No. 04-1800

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL AUDUBON SOCIETY; NORTH CAROLINA WILDLIFE FEDERATION; DEFENDERS OF WILDLIFE; WASHINGTON COUNTY, NORTH CAROLINA; and BEAUFORT COUNTY, NORTH CAROLINA,
Plaintiffs-Appellees,

v.

DEPARTMENT OF THE NAVY; GORDON R. ENGLAND, Secretary of the Navy; WAYNE ARNY, Assistant Secretary of the Navy (Acting); C.S. PATTON, Brigadeer General, U.S. Marine Corp, Commanding General Marine Corps Air Station, Cherry Point,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Nos. 2:04-CV-2-BO(2) & 2:04-CV-3-BO(3)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS SUPPORTING REVERSAL

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Dated: October 27, 2004

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation (WLF) and Allied Educational Foundation are set forth more fully in their motion for leave to file this brief.

STATEMENT OF THE CASE

This case is a challenge to the Navy's plan to construct a new Outlying Landing Field ("OLF") in Washington County, North Carolina ("Site C"). Appellees contend that the Navy's selection of Site C violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370d, because it allegedly made the selection without first taking a "hard look" at the environmental impacts of constructing and operating the new OLF at Site C.

Appellees (three environmental groups and two North Carolina counties) filed suit in U.S. District Court for the Eastern District of North Carolina on January 9, 2004, naming as defendants the Department of the Navy and three senior government officials (collectively, the "Navy"). On February 9, 2004, Appellees filed a motion for a preliminary injunction, seeking to enjoin any further activity associated with construction of an OLF at Site C; Appellees argued that they were entitled to an injunction based on the Navy's alleged

violations of NEPA.[1]

On April 20, 2004, the district court granted a preliminary injunction that barred the Navy from undertaking "any further activity associated with constructing an OLF [at Site C], including but not limited to negotiation for land acquisition, site preparation, and construction." 317 F. Supp. 626, 637. The court determined that Appellees would suffer irreparable harm if the Navy were allowed to proceed with its plans and that "the balance of harm is significantly weighted in [Appellees'] favor." *Id.* at 633. Although the Navy argued that delaying construction would "deprive the Navy of its mission to protect the interests of the United States and to train its pilots," the court found otherwise: "[i]t appears that the OLF is not a true necessity for Navy operations." *Id.* at 633, 634.

Based on that balance-of-harm finding, the court determined that Appellees would be entitled to a preliminary injunction if they could "demonstrate that their claims present 'grave or serious questions' and need not show a likelihood of success on the merits." *Id.* at 635 (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.,* 550 F.2d 189, 196 (4th Cir. 1977)). The court then determined that

[1] The complaint included several other causes of action. However, the motion for a preliminary injunction focused solely on NEPA issues.

Appellees met that standard, finding that Appellees had provided "significant evidence" that: (1) "the Navy may have failed to take a hard look at the environmental effects of its decision"; (2) "the Navy's findings on environmental impacts may run counter to the evidence before the Navy when it was making its decision to locate the OLF at Site C"; (3) "the Navy may have failed to meet its burden under NEPA to sufficiently analyze the cumulative impacts of the OLF, when combined with other military operations in the area"; and (4) "the Navy may have failed to sufficiently analyze the various alternatives to Site C." *Id.* at 636-37. The court also determined that granting a preliminary injunction would serve the public interest by ensuring full compliance with NEPA. *Id.* at 637.

The Navy thereafter filed a motion for reconsideration. The motion contended that the court had applied an incorrect legal standard in granting a preliminary injunction and, alternatively, that the injunction was overly broad. The court denied the motion on August 13, 2004. JA 1963-1974. The court found that "the Navy has not demonstrated that the Court's previous Order was based upon a clear error of law, nor has the Navy presented new evidence that would cause the Court to amend its Order." JA 1967. The court once again rejected the Navy's claim that the preliminary injunction would cause substantial

harm to the Navy, finding that the injunction neither "threatens the nation's preparedness nor ability to protect itself." JA 1968 n.4. In rejecting the Navy's request to narrow the scope of the injunction, the court said that its findings *required* issuance of a broad injunction: "The Court finds that an injunction, when issued, must afford the remedy necessary to maintain the status quo and to avoid the threatened harm, as a matter of law." JA 1972.

SUMMARY OF ARGUMENT

Amici agree with the Navy that the district court erred as a matter of law in determining that Appellees could meet the standards for obtaining a preliminary injunction by raising "grave or serious questions" regarding whether the Navy complied with NEPA; and erred in its assessment of the merits of Appellees' NEPA claims. However, this brief does not focus on those issues. Rather, we focus on the district court's analysis of the "balance of harms" issue. The court erred as a matter of law in assessing the harm that the Navy (and the public as a whole) would suffer if work on the OLF were enjoined, and the harm that Appellees would suffer if a preliminary injunction were denied. The court also erred in determining that an injunction against further work on a project *is required as a matter of law* whenever a court has found that a federal agency has

not fully complied with all of NEPA's procedural requirements.

First, the district court erred in second-guessing the Navy's determination that construction of the OLF was critical to fulfillment of its national security mission. Both this Court and the Supreme Court have made clear that federal courts are required to display extreme deference to Executive Branch decisions relating to military and national security matters. In opposing the preliminary injunction motion, the Navy submitted declarations from senior Navy officers who determined that construction of the OLF at Site C was critical to national security, and they listed numerous reasons for that conclusion. In rejecting that evidence of harm, the district court failed to provide any deference to the Navy's determination. Indeed, it rejected that determination without citing *any* countervailing evidence from Appellees; rather, it simply re-analyzed the Navy's evidence and arrived at its own independent determination of national security needs. By engaging in that exercise, the district court far exceeded the extremely circumscribed role assigned by our Constitution to the judiciary in national security matters.

Second, the district court erred by attaching unprecedented weight to Appellees' claims that denial of a preliminary injunction would harm them by

allowing the "bureaucratic steamroller" process to gain momentum. The case law creates significant doubt that such harm is *ever* properly considered in determining whether a litigant has established "irreparable harm." But even if such harm should be given some weight at the margins, the district court erred in assigning overwhelming weight to this factor. There can be little doubt that the primary focus of NEPA is to prevent harm to *the environment*. Because "bureaucratic steamroller" harm is only tangentially and speculatively associated with environmental harm, this Court has made clear that it cannot bear the extremely heavy load that the district court attempted to assign to it.

Finally, the district court erred in basing its preliminary injunction on an assumption that a finding that a federal agency has failed to comply with NEPA must always result in an injunction against further work on a project until the agency has come into compliance with NEPA. To the contrary, the Supreme Court has made clear that an injunction is always a discretionary remedy, except in those rare instances in which a statute unequivocally mandates injunctive relief. NEPA is a procedural statute that includes no such mandate. If a federal agency fails to take NEPA's mandated "hard" look at environmental issues, the most appropriate remedy is an order requiring the agency to take that "hard"

look. Any court order that goes farther and prohibits the agency from moving forward at all on a project while the agency is taking that "hard" look is purely discretionary and should be limited to those instances in which serious *environmental* harm is threatened.

ARGUMENT

I. IN ASSESSING THE BALANCE OF HARMS, THE DISTRICT COURT ERRED IN FAILING TO ACCORD SUBSTANTIAL DEFERENCE TO THE EXECUTIVE BRANCH'S NATIONAL SECURITY DETERMINATIONS

In opposing the preliminary injunction motion, the Navy submitted declarations from senior Navy personnel, who concluded that the Navy's ability to carry out its military mission was dependent on completion of the OLF at Site C at the earliest possible date.[2] The district court expressed no willingness to accord deference to that conclusion, and ultimately wholly discounted the Navy's claim that it would be harmed by an injunction. That failure to accord deference

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[2] For example, Admiral Fallon stated, "Every day that the Navy is prevented from moving forward with an Outlying Landing Field (OLF) in Washington County has an impact on Naval aviation readiness." Declaration of Admiral William J. Fallon, ¶ 6, JA 1943. He stated that such delays "prolong the challenge faced by the Navy in promptly and effectively responding to the demands of the Global War on Terrorism or other national crises" and prevent the Navy from improving training so as to "reduce risk to our East Coast carrier aviators." *Id.* ¶ 24, JA 1947.

was a significant error of law; case law is clear that the courts are required to apply a highly deferential standard of review to Executive Branch military determinations.

Even in the context of criminal prosecutions, where individuals' lives and liberty are at stake, this Court has recognized the constitutional imperative to grant such deference. For example, just last month, the Court stated:

> "[G]overnment has no more profound responsibility than the protection of Americans . . . against additional unprovoked attack." Thus, "[i]n accordance with the constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs."

United States v. Moussaoui, 382 F.3d 453, 470 (4th Cir. 2004) (quoting *Hamdi v. Rumsfeld,* 296 F.3d 278, 283, 281 (4th Cir. 2002)).

The Court has stated that such deference is required both because the courts lack expertise in military matters, and because the Constitution explicitly assigns such matters to the elected branches of government. As the Court has explained:

> The reasons for this deference are not difficult to discern. Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the

> executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them.

Hamdi v. Rumsfeld, 316 F.3d 450, 463 (4th Cir. 2003), *vacated and remanded on other grounds*, 124 S. Ct. 2633 (2004).

In mandating such deference by the federal courts, this Court is fully in accord with a long line of Supreme Court decisions. *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952) ("[P]olicies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

Amici do not mean to suggest that the American military is free to ignore the dictates of NEPA. To the contrary, nothing in that statute indicates that Congress intended to exempt military projects from the requirement that "all"

agencies of the Federal Government "shall" include within reports on proposals for "major Federal actions significantly affecting the quality of the human environment" a "detailed statement" on such items as "the environmental impact of the proposed action." 42 U.S.C. § 4332(C). But Congress's mandate to the federal courts to ensure compliance with NEPA (by ensuring that required environmental studies are completed) does not license the courts to second-guess military determinations regarding harms to national security that will arise if specific military projects are not permitted to go forward. It was clear error for the district court to refuse to accord deference to the Navy's conclusion that delays in completion of the OLF would cause substantial harm to military readiness.

What is most disturbing is that the district court rejected the Navy's conclusions regarding harms to military readiness if an injunction were issued, even though Appellees introduced *no* evidence from competing military experts challenging those conclusions. For example, the district court said that an injunction would not cause the Navy "appreciable harm" because the Navy could simply train pilots at NALF Fentress instead, 317 F. Supp. at 634, but the court had no response to the claims of Navy experts that training at NALF Fentress

was an inadequate alternative. The district court discounted the Navy's claims of harm in part because the OLF at Site C would not in any event be operational until 2007 at the earliest, *id.*, but the court did not address the Navy's evidence that an injunction would render unattainable the 2007 operational date.

In assessing the Navy's "harm" claims, the district court faulted the Navy for having failed to move forward on alternative locations for a new OLF. *Id.* ("[O]n its own initiative and in its discretion, the Navy eliminated [from site consideration] all former military facilities and all current facilities operated by the Army and Air Force, which might have allowed it to get its training operation under way more quickly. . .") But whether the Navy can be faulted for having, in the past, eliminated other sites from consideration has no bearing whatsoever on whether national security is, in fact, being harmed by the preliminary injunction. It certainly provides no basis for the district court's rejection of the Navy's "harm" claims.

In sum, the preliminary injunction should be reversed because the district court's balance-of-harms analysis failed to accord proper deference to the Navy's determination that its ability to carry out its national security mission would be impaired by an injunction.

II. THE DISTRICT COURT ERRED IN ACCORDING OVERRIDING SIGNIFICANCE TO ALLEGED "BUREAUCRATIC STEAMROLLER" HARMS

Virtually all of the harms *to the environment* of which Appellees complain (*e.g.*, the allegedly negative impact of aircraft noise on bird populations) would arise only after the OLF became operational. Those harms cannot, of course, justify entry of a *preliminary* injunction because even the most optimistic Navy schedule does not envision the OLF becoming operational before 2007. That is, no preliminary injunction would be required to prevent those alleged environmental harms from arising before this case could be tried.

Instead, the district court's finding that the balance of harms tilted in Appellees' favor was based largely on a finding that *any* additional work on the OLF at Site C would set a "bureaucratic steamroller" in motion. The court held that if preliminary phases of the OLF project were permitted to go forward, the Navy would lose its ability to objectively assess environmental impacts: "Once the Navy moves forward, any consideration of the environmental impact will be less objective given the commitments made on the project and may become a mere formality." 317 F. Supp. 2d at 634. *See also id.* at 633 ("No one can act as the judge in his own case and be expected to be a fair arbiter. Once the land

acquisition, site preparation, and construction on the OLF begin, the Navy's impartiality will be compromised, and it will be committed to proceeding with the project.").

While several older Fourth Circuit decisions appear to endorse the argument that a "bureaucratic steamroller" can in *some* instances constitute "irreparable harm" that would justify a preliminary injunction while NEPA litigation continues,[3] those decisions were thrown into considerable doubt by a later Supreme Court decision. In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), the Court rejected a similar argument made with respect to the Alaska National Interest Lands Conservation Act (ANILCA) -- a law that is similar to NEPA in structure and purpose and that is designed to ensure that public lands in Alaska are not over-developed. The Court held that "irreparable damage" to the environment (sufficient to justify issuance of a preliminary injunction) cannot be "presumed" simply because the federal government has failed to undertake environmental studies mandated by ANILCA before proceeding with oil and gas leases. *Amoco Production,* 480 U.S. at 544-45.

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[3] *See Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323, 1333-34 (4th Cir. 1972); *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986).

After *Amoco Production,* this Court has been far less willing to recognize a "bureaucratic steamroller" effect as an irreparable harm that would justify a preliminary injunction. In *South Carolina Department of Wildlife and Marine Resources v. Marsh* ["*South Carolina*"], 866 F.2d 97 (4th Cir. 1989), the Court reversed a preliminary injunction against installation of pumped storage generators at a South Carolina dam, even though the Court affirmed the district court's finding that the defendants had violated NEPA by failing to prepare an adequate environmental impact statement ("EIS") regarding the impact of *operating* the generators and even though installation of the generators would likely create some internal agency pressures to allow the generators to be operated. The Court explained:

> Plaintiffs conceded at oral argument that installation alone of the already purchased pumped storage generators will cause no environmental damage. Accordingly, since restraining installation of the generators is not reasonably required to protect the environment, we vacate that part of the injunction which prohibits the Corps from installing the pumped storage generators at the Dam.

South Carolina, 866 F.2d at 100. Implicit in the Court's holding was an understanding that a bureaucratic steamroller effect is not the type of "environmental damage" that would justify a preliminary injunction against moving forward with a federal project.

Two years later, in *North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Circuit 1991), the Court held open the possibility that the bureaucratic steamroller effect *might*, in some limited instances, provide the "irreparable harm" necessary to justify issuance of a preliminary injunction. The Court nonetheless reversed the district court's denial of the defendant's motion to narrow an existing injunction -- because the plaintiff had not demonstrated that, in the absence of an injunction, the federal agency's decision would likely be significantly influenced by political pressures to complete the project. *Virginia Beach,* 951 F.2d at 605. The Court explained:

> To argue that any work wherever planned in connection with the project should be enjoined because it unduly influences FERC's decision-making reaches far too broadly to justify the extraordinary writ of injunction, which should be tailored to restrain no more than what it reasonably required to accomplish its ends. * * * If the rule were such that any construction that could, in even the smallest degree, bring public and political pressure on agencies is prohibited until final agency approval of all aspects of the project, the prohibition would logically extend to any *de minimis* construction.

Id. at 602-03. The Court held that work on the project at issue could be enjoined for the period during which FERC was preparing an EIS "only when it has a direct and substantial probability of influencing FERC's decision." *Id.* at 603.

In an effort to justify its decision to enjoin *all* work on the OLF at Site C,

the district court sought to distinguish *South Carolina* and *Virginia Beach* on their facts. JA 1969-71. That effort is unavailing. The district court noted that in *South Carolina* the federal agency had already spent a majority of the funds budgeted for its generator project, while "the Navy has spent only a small fraction of the total estimated cost of the OLF." JA 1970. But the district court failed to provide any explanation regarding why that distinction is relevant to the "bureaucratic steamroller" analysis, and no explanation is readily apparent. There is no reason to suppose that dollars spent near the end of a federal project will have any lower "direct and substantial probability of influencing [an agency's NEPA] decision" than will dollars spent at the start of the project. Indeed, the expenditures at issue in *Virginia Beach* were among the first to be spent on the project at issue, but the *Virginia Beach* Court did not deem that distinction between its facts and the facts in *South Carolina* worthy of mention.

The district court's efforts to distinguish *Virginia Beach* are similarly unavailing. The district court noted that the federal agency conducting the NEPA analysis in *Virginia Beach* "was not the agency that ultimately desired the pipeline or was responsible for constructing the pipeline." JA 1971. In contrast, the court noted, the Navy is performing the NEPA analysis and is also "the

agency that desires the OLF." *Id.* Thus, the court argued, *Virginia Beach* is distinguishable because in that case "[i]n effect there was an intermediary preserving the decision-maker's impartiality." *Id.* But nothing in the *Virginia Beach* decision so much as hints that its "direct and substantial probability" standard applies only in cases with so-called "impartial" decision-makers. Indeed, the court explicitly recognized that FERC officials might well come under political pressure from Virginia Beach officials to approve completion of a substantially-completed pipeline. *Virginia Beach,* 951 F.2d at 602. Moreover, the district court's distinction does not take into account this Court's apparent rejection of "bureaucratic steamroller" harm in *South Carolina*, in which the Army Corps of Engineer was both the decision-maker and the agency that wished to operate pumped storage generators.

In sum, to the extent that "bureaucratic steamroller" harm is cognizable at all after *Amoco Production*, this Court's decisions in *South Carolina* and *Virginia Beach* make clear that the district court applied that theory far to broadly. The district court erred in invoking that theory to enjoin *all* work on the OLF at Site C, even preliminary work (such as site acquisition and development) that is certain to have virtually no impact on any revised EIS that the Navy might be

required to complete.

III. THE DISTRICT COURT ERRED IN FINDING THAT AN INJUNCTION AGAINST FURTHER PROJECT WORK IS MANDATORY WHENEVER A FEDERAL AGENCY HAS FAILED TO COMPLY WITH NEPA

The district court based its preliminary injunction on an assumption that a finding that a federal agency has failed to comply with NEPA must *always* result in an injunction against further work on a project until the agency has come into compliance with NEPA. In rejecting the Navy's request to narrow the scope of the preliminary injunction, the court said: "The Court finds that an injunction, when issued, must afford the remedy necessary to maintain the status quo and to avoid the threatened harm, *as a matter of law.*" JA 1972 (emphasis added).

The preliminary injunction should be reversed because the district court erred as a matter of law in ruling that any injunction *must* be broad enough to "maintain the status quo." Contrary to the district court's holding, the Supreme Court has repeatedly made clear that injunctive relief is *always* a discretionary remedy, except in those rare instances in which a statute unequivocally mandates injunctive relief.

The discretionary nature of injunctive relief is set forth most clearly in *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982). *Romero-Barcelo* involved

a Clean Water Act challenge to the Navy's use of a Puerto Rican island (and its surrounding waters) for weapons training. The district court had found a Clean Water Act violation and had ordered the Navy to obtain the necessary discharge permit, but had refused to enjoin naval operations until the permit was obtained. The appeals court reversed, finding that the Clean Water Act required such injunctions to be issued whenever a defendant was found to be discharging pollutants into navigable waters in violation of the Act. The Supreme Court reversed the appeals court, finding that the district court had acted properly in denying an injunction. *Romero-Barcelo*, 456 U.S. at 320. The Supreme Court explained:

> It goes without saying that an injunction is an equitable remedy. It is not a remedy which issues as of course. . . . An injunction should issue only where the intervention of a court of equity is essential in order to protect property rights against injuries otherwise irremediable. . . . The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. . . . Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles.

Id. at 311-13 (internal quotations omitted).

Romero-Barcelo involved review of a *permanent* injunction issued by an appeals court. The Court later made clear in *Amoco Production* that *Romero-*

Barcelo is equally applicable to a request, as here, for a *preliminary* injunction. *Amoco Production,* 480 U.S. at 546 n.12. Thus, even though the district court had found that the federal agency had likely violated ANILCA by issuing oil and gas leases without first conducting studies mandated by ANILCA, the Supreme Court ruled that the appeals court erred in finding that a preliminary injunction against exploratory drilling under the leases was mandatory. *Id.* at 546. The Court found that "compliance [with ANILCA] could be obtained through the simple means of an order to the responsible federal official to comply," rather than by an injunction against lease activity until compliance had been achieved. *Id.* at 543 n.8. The Court said that the appeals court's presumption that irreparable harm should be presumed -- and an injunction mandated -- in all environmental cases "is contrary to traditional equitable principles." *Id.* at 545.

Nothing in the text of NEPA suggests that Congress intended to reverse "traditional equitable principles" and to mandate an injunction against all work on a federal project until the federal agency has taken NEPA's mandated "hard" look at environmental issues. If a federal agency fails to take NEPA's mandated "hard" look at environmental issues, the most appropriate remedy is an order requiring the agency to take that "hard" look. Any court order that goes further

and prohibits the agency from moving forward at all on a project while the agency is taking that "hard" look is purely discretionary and should be limited to those instances in which serious *environmental* harm is threatened.

In sum, as noted above, the district court erred in granting injunctive relief because -- in balancing the harms to the parties -- it improperly failed to show deference to the Navy's determination that national security would be harmed by an injunction against work on the OLF and it improperly overvalued the "bureaucratic steamroller" harm allegedly suffered by Appellees. But even if the district court had not erred in that manner, the preliminary injunction should still be reversed because it was issued based on a faulty legal premise -- that once likelihood of success on the merits has been established, the district court is *required* to issue an injunction that maintains the status quo.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court reverse the district court's grant of a preliminary injunction to Plaintiffs-Appellees.

Respectfully submitted,

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Counsel wish to thank Timothy Kotsis, a student at Catholic University's Columbus School of Law, for his assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al*. Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 6.0), the word count of the brief is 4,499, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

_____

Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 27th of October, 2004, I deposited two copies of the *amicus* brief of Washington Legal Foundation, *et al.,* in the U.S. Mail, postage prepaid, addressed as follows:

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