REQUESTED ORAL ARGUMENT NOT SCHEDULED
No. 09-5359

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EQUAL RIGHTS CENTER,

Plaintiff-Appellant

v.

POST PROPERTIES, INC., *et al*.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the United States as *Amicus Curiae* hereby submits this Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici:

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellant.

(B) Rulings Under Review:

References to the rulings at issue appear in the Brief for Appellant.

(C) Related Cases:

The case on review was never previously before this Court or any other court, and the United States is not aware of any related cases currently pending before this Court or any other court.

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INTEREST OF THE UNITED STATES

This case concerns the standing of a fair housing organization to file suit on its own behalf pursuant to the Fair Housing Act, 42 U.S.C. 3601 *et seq*. The Act provides for enforcement actions by the Attorney General, as well as by private parties. See 42 U.S.C. 3613-3614. Private litigation under the Act by fair housing organizations, like plaintiff, provides an important supplement to government enforcement under the Act. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S.

205, 211 (1972) ("private attorneys general" suits play "an important role in this part of the Civil Rights Act of 1968"); 42 U.S.C. 3616a (requiring the Secretary of Housing and Urban Development to contract with private non-profit fair housing organizations to conduct testing, complaint investigation, and litigation under the Act). The United States has an interest in ensuring the availability of such private enforcement actions, consistent with the statute and the Constitution. Thus, it filed an *amicus* brief in this case in the district court, arguing, *inter alia*, that defendants had misstated the law as to organizational standing. See R. 143-2 at 27-29.[1]

QUESTION PRESENTED

This *amicus* brief will address the following question: whether the district court committed legal error in granting defendants' motion for summary judgment on the ground that plaintiff, a non-profit fair housing organization, lacked standing to bring suit on its own behalf to enforce the Fair Housing Act, 42 U.S.C. 3601 *et seq*.

STATUTES AND REGULATIONS

This brief relies upon the following statute: 42 U.S.C. 3601 *et seq*.

STATEMENT OF FACTS

Plaintiff–appellant, the Equal Rights Center (ERC), is a national non-profit organization devoted to promoting equal housing opportunities for all members of

[1] "R. __" refers to the docket entry number on the district court's docket sheet.

the public, including people with disabilities. To advance its mission, ERC provides counseling, education, and outreach activities to individuals, members of the real estate industry, developers, and fair housing organizations around the country. Defendants, Post Properties, Inc., Post GP Holdings, Inc., and Post Apartment Homes, L.P. (Post) own and manage 59 apartment communities, which have more than 21,000 units located in five states and the District of Columbia.

In November 2006, following the investigation and testing of 61 apartments owned by defendants in various states, ERC filed this action under the Fair Housing Act, seeking injunctive and declaratory relief, as well as damages. The complaint alleged, *inter alia*, that Post engaged in a pattern and practice of discrimination in violation of the Fair Housing Act, by failing to design, construct, and operate its complexes so they are accessible to persons with disabilities. R. 1.

On January 29, 2007, prior to the commencement of discovery, defendants filed a motion to dismiss, contending that plaintiff lacked standing. R. 10. On March 2, 2007, plaintiff filed a response, arguing that it had standing because defendants' actions "frustrated * * * its mission [and] * * * forced [it] to divert significant and scarce resources to identify, investigate, and counteract Post's discriminatory practices." R. 14 at 5-6. On June 14, 2007, the district court summarily denied defendants' motion without an opinion.

On December 17, 2008, following extensive discovery, the parties filed cross-motions for summary judgment as to the merits. R. 121, 123. Defendants also renewed their argument that the action should be dismissed because plaintiff lacked standing.

On February 20, 2009, plaintiff filed pleadings and exhibits in response to defendants' standing argument. R. 141. That same day, the United States requested the district court's permission to file an *amicus* brief that supported plaintiff on the merits, and maintained that defendants misstated the law as to standing. R. 143. On September 14, 2009, the district court granted the United States' motion. R. 196.

On September 28, 2009, the district court issued an opinion and order granting defendants' motion for summary judgment solely on the issue of standing. See *Equal Rights Center* v. *Post Props., Inc.*, 657 F. Supp. 2d 197 (D.D.C. 2009). The court first summarized the Supreme Court's and this Court's precedent governing standing, including *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982); *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir.), cert. denied, 498 U.S. 980 (1990); and *Fair Employment Council of Greater Washington, Inc.* v. *BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994). See 657 F. Supp. 2d at 199-200. Based on its review of this precedent, the court concluded that, "to establish the injury necessary for constitutional standing," an organizational

plaintiff, like ERC, cannot rely "merely o[n] the impact * * * caused by [its] willful diversion of * * * resources in response to the defendants' conduct." *Id.* at 200. Rather, it must prove "that the injuries it suffered were *not* due to a self-inflicted diversion of resources." *Id.* at 201.

Turning to the record on summary judgment, the court stated that, "[w]hile ERC broadly alleges Post's actions 'directly interfered with ERC's existing counseling, education, and advocacy programs and activities,' * * * discovery has revealed that any injury ERC suffered was due to its own decision to investigate Post." 657 F. Supp. 2d at 201 (citation omitted). Citing to Plaintiff's Statement of Undisputed Facts, the court stated that ERC "specifically noted that it 'was forced to expend time, resources, and personnel to conduct a more in-depth nationwide investigation of Post, in order to identify the extent and effect of Post's illegal practices so that it could tailor its counseling, education, and advocacy efforts to effectively combat the problem.'" *Ibid.* The court also referred to the declaration of Donald Kahl, ERC's Executive Director, in which Kahl stated that ERC's investigation of Post was not necessarily in anticipation of litigation. Rather, ERC "uses the information obtained in the investigation to determine whether litigation, or other action, is the best manner in which to combat the discrimination." *Ibid.*

Applying what it deemed to be the correct legal standard to its view of the facts, the district court ruled that plaintiff lacked standing because its injury was

"self-inflicted," or "due to its own decision to investigate Post." 657 F. Supp. 2d at 201. The district court emphasized that, because ERC "concedes its sole injury occurred as the result of its decision to investigate Post," and it "*chose* to redirect its resources" to pursue that goal, it has "not suffered an injury * * * traceable to Post's [allegedly discriminatory] conduct within the meaning of Article III." *Ibid.* According to the court, that is so, even though ERC had demonstrated that it was "forced to expend time, resources, and personnel to * * * identify the extent and effect of Post's illegal practices so that it could * * * effectively combat" defendants' alleged discrimination. *Ibid.* In the court's view, "organizational plaintiffs cannot establish injury that is fairly traceable to defendants' conduct merely by deciding to 'devote resources to identify and counteract misinformation.'" *Ibid.* (citation omitted).

SUMMARY OF ARGUMENT

The district court applied an incorrect legal standard in granting defendants' motion for summary judgment. The district court held that plaintiff, as a matter of law, failed to establish injury for purposes of standing because its expenditure of "time, resources, and personnel" on "counseling, education, and advocacy" was "self-inflicted," or resulted from "its own decision to investigate Post." *Equal Rights Center* v. *Post Props., Inc.*, 657 F. Supp. 2d 197, 201 (D.D.C. 2009) (citation omitted). As a result, it never considered the controlling question:

whether ERC had expended resources, in addition to those devoted to investigating and suing Post, in order to counteract Post's alleged discrimination. The district court failed to recognize that a fair housing organization has standing under the law of this Circuit if it diverts resources to non-litigation, non-investigatory programs in order to counteract a defendant's conduct, even if that diversion can be characterized as "voluntary." Consequently, the district court erred as a matter of law in granting Post's motion for summary judgment on the ground that ERC lacked standing to bring this suit on its own behalf.

ARGUMENT

THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN CONCLUDING THAT ERC LACKED STANDING TO BRING THIS SUIT

1. A court reviews an order granting summary judgment *de novo.* See *Pardo-Kronemann* v. *Donovan*, 601 F.3d 599, 604 (D.C. Cir. 2010). Summary judgment is proper when a court determines "there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). In making that determination, a court of appeals must view the evidence "in the light most favorable to the non-moving party," with "all reasonable inferences" drawn in its favor. *Pardo-Kronemann*, 601 F.3d at 604. Consequently, at this stage of the proceedings, a reviewing court should not make

"[c]redibility determinations" or "weigh[ ] * * * the evidence." *Ibid.* (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

2. The Fair Housing Act specifically contemplates enforcement suits by non-profit fair housing organizations such as ERC. The statute authorizes a civil action by "[a]n aggrieved person," 42 U.S.C. 3613(a); defines an "[a]ggrieved person" as "any person who * * * claims to have been injured by a discriminatory housing practice," 42 U.S.C. 3602(i) & (i)(l); and defines a "[p]erson" to include "associations" and "unincorporated organizations." 42 U.S.C. 3602(d).

The Supreme Court has concluded that Congress intended for fair housing organizations to be afforded the broadest possible standing, consistent with the constitutional limitations of Article III. See *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982) (holding that "Congress intended standing * * * to extend to the full limits of Art. III and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under [the Fair Housing Act]") (internal quotation marks and citation omitted). That is, "the only requirement for standing to sue * * * is the Art. III requirement of injury in fact." *Id.* at 375-376.

"Article III standing requires that a plaintiff have suffered an (1) 'injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical' – (2) which is 'fairly traceable' to the challenged act, and (3) 'likely' to be 'redressed by

a favorable decision.'" *National Treasury Emps. Union* v. *United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). Consequently, to establish "injury in fact," an organization suing on its own behalf must demonstrate that it has suffered "concrete and demonstrable injury to [its] activities" that is fairly traceable to defendant's alleged illegalities. *National Treasury Emps. Union*, 101 F.3d at 1427 (quoting *Havens*, 455 U.S. at 379).

In *Havens*, the Supreme Court held that a non-profit corporation, whose purpose was "to make equal opportunity in housing a reality," had standing to bring a suit on its own behalf against a realty company and one of its employees for alleged "racial steering" in violation of the Fair Housing Act. 455 U.S. at 366, 368. The Court explained that while "a setback to [an] organization's abstract social interests" is insufficient to show "injury in fact," plaintiff had standing because the complaint alleged that defendants' discriminatory conduct "frustrated * * * its efforts to assist equal access to housing through counseling and other referral services" and that it "had to devote significant resources to identify and counteract the defendant[s'] racially discriminatory steering practices." *Id.* at 379 (citation omitted). The Court emphasized that if, as plaintiff alleged, defendants' discrimination "perceptibly impaired [its] ability to provide counseling and referral

services for low – and moderate – income homeseekers, there can be no question that [it] has suffered injury in fact." *Ibid.*

This Court has twice interpreted *Havens* in the context of considering whether a civil rights organization that filed suit on its own behalf against a defendant for discrimination alleged sufficient injury to have standing. See *Fair Emp't Council of Greater Washington, Inc.* v. *BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994) (*FEC*); *Spann* v. *Colonial Vill., Inc.*, 899 F.2d 24 (D.C. Cir.), cert. denied, 498 U.S. 980 (1990). In *Spann*, in an opinion written by current Justice Ginsburg, this Court explained that "*Havens* makes clear * * * that an organization establishes Article III injury if it alleges that [a defendant's] purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action." *Id.* at 27. Applying that standard, this Court held that two non-profit corporations "dedicated to ensuring equality of housing opportunity through education and other efforts" had standing to pursue their claims that defendants' racially discriminatory newspaper advertisements for residential condominiums violated the Fair Housing Act, because they alleged that they were "required * * * to devote scarce resources to identify and counteract defendants' advertising practices." *Id.* at 26, 28 (internal quotation marks and citation omitted). It explained that because "increased education and counseling could plausibly be required * * * to identify and inform minorities, steered away

* * * by the challenged ads, that defendants' housing is by law open to all[,] * * * or to monitor and to counteract on an ongoing basis public impressions created by defendants' use of print media" that racial discrimination in housing is permissible, plaintiffs' alleged injuries "are sufficiently tangible to satisfy Article III's injury-in-fact requirement." *Id.* at 28-29.

In *FEC*, 28 F.3d at 1276, this Court likewise held that a fair employment organization, which had the "broad goal of promoting equal opportunity," had standing to challenge an employment agency's pattern or practice of discrimination on the basis of race because it claimed that defendant's actions "have caused it injury in its own right." According to this Court, that is so because plaintiffs alleged that defendant's actions "interfered" with its "community outreach and public education, counseling, and research projects," and "required [it] to expend resources to counteract [defendant's] alleged discrimination." *Ibid*. It emphasized that, because defendant's "alleged pattern of discrimination * * * has made [plaintiff's] overall task more difficult" by "increas[ing] the number of people in need of counseling[,]" and "reduc[ing] the effectiveness of any given level of outreach efforts[,] * * * 'there can be no question that [plaintiff] has suffered injury in fact.'" *Ibid.* (quoting *Havens*, 455 U.S. at 379).

In reaching that conclusion, this Court pointed out "that the mere expense of testing" – like "the time and money that plaintiffs spend in bringing suit" – is not

harm that confers standing; *i.e.*, it is not "'injury in fact' fairly traceable to [defendant's] conduct." *FEC*, 28 F.3d at 1276-1277. It explained that "[o]ne can hardly say that [a defendant] has injured [an organizational plaintiff] merely because [the organization] * * * decide[s] that its money would be better spent by testing," rather "than by counseling or researching." *Id.* at 1277. In addition, the Court stated, to conclude otherwise would be a "circular position that would effectively abolish the [injury-in-fact] requirement altogether." *Ibid.* This is so, it reasoned, because "bringing suit against a defendant would itself constitute a sufficient 'injury in fact,'" since litigation is a "drain on [an] organization's resources." *Ibid*. (quoting *Havens*, 455 U.S. at 379). See also *Spann*, 899 F.2d at 27 (refusing to allow organization to rely on costs of litigation to establish standing, because "[w]ere the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation").[2]

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[2] The courts of appeals are divided on the question whether the costs of investigating the defendant's conduct or pursuing litigation to remedy the discrimination may, in itself, constitute an injury in fact sufficient to confer standing. Compare, *e.g.*, *Alexander* v. *Riga*, 208 F.3d 419, 427 n.4 (3d Cir. 2000), cert. denied, 531 U.S. 1069 (2001); *Arkansas ACORN Fair Hous., Inc.* v. *Greystone Dev., Ltd.*, 160 F.3d 433, 434-435 (8th Cir. 1998); *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993); and *Village of Bellwood* v. *Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (cost of litigation sufficient to confer standing), with, *e.g.*, *Association for Retarded Citizens of Dallas* v. *Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994), and *Spann*, 899 F.2d at 27 (cost of litigation insufficient to confer standing). But this Court need not confront that question in

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3. In this case, the district court misconstrued controlling precedent and thus committed legal error in granting defendants' motion for summary judgment. It held that ERC's expenditure of "time, resources, and personnel * * * to effectively combat" Post's discrimination was not harm that constituted "injury" for purposes of standing – even, apparently, if that expenditure was devoted to education, outreach, and counseling measures – because that injury was "self-inflicted," or resulted from "its own decision to investigate Post." 657 F. Supp. 2d at 201. See *ibid.* (because "ERC *chose* to redirect its resources to investigate Post's allegedly discriminatory practices[, it] has thus not suffered an injury * * * traceable to Post's conduct within the meaning of Article III"). Its holding is at odds with the settled principle in this Circuit that an organization has standing if it diverts resources to non-litigation, non-investigatory programs as a result of a defendant's misconduct, even if that diversion can be characterized as "voluntary."

The district court's conclusion is plainly inconsistent with *Havens*, *FEC*, and *Spann*. In each of those cases, the plaintiff organizations *chose* to investigate a defendant's allegedly discriminatory practices, in addition to filing suit against the defendants. The Supreme Court and this Court nonetheless held that the

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this case, because ERC does not argue that its costs of investigation of or litigation against Post provide a basis for standing.

organizations' expenditure of resources for education, counseling, referral, research, or outreach, which was consistent with their purpose and required to "counteract" defendants' alleged discrimination, was "injury in fact." *Haven*s, 455 U.S. at 379; *FEC*, 28 F.3d at 1276; *Spann*, 899 F.2d at 27-29. Consequently, the district court erred in concluding that ERC's injuries were "self-inflicted" and "not * * * traceable to Post's conduct," simply because ERC elected to investigate Post before determining what actions would be necessary to counteract Post's conduct. 657 F. Supp. 2d at 201. In particular, the district court's assertion that "organizational plaintiffs cannot establish injury that is fairly traceable to defendants' conduct merely by deciding to 'devote resources to identify and counteract misinformation,'" *ibid.* (citation omitted), is flatly inconsistent with *Havens*, *Spann*, and *FEC*, and, if uncorrected, may significantly undermine the ability of fair housing organizations to enforce the Act.

Moreover, to the extent that the district court's opinion suggests that ERC failed to establish standing because its "diversion of resources" in response to Post's conduct was "willful," it is also error. 657 F. Supp. 2d at 200. Because an organization's expenditure of resources is always knowing and deliberate – except when done inadvertently or by mistake – the district court's narrow focus on whether ERC "willfully" redirected its resources misses the mark. In fact, it says nothing about the dispositive issue for purposes of standing: *i.e.*, whether ERC

expended resources – in addition to those devoted to its investigation and litigation of Post – in order to "'counteract' the defendants' [allegedly] illegal practices." *FEC*, 28 F.3d at 1277. See also *Spann*, 899 F.2d at 27 (concluding that plaintiffs had standing because defendants' discriminatory advertising "impelled the organizations to devote resources to checking or neutralizing the [discriminatory] ads' adverse impact").

The district court was apparently of the view that *any* discretionary decision by ERC to devote more resources to an activity in response to Post's actions was a "self-inflicted," strategic choice that would not provide a basis for standing. While this view would have support in this Circuit's law if the activity to which the resources are devoted is limited to litigation or investigation of a defendant's conduct, see *FEC*, 28 F.3d at 1276, the district court's decision appears to interpret *FEC* more broadly to cover all "strategic choices," including a choice to increase counseling or education to counteract a defendant's conduct. See 657 F. Supp. 2d at 201. This interpretation of *FEC* is erroneous. See, *e.g.*, *Spann*, 899 F.2d at 27 (characterizing education and outreach efforts as "independent of [the] suit challenging the action"). Virtually all activities undertaken by a fair housing organization are "voluntary" in this sense, including the decision to respond to discrimination by a defendant by bolstering its non-litigation, non-investigatory programs and activities. Such decisions were found sufficient to confer standing in

Havens, *Spann*, and *FEC*. The district court therefore erred as a matter of law in granting summary judgment to Post on the ground that such activities do not provide a basis for standing.

4. The district court's error in this case is illustrated by the Eleventh Circuit's recent decision in *Florida State Conference of the N.A.A.C.P.* v. *Browning*, 522 F.3d 1153 (11th Cir. 2008). The Eleventh Circuit held in *Browning* that plaintiff organizations seeking to increase voter registration and participation among racial and ethnic minorities had standing to challenge a Florida voter registration statute, because that statute required plaintiffs to "divert personnel and time to educating volunteers and voters on compliance with [the state statute,] * * * resources [that] would otherwise be spent on registration drives and election-day education and monitoring." *Id*. at 1166. Consistent with this Court's precedent, the Eleventh Circuit emphasized that "[c]osts unrelated to [a] legal challenge are different and do qualify as injury" for purposes of standing, regardless of "*whether they are voluntarily incurred or not*." *Ibid.* (emphasis added).

In so holding, the Eleventh Circuit expressly rejected defendant's reliance on this Court's decision in *FEC*, as well as defendant's argument that "any diversion of resources * * * [that] is voluntary [is] not an injury." 522 F.3d at 1166. It explained that there is "no support in the law * * * [f]or the proposition that

'voluntary' diversion[s] of resources are not injuries." *Ibid*. It further observed that this Court's statement in *FEC* "that costs of using * * * 'testers'" does not satisfy "the injury in fact requirement * * * simply [means] that plaintiffs cannot bootstrap the cost of detecting and challenging illegal practices into injury for standing purposes." *Ibid.*[3]

As the Eleventh Circuit understood – but the district court here did not – the relevant distinction in this Court's cases is between litigation or investigation activities on the one hand, and non-litigation or non-investigation activities on the other. The distinction between voluntary and involuntary actions does not play a role, and the district court erred in concluding otherwise.

* * * * *

In sum, a fair housing organization's expenditures on programs and activities unrelated to litigation and investigation necessitated by a defendant's conduct can provide a basis for standing, and the district court erred to the extent it concluded that such expenditures were not cognizable because they were "self-inflicted."

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[3] Like this Court and the Eleventh Circuit, other circuits have followed *Havens* in ruling that counseling, education, and outreach create sufficient injuries to create standing. See, *e.g.*, *Fair Hous. of Marin* v. *Combs*, 285 F.3d 899, 903-904 (9th Cir.), cert. denied, 537 U.S. 1018 (2002); *Housing Opportunities Made Equal, Inc.* v. *Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir. 1991); see also cases cited in n.2, *supra*.

CONCLUSION

This Court should vacate the district court's order granting defendants' motion for summary judgment, and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7). This brief contains 4024 words of proportionately spaced text, as calculated by the Microsoft Word 2007 word-count system. The typeface is Times New Roman, 14-point font.

I further certify that the electronic copy of this brief is an exact copy of what has been submitted to the court in hard copy. Furthermore, the electronic copy is a searchable PDF document and has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 8.0) and is virus-free.

s/ Lisa J. Stark
LISA J. STARK
Attorney

Date: July 13, 2010

CERTIFICATE OF SERVICE

I certify that on July 13, 2010, an electronic copy of this BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL was transmitted to the Court by using the appellate CM/ECF system and that eight hard copies of the same were sent by first class mail.

I further certify that all counsel of record in this case are CM/ECF participants, and will be served electronically.

s/ Lisa J. Stark
LISA J. STARK
Attorney