Case No. 02-13981-J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

———————— ♦ ————————

WOMEN'S EMERGENCY NETWORK, JOSHUA BECKER
and DAWN JACKSON
Plaintiffs/Appellants,

v.

JEB BUSH, FRED DICKINSON, PALM BEACH COUNTY, MIAMI-DAD COUNTY and HILLSBOROUGH COUNTY,
Defendant/Appellees,

v.

PATRICIA MORRIS, EDWINA BOOTH, FIRST CARE PREGNANCY CENTER, AND JMJ LIFE CENTER,
Defendant-Intervenors/Appellees.

———————— ♦ ————————

On Appeal from the United States District Court
For the Southern District of Florida
Honorable K. Michael Moore, U.S. District Judge
Case No. 02-20172-CIV

———————— ♦ ————————

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS

Supporting affirmance.

———————— ♦ ————————

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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

WOMEN'S EMERGENCY NETWORK, et al.,
Appellants,

v.

BUSH, et al.,
Appellees,

Appeal No. 02-13981-J
Dist. Case No. 02-21072-CIV

AMICUS CURIAE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1 the following individuals/entities have an interest in this litigation. None of the following individuals/entities are a corporation that issues shares to the public.

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Edwina Booth, Defendant-Intervenor-Appellee

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Jeb Bush, Defendant-Appellee

Carol Cohan, President of Women's Emergency Network, Plaintiff-Appellee

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AMICUS CURIAE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
(Continued)

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UNITED STATES COURT OF APPEALS
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AMICUS CURIAE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
(Continued)

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Patricia Morris, Defendant-Intervenor-Appellee

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Honorable John J. O'Sullivan, U.S. Magistrate Judge

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UNITED STATES COURT OF APPEALS
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AMICUS CURIAE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
(Continued)

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STATEMENT OF THE ISSUE

I. DID THE DISTRICT COURT PROPERLY RULE THAT THE INDIVIDUAL PLAINTIFFS IN THIS CASE LACKED STANDING TO PURSUE AN ESTABLISHMENT CLAUSE CLAIM AGAINST THE COUNTIES AND STATE OF FLORIDA WHEN THE PLAINTIFFS HAVE NOT ALLEGED THAT A SPECIFIC AMOUNT OF TAX MONEY IS SPENT ON THE ALLEGED UNCONSTITUTIONAL ACTIVITY AND WHEN THE PLAINTIFFS HAVE NOT SHOWN THAT A SUBSTANTIAL AMOUNT OF MONEY IS SPENT OCCASIONED SOLELY BY THE ALLEGED UNCONSTITUTIONAL ACTIVITY?

INTEREST OF AMICUS

The National Legal Foundation (NLF) is a non-profit corporation dedicated to the defense of First Amendment liberties. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on religious liberty. We believe that the ability of our elected representatives to enact programs that allow people of faith to participate in governmental affairs should not be hindered in our nation's courts by those who do not have the requisite standing. This Brief is filed pursuant to the consent of the parties in this case.

SUMMARY OF THE ARGUMENT

The individual Plaintiffs have failed to establish taxpayer standing to raise their Establishment Clause claim. The Plaintiffs allege that they are county taxpayers and that, therefore, the only "injury" they must allege to give them standing is that county funds are being spent in an allegedly unconstitutional manner. However, county taxpayers are more akin to state taxpayers because they do not share the unique relationship with the county that a municipal taxpayer does with a municipal corporation. Therefore, Plaintiffs must show a more direct injury than merely alleging county funds are being spent improperly. However, even should this Court disagree that county taxpayers are analogous to state taxpayers,

Plaintiffs still fail the standard for standing which applies equally to state and municipal taxpayers.

This Court should apply a four part test to determine whether county taxpayer have standing. Plaintiffs must show that they are taxpayers, that the alleged funds are spent solely for the challenged activity, that a specific amount of funds have been expended, and that the expenditure is significant and not merely incidental. Plaintiffs in this case have failed to meet three of the four elements of this test. First, Plaintiffs have not shown the expenditures are made solely on the unconstitutional activity. Plaintiffs do not claim new employees were hired, or the ones employed currently must work extra hours to accommodate the alleged unconstitutional activity. Second, Plaintiffs have not alleged a specific amount of money spent on the alleged unconstitutional activity. Plaintiffs' arguments are general and vague. Third, Plaintiffs have not shown the money spent is anything more than incidental. Therefore, since Plaintiffs have not shown they have standing to sue in this case this Court should affirm the district court's holding.

ARGUMENT

Amicus recognizes that there are many issues involved in this case with respect to both the individual and organizational Plaintiffs. However, this brief addresses only the issue of standing as it relates only to the individual Plaintiffs' allegations that the Establishment Clause is violated.

I. COUNTY TAXPAYER STANDING IS MORE AKIN TO STATE TAXPAYER STANDING BECAUSE A COUNTY TAXPAYER LACKS THE SPECIAL RELATIONSHIP THAT A MUNICIPAL TAXPAYER HAS WITH A MUNICIPAL CORPORATION

As Defendant-Intervenors point out, the Supreme Court has not ruled directly on the status of county taxpayers. (*See* Def.-Int.'s Answer Brief at 32.) Defendant-Intervenors suggest that courts that have considered the matter have concluded that county taxpayers are better likened to state taxpayers. *Id*. (citing *Rifkin v. Bear Sterns & Co., Inc.* 248 F.3d 628, 632 (7th Cir. 2001)). Defendant-Intervenors suggest this is because county taxpayers "do not enjoy the direct pecuniary interest a municipal taxpayer would enjoy." *Id*. The Defendant-Intervenors do an excellent job of pointing out just how remote and conjectural any injury based on the spending of county funds would be to the plaintiffs. *Id*. at 32–34.

In contrast to Plaintiffs' assertions, Defendant-Intervenors' logical reasoning on this point is actually bolstered by Justice Kennedy's plurality opinion in *ASARCO v. Kadish,* 490 U.S. 605 (1989). Plaintiffs contend that that case recognizes "the uniqueness of municipal taxpayer standing." (*See* Pls.' Brief at 32.) This is true to the extent that Justice Kennedy said the Court has "*indicated"* that there "*may*" be a different standard for municipal taxpayers, "*if* it has been shown that the 'peculiar relation of the corporate taxpayer to the [municipal] corporation' *makes* the taxpayer's interest in the application of municipal revenues

'direct and immediate.'" *Kadish*, 490 U.S. at 613 (quoting from *Commonwealth of Massachusetts v. Frothingham*, 262 U.S. 447, 486-87 (1923)) (emphasis added). This standard does not eliminate a plaintiff's burden of demonstrating a "direct and immediate" injury. Rather, that burden is met *because of* the "unique" relationship. *Id.* A county taxpayer does not have the "unique" relationship that a municipal taxpayer does and therefore is required to show a direct and immediate injury through other means, just as federal and state taxpayers are required to do. (*See* Def.-Int.'s Answer at 32-34.) And that, Plaintiffs have failed to do. *Id.*

Furthermore, as will be explained below, both state and municipal taxpayers must demonstrate a "pocketbook" injury, and that injury is evaluated under the same test for both types of taxpayers. Thus, even should this Court disagree that the individual Plaintiffs are analogous to state taxpayers, their standing should be evaluated under the same test.

II. INDIVIDUAL PLAINTIFFS HAVE NOT SHOWN A DIRECT AND IMMEDIATE INJURY BECAUSE THEY HAVE NOT ALLEGED A SPECIFIC AMOUNT OF MONEY SPENT ON THE ALLEGED UNCONSTITUTIONAL ACTIVITY AND THEY HAVE NOT SHOWN THE EXPENDITURE WAS SUBSTANTIAL AND NOT MERELY INCIDENTAL.

The individual Plaintiffs in this case, Joshua Becker and Dawn Jackson, have not established taxpayer standing to challenge the statute creating the "Choose Life" license plates. Assuming *arguendo* that county taxpayer standing

should be evaluated under the same standard as state taxpayer standing, the controlling precedent is *Doremus v. Board of Education*, 342 U.S. 429 (1952).

Although the Eleventh Circuit has not directly interacted with *Doremus* on this particular issue, other courts of appeals have expounded on *Doremus'* requirements. In particular, the Ninth Circuit's *en banc* opinion in *Doe v. Madison School District* No. 321, 177 F.3d 789 (9th Cir. 1999) is helpful in that it summarizes how various courts of appeals had applied *Doremus* up until that time. The *Doe* court identified four important aspects of the application of *Doremus*. First, the plaintiff seeking state taxpayer standing must show that he is a taxpayer. *Id*. at 795 (quoting from *Doe v. Duncanville Ind. Sch. D*ist., 70 F.3d 402, 408 (5th Cir. 1995)). Second, the taxpayer must show that the alleged funds are spent solely for the challenged activity, *i.e.*, that the funds would not otherwise be spent. *Id.* at 795-96 (citing *Gonzales v. N. Township*, 4 F.3d 1412, 1416 (7th Cir. 1993)). Third, the plaintiff must show a specific amount of funds that have been expended. *Id*. at 794. Fourth, the expenditure must be significant and not merely incidental. *Id*. at 796.[1]

[1] To avoid confusion, it should be noted that the second and fourth elements often are analyzed together. However, they are analytically distinct. For example, one can easily imagine an expenditure that might be very large, but that is not used solely for the allegedly unconstitutional purpose. Similarly, one could imagine an expenditure that is used solely for the allegedly unconstitutional purpose, but which is very small. To further avoid confusion, it should be noted that many courts use the original "measurable appropriation" language from *Doremus*, 342

Although the *Doe* court did not *explicitly* identify these four aspects of *Doremus* as a "test," the test is implicit in the court's analysis. The court systematically analyzed cases in which other circuit courts had applied *Doremus*. *See Doe*, 177 F.3d at 794–97. In each case in which taxpayer standing was not found, it was because at least one of the above elements was not met. *Id.* Likewise, if Plaintiffs here fail to meet any of the above elements they lack the requisite standing to challenge the expenditure they claim is unconstitutional.

Furthermore, should this Court disagree that county taxpayers should be analogized to state taxpayers, it must be noted that the elements of the *Doremus-Doe* test have been applied to municipal taxpayer standing as well. *See, e.g., District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, (1988). In *Common Cause*, the plaintiffs (who were, in fact, District of Columbia taxpayers) sued the District of Columbia for expenditures used to pay for "pamphlets, flyers, and posters urging a 'No' vote" on a city referendum. *Id*. at 3. "D.C. spent nearly $7,000 to oppose" an initiative that voters ultimately approved. *Id*. The court discussed the elements of municipal taxpayer standing, and held that

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U.S. at 434 to analyze the second element, while other courts use that term to analyze the fourth element and yet others use it to analyze both. *See, e.g., Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620,639 (1st Cir. 1990); *District of Columbia Common Cause v. District of Columbia,* 858 F.2d 1, 8 (D.C.Cir. 1988); *Johnson v. Economic Dev. Corp.,* 241 F.3d 501, 508 (6th Cir. 2001); *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1178 (9th Cir. 1991); *Altman v. Bedford Cent. Sch. Dist*., 245 F.3d 49, 73 (2d Cir. 2001).

the "pocketbook injury requirement also applies to municipal taxpayers, as *Doremus'* reference to *Frothingham* makes clear." *Id*. at 4.

In *Common Cause*, each of the four elements of the *Doremus-Doe* test is clearly evident in the municipal taxpayer setting. As for the first element, as noted above, the plaintiffs *were* municipal taxpayers. As for the second element, the court compared its plaintiffs with the plaintiffs in *Miller v. California Commission on the Status of Women*, 469 U.S. 806 (1984). The *Common Cause* court noted that the United States Supreme Court had dismissed the *Miller* appeal for want of jurisdiction. In so doing, the Supreme Court had cited *Doremus*, stating that appellants had failed to show "a measurable appropriation or disbursement of school-district funds occasioned *solely* by the activities complained of . . . ." *Common Cause*, 858 F.2d at 8. (citing *Miller*, 342 U.S. at 434) (emphasis added). The *Common Cause* court stated that since the plaintiffs in *Common Cause* had made such a showing their claim was not foreclosed. *Id*. As to the third element, the Common Cause court went on to note that, unlike the plaintiffs in *Miller*, its plaintiffs were "challenging a *specific* expenditure of public funds." *Id*. (emphasis added). As to the fourth element, the *Common Cause* court explicitly stated that incidental expenditures are insufficient to grant standing. *Id*. at 4 (citing other courts for the same proposition).

Thus, the *Common Cause* court recognized all four elements of the *Doremus-Doe* test in determining whether a municipal taxpayer could maintain standing.[2] Therefore, even should this Court disagree that the individual Plaintiffs should be analogized to state taxpayers, the Doremus-Doe test still applies. And that is a test that the individual Plaintiffs in this case fail. While Plaintiffs have arguably shown that they are county taxpayers (Decl. of Joshua Becker ¶ 3; Plaintiff's Amended Complaint ¶ 14 and 15), they fail the remaining three elements of the *Doremus-Doe* test. Plaintiffs have not alleged that the funds are used solely for the such delegation, *i.e.* that the county resources would not be used otherwise. Neither have Plaintiffs alleged any specific amount of county taxpayer dollars that are used for the delegation of the distribution responsibilities for the "Choose Life" funds. Nor have Plaintiffs shown that any expenditure made in delegating the distribution of the "Choose Life" funds is anything but incidental.

[2] Other courts have recognized these elements as implicit in the municipal taxpayer standing analysis. *See e.g.*, *Clay v. Fort Wayne Comm. Schools*, 76 F.3d 873 (7th Cir. 1996) (recognizing that municipal taxpayers have standing only when 'they object to a disbursement of funds occasioned *solely* by the alleged unconstitutional conduct." (emphasis added)); *Cantrell v. City of Long Beach,* 241 F.3d 674 (9th Cir. 2001) ("When a plaintiff has failed to allege that the government spent *specific* amounts of tax dollars on the challenged conduct, we have denied standing." (emphasis added)).

D. The Individual Plaintiffs Fail The Second Element Of The *Doremus-Doe* Test Because They Have Not Shown That The Expenditures Are Spent Solely for the Challenged Activity

The only expenditure the individual Plaintiffs contend violates the Establishment Clause is the expenditure created by interacting with Catholic Charities. (Brief of Pls.-App. at 30 ("Specifically, county resources must be used to contract with Catholic Charities, research whether Catholic Charities is an eligible organization, and monitor whether Catholic Charities uses the funds as required by the Act").) The Plaintiffs have not shown that the resources spent on distributing the "Choose Life" funds in this manner would not otherwise be spent.

The decision of the Seventh Circuit Court of Appeals in *Gonzales v. North Township of Lake County,* 4 F.3d 1412, (7th Cir. 1993), further supports the above assertion. In *Gonzales*, the plaintiffs brought suit against the township claiming a crucifix erected in a public park violated the Establishment Clause. *Id*. at 1414. The plaintiffs claimed that "expenditure of taxpayer dollars for the crucifix" gave them municipal taxpayer standing. *Id*. at 1416. The plaintiffs specifically claimed that "municipal taxpayers have standing to challenge tax dollar expenditures that allegedly contribute to Establishment Clause violations." *Id*. However, the Seventh Circuit held that "plaintiffs' claim is undercut by their inability to show that tax revenue is spent for the crucifix." *Id*. The court then pointed out that the town did not spend any money to buy the crucifix and did not use any money to

maintain the crucifix. *Id*. Specifically, the court noted that although money was spent to maintain the public park where the crucifix was located, "this cost would be incurred with or without the presence of the crucifix." *Id*. (citing *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 267 (7th Cir.), *cert. denied* 479 U.S. 961 (1986)).

Similarly, the county expenditure that the Plaintiffs in this case alleged constitute an expenditure in violation of the Establishment Clause would be spent with or without the delegation to Catholic Charities. The Plaintiffs have not suggested that new employees have been hired solely for purposes of contracting with or monitoring Catholic Charities. The same employees who are paid to do this work would be paid to distribute the "Choose Life" funds themselves, perhaps even incurring more cost to the county. Indeed, Plaintiffs themselves recognize that delegating "the fund distribution function to Catholic Charities" saved county resources, (Pls.–App. Brief at 30 n.12), *i.e.* the money to distribute the "Choose Life" funds would be spent with or without the delegation to Catholic Charities.

E. The Individual Plaintiffs Fail The Third Element Of The *Doremus-Doe* Test Because They Have Not Shown Any *Specific* Amount Of Money Spent On The Alleged Violation Of The Establishment Clause.

The individual Plaintiffs have also failed to satisfy the third element of the *Doremus-Doe* test. Other courts of appeals have held that merely asserting that taxpayer money is being spent on some alleged unconstitutional action does not

give taxpayers sufficient status for standing. Rather the courts have held that the taxpayers must allege *specific* amounts of money spent on the alleged unconstitutional activity as one of the requirements for taxpayer standing. *See Doe*, 177 F.3d at 794 (citing *Cammack v. Waihee*, 932 F.2d 765, 771 (9th Cir. 1991); *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1180 (9th Cir. 1991)).

Indeed, *Cammack*, the very case which Plaintiffs cite as part of the "long-established precedent that allows for municipal taxpayer standing in the context of Establishment Clause violations," (*see* Pls.' Brief at 33) is the case that the court in *Doe* referred to when discussing the requirement of alleging specific amounts of money. In *Cammack,* the plaintiffs, municipal and state taxpayers, challenged an act in Hawaii making Good Friday a public holiday. 932 F.2d at 766. The court held they did have taxpayer standing because they "*specifically* have stated the amount of funds appropriated and allegedly spent by the taxing governmental entities as a result of the Good Friday holiday." *Id*. at 771 (emphasis added). There, taxpayer money was expended on a paid holiday for government employees. *Id*. That, the court held, was a sufficient pocket-book injury to confer taxpayer standing on the plaintiffs. *Id*. Thus, the Plaintiffs here state incorrectly that the holding in *Cammack* stands for the proposition that "municipal taxpayer standing requires no more injury than an allegedly improper municipal

expenditure." (Pls.' Brief at 33.) Rather, *Cammack* stands for the proposition that taxpayers, whether state or municipal, must demonstrate a pocket-book injury.

The *Cammack* court specifically stated that 'the *Doremus* requirement of a pocket-book injury applies to municipal taxpayer standing as well as to state taxpayer standing." *Id*. at 770. Plaintiffs fail to recognize that 'improper municipal expenditures" must still constitute a 'pocket-book" injury, *id,* which, as noted above, must be alleged with specificity, *id*. at 771. Here, the Plaintiffs have not identified a specific amount of money expended by the county. Therefore, according to the very case they cite as authority, Plaintiffs have not shown an actual 'pocket-book" injury for either state or municipal taxpayer standing.

F. The Individual Plaintiffs Fail The Fourth Element Of The *Doremus-Doe* Test Because They Have Not Shown That Any Expenditure Is Substantial And Not Merely Incidental

Just as the Plaintiffs have failed to meet the second and third elements of the *Doremus-Doe* test, they have also failed to meet the fourth prong of the test. Because the expenditure is, at most, incidental,[3] the Plaintiffs do not have standing.

An example of a case in which administrative and processing costs—costs similar to those at issue here—were found to be incidental, and thus insufficient to grant standing, is *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990). In *Schneider*, attorneys from Puerto Rico challenged the Puerto

Rico Bar's mandatory membership requirement. *Schneider*, 917 F.2d at 623. The Colegio (the Puerto Rican Bar) also required attorneys to purchase official stamps that were to be affixed to every document filed or served. *Id*. The stamps were sold at the "Commonwealth's internal revenue offices by government employees, but all proceeds [were] turned over to the Colegio." *Id*. at 637. "The Colegio [was] not charged for any administrative or processing costs." *Id*. The court stated that, under an alternative voluntary program, plaintiffs lacked state taxpayer standing because they did not show more than an incidental expenditure on the alleged unconstitutional activity. *Id*. at 639. The court stated that,

> [t]he stamps are sold at government offices that exist for another purpose, and plaintiffs do not allege that additional employees are hired to handle the stamp business. At best, it might be argued that there are some incidental expenses incurred by the government, but this does not constitute the "direct and particular financial interest" necessary to establish standing.

Id. (quoting Doremus, 342 U.S. at 435).[4]

Similarly, in this case, the counties' administrative staff that would be responsible to contract with Catholic Charities and review audits are there for another purpose. Specifically, the Act requires the counties to distribute the funds it receives from the "Choose Life" license plates to "nongovernmental, not-for-

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[3] Indeed, as mentioned in the preceding section, Plaintiffs have conceded that the current program actually saves the taxpayers money.

[4] Here again, one sees that the discussion of the second and fourth elements is closely linked. *See* footnote 1, *supra*.

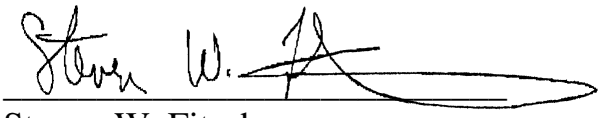
profit agencies within the county . . . .” Fla. Stat. § 320.08058 (30) (b). Just as the administrative and processing expenses incurred in *Schneider* were merely incidental, so here the expenses (if any) incurred to interact with Catholic Charities are only incidental. Therefore, the Plaintiffs have also failed the fourth element.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's holding that the individual Plaintiffs do not have standing to bring this suit.

Respectfully Submitted,

This 15th day of October 2002



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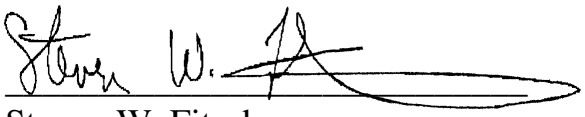
CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 3,370 words. This total was calculated with the Word Count function of Microsoft Word 97.



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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Women's Emergency Network, et al., v. Bush, et al.,* Appeal Number 02-13981-J, on all required parties by depositing same in the United States mail, first class postage, on October 15, 2002 addressed as follows:

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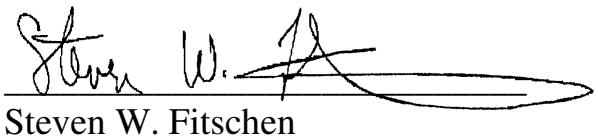

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