELF. & INST. CODE § 315; CAL. R. CT. 5.670. With the core purpose of the hearing being the child's initial safety plan, the initial detention hearing is not amenable to litigating complex class actions.

Jurisdictional Hearing. At the jurisdictional hearing, the court must determine whether the child has suffered harm in a manner statutorily conferring jurisdiction on the dependency court and warranting state intervention. This stage "is the trial" of a dependency case. Publication Development Committee, Victims of Child Abuse Project, *Resource Guidelines, Improving Court Practice in Child Abuse & Neglect Cases*, 46 (1995), <http://www.ncjrs.gov/pdffiles/resguid.pdf>. Counsel argue whether past events satisfy the jurisdictional standards, and examination and cross-examination witnesses on occasion. This is the stage that most resembles a typical non-dependency court proceeding. The judge's ruling

that the jurisdictional standard is satisfied, though, signals the beginning in a sense. From this point forward, the court plans for the child's future well-being. Thus, jurisdiction in a dependency case is based on a finding of specific harms or risks of harm to an individual child and typically ends when a child is no longer at risk. It is very different from the personal and subject matter jurisdiction exercised in typical state court.

Disposition Hearing. Within ten days after the jurisdiction hearing, the court must conduct a disposition hearing. Here, the court must decide “whether to dismiss the case, order informal services for the family without making the child a dependent, appoint a guardian with the consent of the parties, or declare the child a dependent of the court.” Cal. Admin. Office of the Courts, *California Juvenile Dependency Court Improvement Program Reassessment*, 2-4 (November 2005), <http://www.courtinfo.ca.gov/programs/cfcc/pdf/CIPReassessmentReport.pdf>; CAL. R. CT. 5.695(a). Where the court deems the parents' residence proper for the child, the child welfare agency provides “family maintenance” services. If the court determines that the child cannot remain with the parents, the social worker assigned to the case will prepare a “reunification plan” addressing the parental problems and specifying how the parents can earn back custody over the child. The goal of the dispositional hearing is to create a plan in the best interests of the

child—again a hearing that is neither appropriate nor available for litigating broad policy challenges.

Review Hearings. In maintenance cases, the court will review the parents' progress at periodic review hearings. The court, in its discretion, may choose to extend the child welfare services for another six months at these hearings. In reunification cases, the court must hold a review hearing no less frequently than every six months. If the child is not returned to the parents during a review hearing, the court must have found that return would have created a substantial risk to the child's well-being. CAL. WELF. & INST. CODE § 366.21(e). Within 12 months of the disposition hearing, if the parental environment remains too dangerous, the court must hold a permanency hearing at which it specifies a permanent plan for the child. The court also may extend the reunification plan for another six months if the parent is making progress but has yet to satisfy the reunification requirements. At the review hearings, the court must consider issues such as the services that have been offered to the parent, efforts of the social worker to maintain relationships between a child and individuals important to the child, and the child's relationship with his sibling group. CAL. WELF. & INST. CODE § 366.21(e). The hearings where these parenting-type decisions are being made, are not the appropriate venue for litigation of the type brought in this case.

Termination hearing. Once the time for reunification has expired, the court must set a “366.26,” or termination of parental rights, hearing. At this hearing, all parties, including the parents who have failed their child, may present evidence to be considered as the court creates a permanent plan serving the child’s best interests. There must be a compelling reason for the court not to find adoption to be in the child’s best interests. CAL. WELF. & INST. CODE § 366.26. Here, again, the focus is on the child’s best interests—this hearing is not structured nor equipped to include litigation of the types of violations alleged in the Complaint filed in this case.

Each case involves at least these proceedings listed and the attorneys for the children then continue their representation for many years beyond the participation of the parent attorneys. Many children will continue under the jurisdiction of the courts for years after their parents have left their lives and left their interaction with the courts. The court continues to act in a parental role for the children and will need to decide: where they will live, with whom, and whom they will be allowed to see, as well as a myriad of other detailed decisions about their lives including what medication they will take and decisions about their education. All of these decisions are made in a court where those whose lives are affected require representation—representation which becomes meaningless when, as the

California Judicial Council has acknowledged in its own adopted standard, caseloads exceed 188 clients per attorney.

Furthermore, this highly specialized process with its time lines and stages does not lend itself to adjudication of systemic claims. Dependency courts are not courts of general jurisdiction equipped to, used to, or resourced to decide routine civil matters, let alone complex federal class action cases that will involve vigorous law and motion, discovery, and fact-finding contested by some of the world's largest law firms. All these factors reinforce the wisdom of this Court's real-world, practical approach to adjudicating the third prong of *Younger*. *Meredith v. Oregon*, 321 F.3d 807 (9th Cir. 2003).

B. Children In Dependency-Court Proceedings Rely On Others To Protect Their Rights.

“Children are, by dint of their minority, typically seen as incompetent under the law.” Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 684 (2006). And this rule refers to ordinary children—not abused and neglected children who populate dependency courts. No one expects that participants in the dependency-court system will recognize and assert their rights to adequate legal representation. As the Administrative Office of the Courts (AOC) itself has explained, “children had very little to say about their attorneys; many reported never having met them or never having had anything explained to them by their counsel, and some did not know

that they had an attorney.” Cal. Admin. Office of the Courts, *California Juvenile Dependency Court Improvement Program Reassessment*, 3-3 (November 2005), <http://www.courtinfo.ca.gov/programs/cfcc/pdf/CIPReassessmentReport.pdf>; see also Cal. Admin. Office of the Courts, *California Juvenile Dependency Court Improvement Program Reassessment* (2005), p. 4-4 (further reporting that the children did not understand the proceedings as they happened, and half the children reported that no one ever explained the proceedings afterwards). Unlike adults or corporations who enter the legal system through some voluntary act, no one expects children in dependency proceedings to have to critically evaluate their attorneys’ performances.

Nor are there others besides an affected child who necessarily would have an interest in monitoring the performance of a child’s counsel. Although Local Rule 17.28 authorizes “a complaint concerning the performance of a counsel appointed to represent a minor . . . lodged on the minor’s behalf by any interested person,” children in dependency proceedings by definition have few or no “interested persons” to turn to. Their attorneys have obvious disincentives to raise their own ineffectiveness. And the child’s parents have been adjudged unable to provide a safe environment for their children and are adverse to their child in the proceedings. *Mills v. Habluetzel*, 456 U.S. 91, 195 n.4 (1982)(O’Connor, J. concurring); Rebecca Baneman, *Comment: Who Will Speak for the Children?*

Finding a Constitutional Right to Counsel for Children in Foster Care, 9 U. PA. J. CONST. L. 545, 550 (2007) (“[T]he parent, who is often represented by counsel, has interests that do not necessarily align with the child’s in a dependency proceeding.”).

For these reasons, it is critical that children in dependency court have not only competent and zealous advocates but advocates who possess the resources and time to identify and promote every child’s well being. Under California law, a “primary responsibility of any counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child.” CAL. WELF. & INST. CODE § 317(c). Counsel for children in dependency court accordingly are statutorily required to “investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child.” CAL. WELF. & INST. CODE § 317(e); *see also id* § 317(f) (giving counsel access for this purpose to a child’s health records and those maintained by local public agencies).

If funding shortages prevent these advocates from discharging their statutory and constitutional duties, as the complaint in this case alleges, affected children will not as a practical matter have any avenue to challenge the resulting deprivation of their rights. That a child theoretically could challenge the adequacy of his or her counsel as part a dependency-court proceeding ignores the reality that children in

dependency proceedings never or almost never have the ability or wherewithal to do so. Children in these proceedings rely on their court-appointed lawyers for legal advice. If those advisors prove incapable, they are entitled to an “adequate” opportunity to challenge their effectiveness. *AmerisourceBergen*, 495 F.3d at 1149. That opportunity is not available in the dependency court itself.

C. Abstention Is Inappropriate Because Lower State Courts Lack Capacity To Grant Class-Wide Relief And The Lawsuit Does Not Seek To Upset Any Ruling In A Past Or Ongoing Dependency Proceeding.

1. Lower State Courts Are Unable To Fashion Relief.

Plaintiffs’ lawsuit challenges the funding decisions by the Administrative Office of Courts, an arm of the California Supreme Court. Thus, the district court’s ruling on abstention requires plaintiffs to file this action, seeking an order from a California Superior Court judge that his or her superior, the Chief Justice, who is in charge of the Administrative Office of Courts, has violated the plaintiffs’ class’s rights by failing to fund adequately the dependency courts. To state the obvious, there is no constitutionally impartial jurist in California who can decide this lawsuit. *Cf., Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2263 (2009)(in assessing the risk of actual bias or prejudgment of a jurist, due process guarantees require “a realistic appraisal of psychological tendencies and human weakness....”).

Federal courts should not abstain when it leaves a party without a remedy or where the state court is not impartial. *Kugler v. Helfant*, 421 U.S. 117, 124-125 (1975)(relaxing deference to abstention principles when the state court is “incapable of fairly and fully adjudicating” the matter); *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)(ruling that abstention “presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved,” which was unavailable where the state tribunal was impermissibly biased).

2. Plaintiffs’ Lawsuit Would Not Upset Any Ruling In A Past Or Ongoing Dependency Proceeding.

The prospective relief that the plaintiffs seek—a declaration that attorney caseloads defendants have imposed on its Sacramento County vendor are prospectively infirm—will not upset any prior ruling at any step of this process. *See Wooley v. Maynard*, 430 U.S. 705, 711 (1977) (*Younger* is no bar to prospective relief that fails to overturn the results of a state-court judgment). The plaintiffs are not challenging the results of any initial hearing, jurisdictional hearing, disposition hearing, review hearing, termination hearing, or other ruling by a dependency court. *See Kenny A. v. Perdue*, 218 F.R.D. 277, 286-87 (N.D. Ga. 2003) (making the same point in connection with the various stages of review in the Georgia foster-care system). The plaintiffs instead are attacking a general administrative policy in order to safeguard *in the future* their constitutional right to

competent counsel in dependency-court hearings. *Younger* does not bar such a claim.

III. CONCLUSION

For the foregoing reasons, Voices for America's Children, National Association of Counsel for Children, Juvenile Law Society, Fostering Imagination, Juvenile Rights Project, Professor Barbara B. Woodhouse, and Associate Professor Daniel L. Hatcher submit that this Court should reverse the district court's judgment and remand the case for further proceedings.

June 10, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and 9th Cir. Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points in Times New Roman font and contains 5,143 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as counted by Microsoft Word 2003.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and 9th Cir. Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points in Times New Roman font and contains 5,143 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as counted by Microsoft Word 2003.

June 10, 2010

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