No. 99-55580

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KORNEL BOTOSAN,

Plaintiff-Appellee

v.

PAUL MCNALLY REALTY, INC., et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

The United States has substantial responsibility for enforcement of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181, et seq. Section 308(b) of Title III of the ADA, 42 U.S.C. 12188(b), provides the Attorney General with the authority to enforce the nondiscrimination requirements of Title III when public facilities engage in a "pattern or practice" of discrimination or where discrimination raises an "issue of general public importance." It was part of Congress's design, also, that individuals utilize the private remedy provided for in Section 308(a), 42 U.S.C. 12188(a), to correct other instances of discrimination, thereby vindicating the public interest as "private attorneys general." See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a et seq., prohibits discrimination on the basis of race, color, national origin, or religion in public accommodations. Under Section 204(c), 42 U.S.C. 2000a-3(c), the district court has the authority to "stay proceedings in such civil action pending the termination of State or local enforcement proceedings." Appellants here are seeking to introduce a similar limitation in Title III of the ADA though it is unsupported by the plain language of Section 308(b) of the ADA, and could significantly delay the vindication of federal rights in a manner not intended by Congress.

One of the express purposes of the ADA is to "ensure that the Federal Government plays a central role in enforcing the standards established in [the Act] on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(3). Pursuant to 42 U.S.C. 12186(b) and 42 U.S.C. 12206(c)(3), the Department of Justice has issued regulations and a Technical Assistance Manual interpreting Title III. Those regulations are entitled to deference as they represent the contemporaneous interpretation of the statute by the agency charged with administering it. Hawaii v. Heckler, 760 F.2d 1031, 1033 (9th Cir. 1985). Neither the regulations nor the Technical Assistance Manual require exhaustion of administrative remedies in the part of the Manual addressed to enforcement of Title III. See 28 C.F.R. 36.501(a) (1993); ADA Title III Technical Assistance Manual §§ III-8.1000, III-8.2000. The absence of any mention of such a requirement is cogent evidence

of the Attorney General's belief that resort to such procedures was not intended by Congress.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 42 U.S.C. 12188. The district court entered summary judgment for the plaintiff on February 19, 1999. The defendants filed a timely notice of appeal on March 3, 1999. This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

QUESTION PRESENTED

The United States will address the following question: Whether the plaintiffs were required to exhaust state administrative remedies prior to filing their complaint pursuant to 42 U.S.C. 12188, which incorporates Section 204(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(a).[1/]

STATEMENT OF THE CASE

A. Procedural History

Plaintiff Kornel Botosan filed suit on February 24, 1998, against Chuck and Judith Ruston, trustees of property in Imperial Beach, California, and their lessee, Paul McNally Realty (E.R. Tab 1). Botosan alleged that he was a person with a disability

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[1/] Although the defendant below challenged the constitutionality of the ADA as applied, the district court did not certify that fact to the United States Attorney General as required by 28 U.S.C. 2403. The United States learned of this case too late to address all the questions in the case in this brief. We think the constitutional question was correctly decided below. If this Court has any doubt with respect to that result, it would be best to stay proceedings and to give the United States the opportunity to address the constitutional issues.

(paraplegia) and that the defendants had discriminated against him by failing to provide accessible parking spaces at their real estate office (E.R. Tab 9 at 1), in violation of Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181 et seq. The defendants moved to dismiss the complaint for lack of subject-matter jurisdiction on the ground that the plaintiff had failed to exhaust available administrative remedies before filing suit (E.R. Tab 9 at 2). Subsequently, the plaintiff moved for summary judgment, and the defendants raised a number of constitutional and statutory defenses. On November 24, 1998, the district court denied the defendants' motion to dismiss (E.R. Tab 9), and on February 19, 1999, granted the plaintiff's motion for summary judgment (E.R. Tab 13). The defendants have now appealed from the judgment including the ruling that the plaintiffs did not have to exhaust administrative procedures.

B. The District Court Opinion On The Motion To Dismiss

The district court noted that Section 308(a)(1) of the ADA, 42 U.S.C. 12188(a)(1), provides that "[t]he remedies and procedures set forth in section 2000a-3(a) of [Title 42] are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination" in violation of Title III. The reference to 42 U.S.C. 2000a-3(a) is to Section 204(a) of the Civil Rights Act of 1964, that provides as follows:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by * * * this title, a civil action for preventive relief, including an application for a permanent or temporary

> injunction, restraining order, or other order, may be instituted by the person aggrieved.

Not incorporated, the court noted, is Section 204(c) of the 1964 Act, 42 U.S.C. 2000a-3(c). That section provides that, when a state has a law prohibiting the same conduct as that prohibited by the federal law, an aggrieved person must notify the state enforcement authorities of the grievance and wait 30 days before filing suit in federal court. Some district courts have concluded that, while not specifically incorporated in the ADA, this notice provision applies (E.R. Tab 9 at 2-3).

The district court acknowledged that the plain language of the statute, that does not refer to Section 204(c) of the 1964 Act, would govern unless it is ambiguous (E.R. Tab 9 at 3). Despite the difference of opinion that prevails even within the United States District Court for the Southern District of California, the district court here concluded that the language of Title III of the ADA is not ambiguous, for it expressly incorporates only one subsection, 42 U.S.C. 2000a-3(a), and not the rest of it (E.R. Tab 9 at 3-4). Accordingly, the court denied the motion to dismiss.

STANDARD OF REVIEW

The defense that the court lacks subject matter jurisdiction can be raised at any time. Fed. R. Civ. P. 12(h)(3); Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). It is a matter of law subject to review de novo. Intercontinental Travel Marketing v. FDIC, 45 F.3d 1278, 1282 (9th Cir. 1994).

SUMMARY OF ARGUMENT

In any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." Staples v. United States, 511 U.S. 600, 605 (1994). There is a strong presumption "that the plain language of [a] statute expresses congressional intent." Ardestani v. INS, 502 U.S. 129, 135 (1991), quoted in United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999). Accordingly, "courts must presume that a legislature says in a statute what it means and means * * * what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992).

The district court correctly held (E.R. Tab 9) that nothing in the plain language of Title III of the ADA requires notice to a state agency or resort to administrative remedies by an aggrieved party prior to filing suit to enforce rights under the Act. Section 308(a)(1) of the ADA, 42 U.S.C. 12188(a)(1), incorporates by reference only one piece of the remedial scheme set forth in Title II of the 1964 Civil Rights Act. The portion of the 1964 Act that the ADA adopted, Section 204(a), 42 U.S.C. 2000a-3(a), provides only that an aggrieved person may bring a civil action for injunctive relief. Section 204(c), 42 U.S.C. 2000a-3(c), of the Civil Rights Act of 1964, which requires notification to state agencies prior to suit, was not incorporated in the ADA.

When a legislature adopts part but not all of another statute, there is a presumption that the omission was intentional.

Bank of Am. v. Webster, 439 F.2d 691, 692 (9th Cir. 1971). If relevant, the legislative history and the Attorney General's interpretation of Title III of the ADA are entirely consistent with the result the district court reached here. It would, moreover, be illogical to treat Section 308(a)(1) of the ADA as a mirror-image of Section 204 of the 1964 Act, for this would create duplication of some provisions already included in the ADA and incorporation of other provisions that Congress clearly never meant to include in the ADA.

ARGUMENT

AGGRIEVED PERSONS MAY SUE UNDER TITLE III OF THE ADA WITHOUT PRIOR NOTICE TO STATE AGENCIES

A. The ADA Adopted Different Enforcement Mechanisms In Each Of Its Titles Patterned After Different Titles Of The Civil Rights Act Of 1964

The ADA is the newest major federal civil rights act. It is similar in many respects to the Civil Rights Act of 1964. Title III of the ADA addresses discrimination in public accommodations, as did Title II of the Civil Rights Act, but with a number of differences. The public accommodations provision of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, national origin, or religion. Rather than simply amending Title II of the 1964 Act to add disability as a prohibited basis for discrimination, Congress enacted a new, comprehensive statute addressing issues such as architectural and communication barriers, 42 U.S.C. 12182(b)(2)(A)(iv), and provision of auxiliary aids and services, 42 U.S.C. 12182(b)(2)(A)(iii), that were not relevant to the kinds of discrimination prohibited by

the 1964 Act. The ADA's concept of "public accommodations" is also much broader than that of Title II of the 1964 Act. Compare 42 U.S.C. 2000a(b) with 42 U.S.C. 12181(7).

Congress enacted procedures for the enforcement of the different titles of the ADA that are modeled, in varying degrees, on the enforcement provisions in different titles of the 1964 Civil Rights Act. Thus, for example, one part of the ADA that deals with employment takes its enforcement scheme from Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination on the basis of race, color, national origin, religion, or sex in employment. See Title I of the ADA, Section 107, 42 U.S.C. 12117(a) (incorporating Title VII remedies by reference). Title VII of the 1964 Act clearly has administrative prerequisites to suit in federal court.

Title II of the ADA, which prohibits discrimination in public services, borrows its enforcement scheme from Title VI of the 1964 Civil Rights Act, as those remedies were incorporated in Section 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794a(a)(2). See 42 U.S.C. 12133.

Finally, Title III of the ADA, governing discrimination against persons with disabilities in the use of public accommodations and services operated by private entities, contains a partial incorporation of the remedies provided for in Title II of the Civil Rights Act of 1964.[2/] Under Section 308(a)(1) of the

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[2/] While the district court reached the correct conclusion in the instant case, we cannot agree with its sweeping assertion (continued...)

Act, 42 U.S.C. 12188(a)(1), an aggrieved person may invoke the procedures set forth in Section 204(a) of the 1964 Civil Rights Act. Section 204(a) of the 1964 Act allows aggrieved persons to file suit to enforce Title II. It's incorporation in Title III of the ADA allows an aggrieved person to bring a civil action to enforce Title III. Just as Section 204(a) does not require exhaustion of state remedies, a person filing suit to enforce Title III is not required to resort first to any administrative remedy. Indeed, the enforcement provision goes on to say that the person with the disability need not always wait until the "public accommodation" actually engage in discrimination. It provides that "[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." 42 U.S.C. 12188(a)(1). Thus, for example, a person using a wheelchair need not try to enter a obviously inaccessible store before bringing suit.

[2/](...continued)
that the "remedies available to an aggrieved disabled person under the ADA are similar to those provided in Title VII of the Civil Rights Act [of] 1964" (E.R. Tab 9 at 2). In fact, the enforcement provision in Title III of the ADA is adopted from Title II, not Title VII, of the 1964 Act. This error has been repeated in a number of other district court opinions. See, e.g., Daigle v. Friendly Ice Cream Corp., 957 F. Supp. 8 (D.N.H. 1997); Snyder v. San Diego Flowers, 21 F. Supp. 2d 1207, 1209 (S.D. Cal. 1998) ("Section 2000a-3 is part of Title VII"); Botosan v. Fitzhugh, 13 F. Supp. 2d 1047, 1049 (S.D. Cal. 1998) (Section 2000a-3(a) comes from Title VII); Guzman v. Denny's, Inc., 40 F. Supp. 2d 930, 934 (S.D. Ohio 1999) (the ADA explicitly adopts the enforcement provisions of Title VII).

By incorporating Section 204(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(a), Congress has authorized courts to grant plaintiffs "preventive relief" (injunctive relief) under Section 308(a)(1) of the ADA.[3/] In addition, Section 204(a) of the Civil Rights Act (as incorporated) permits the Attorney General to intervene if she certifies that the case is "of general public importance." Finally, Section 204(a) (as incorporated) permits the district court, under certain circumstances, to appoint an attorney for the plaintiff and "authorize the commencement of the civil action without the payment of fees, costs, or security."

B. The Plain Language Of Title III Is Unambiguous In Its Authorization Of Suit Without "Exhaustion" Or Notice To State Agencies

Settled canons of statutory interpretation tell us that the starting point of any analysis must be the plain words of the statute. Staples v. United States, 511 U.S. 600, 605 (1994). When the plain words are unambiguous, the inquiry is at an end; there is no need to have recourse to the legislative history or other collateral sources. Presumptively, "the plain language of [a] statute expresses congressional intent." Ardestani v. INS, 502 U.S. 129, 135 (1991), quoted in United States v. Mack, 164 F.3d 467, 471 (9th Cir. 1999). Courts "must presume that a legislature says in a statute what it means and means * * * what

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[3/] Section 308(a)(2) of the ADA, 42 U.S.C. 12188(a)(2), expands the injunctive relief available to include orders requiring the alteration of facilities or the provision of auxiliary services, measures that would not be necessary when discrimination is on the basis of race.

it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992). Thus, this Court assumes that "the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." Phaneuf v. Republic of Indonesia, 106 F.3d 302, 308 (9th Cir. 1997) (citations and internal quotation marks omitted).

Had Congress intended to engraft other parts of Section 204 to the ADA, it knew how to do so. What Congress chose to omit is just as significant an indication of its intent as that which it chose to include. Bank of Am. v. Webster, 439 F.2d 691, 692 (9th Cir. 1971); Guzman v. Denny's, Inc., 40 F. Supp. 2d 930, 934 (S.D. Ohio 1999) (relying on the doctrine of "expressio unius est exclusio alterius").

The language of Section 308(a)(1) of the ADA, 42 U.S.C. 12188(a)(1), is clear and unambiguous. By incorporating Section 204(a), it clearly and unambiguously allows suit without any administrative prerequisites.

Appellants rely heavily upon Mayes v. Allison, 983 F. Supp. 923 (D. Nev. 1997), for the contrary proposition, i.e., that the language of Section 308(a)(1) of the ADA, 42 U.S.C. 12188(a)(1), is ambiguous. The reasoning in Mayes is fatally flawed. The court in that case found the language of Section 308(a)(1) to be "ambiguous" because, the court said, Section 36.501(a) of the Attorney General's regulation, 28 C.F.R. Pt. 36, incorporates by reference the attorneys' fees provision of 42 U.S.C. 2000a-3(b). 983 F. Supp. at 925. That suggests, the Mayes court reasoned,

that the Department of Justice believes Congress intended to incorporate more of Section 204 (of the 1964 Act) than 204(a), the part explicitly referenced in the statute.

But the regulation cited, 28 C.F.R. 36.501(a), does not adopt or restate the attorneys' fees provision of 204(b) of the 1964 Act, 42 U.S.C. 2000a-3(b). In fact, as we show, infra, p. 14, the ADA has its own attorneys' fees provision, 42 U.S.C. 12205. The regulation actually restates the provision in 204(a) of the 1964 Act that:

> [u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

See 28 C.F.R. 36.501(a). The appellants' reliance on Mayes, therefore, is misplaced.

Equally misplaced is appellants' reliance (Br. 11) on the reasoning in Snyder v. San Diego Flowers, 21 F. Supp. 2d 1207, 1210 (S.D. Cal. 1998).[4/] Like a number of other courts (see supra, n.2), the district court in Snyder incorrectly believed that Title III of the ADA was based on Title VII of the 1964 Civil Rights Act ("Section 2000a-3(a) is part of Title VII," 21 F. Supp. 2d at 1209). Understandably, the court then wondered whether or not Congress intended the administrative procedures of Title VII to be incorporated in the procedural section of Title III of the ADA. There is not, however, any such ambiguity in the

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[4/] Appellants' brief (Br. 11 & n.16) inadvertently cites the case appearing at 21 F. Supp. 2d 1201 instead of 1207.

Act. As indicated above, Title III of the ADA is generally modeled on Title II of the 1964 Act, not on Title VII.[5/]

C. Incorporating Other Parts Of Section 204 Of The Civil Rights Act Leads To Incongruous Results

Section 204 of the Civil Rights Act of 1964 has four subsections. One of them, Section 204(a), is expressly incorporated in Section 308(a)(1) of the ADA. Appellants argue that Section 204(c) is also incorporated by reference. Appellants do not, however, explain why a court should find Section 204(c) of the 1964 Act incorporated in Section 308(a)(1) of the ADA, but not Sections 204(b) and 204(d), 42 U.S.C. 2000a-3(b) and 42 U.S.C. 2000a-3(d). The only way that appellants can argue for incorporation of Section 204(c) is to claim that Congress intended to incorporate all four subsections of Section 204 into the remedial provision of Title III of the ADA.

If all four subsections were deemed incorporated, however, the result would be duplication and incongruity. For example, Section 204(b) of the Civil Rights Act, 42 U.S.C. 2000a-3(b), provides:

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

[5/] The administrative procedures required by Section 204(c) of the 1964 Act are, in all events, totally different than those required by Title VII of the 1964 Act. There is no logic to the Snyder court's reasoning that Congress intended to incorporate Section 204(c) of the 1964 Act into Section 308 of the ADA in order to make the latter provision similar to Title VII of the 1964 Act.

Congress could not have intended this provision to be incorporated in Section 308(a)(1) of the ADA. The ADA contains its own all-purpose attorneys' fees provision, 42 U.S.C. 12205, applicable to all civil actions and administrative proceedings brought pursuant to all titles of the ADA.

Nor could Congress have intended to incorporate Section 204(d) of the 1964 Civil Rights Act into Section 308 of the ADA. That part of the 1964 Act permits federal courts, in states having no parallel state law prohibiting public accommodations discrimination, to refer pending public accommodation disputes to the Community Relations Service (CRS) for a maximum of 120 days if there is a possibility that the defendant will comply voluntarily with the Civil Rights Act. Congress never expanded the jurisdiction of the CRS to allow it to mediate issues under the ADA. Therefore, Congress could not have intended Section 308 of the ADA to incorporate Section 204(d) of the 1964 Act. Accordingly, there is no basis for an argument that Congress incorporated in Section 308(a)(1) of the ADA one subsection of Section 204 of the 1964 Civil Rights Act without expressly mentioning it, but failed to incorporate two other provisions that are also not mentioned. The rational answer is that Congress incorporated only that section it alluded to explicitly: Section 204(a).

D. The Legislative History Is Consistent With The "Plain Language" Of Title III's Enforcement Provision

Appellants concede that there is no reason to examine the legislative history if the statute on its face is unambiguous (Br. 13). If relevant, however, the legislative history is

entirely consistent with the reading of the statute to incorporate only Section 204(a) of the 1964 Civil Rights Act.

Appellants rely upon (Br. 10) the fragment of legislative history cited in Mayes, 983 F. Supp. at 925. That fragment consists of one sentence from the Conference Report saying that the House amendment, ultimately adopted by Congress, "'specifies that the remedies and procedures of Title II of the 1964 Civil Rights Act' shall be the remedies and procedures for enforcement of 42 U.S.C. §12182." Ibid. The district court in Mayes concluded from this sentence that Congress intended all of the procedures of Title II to be incorporated, not just Section 204(a). This is entirely incorrect. Apart from the fact that incorporation of "all the procedures of Title II" would have an irrational result, as we demonstrated above, the Mayes court missed the point being made in the Conference Report.

Both the House and the Senate passed versions of Title III that expressly incorporated only the procedures set forth in 42 U.S.C. 2000a-3(a) of the 1964 Civil Rights Act. See Section 308(a)(1) of the Senate Bill, S. 933, as passed September 18, 1989 (appearing also at 135 Cong. Rec. S10707 (daily ed. Sept. 7, 1989)); 136 Cong. Rec. H2460 (daily ed. May 19, 1990) (House-passed version). The two bills differed, however, as to who could invoke the remedies offered by Title III. The Senate version provided: "The remedies and procedures set forth in section 204 of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) shall be available to any individual who is being or is

about to be subjected to discrimination on the basis of disability in violation of this title" (emphasis added). The House bill, however, provided that the "remedies and procedures of title II of the 1964 Civil Rights Act shall be the powers, remedies and procedures title III provides to any person who is being subject to discrimination * * * or * * * has 'reasonable grounds' for believing that he or she is about to be subjected to discrimination with respect to the construction of new or the alteration of existing facilities in an inaccessible manner." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 80 (1990) (emphasis added).

The Conference Report explained, briefly, that the Senate receded and the House version prevailed. In so doing, it shortened its description of the two provisions, referring to the "remedies and procedures of the 1964 Civil Rights Act" and "the remedies and procedures of title II of the 1964 Civil Rights Act" instead of specifying what subsection was actually in each version of the bill. See H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 80 (1990) (reproduced in Addendum to this brief). Clearly, by using these shorthand descriptions, the conferees did not purport to change the words of the bill that the House passed, especially considering that the purpose of the Report was to announce that the committee was adopting the House version.

The only other legislative history we have found relevant to this point consists of a colloquy between two sponsors of the Senate bill, ending with a definitive statement that no

administrative procedures attach to Title III of the Act.[6/] There is not a scintilla of evidence in the legislative history that Congress intended anything but 42 U.S.C. 2000a-3(a)to be incorporated in the enforcement section of Title III of the ADA.

[6/] 135 Cong. Rec. S10759-S10760 (daily ed. Sept. 7, 1989):

MR. BUMPERS. Mr. President, to continue the colloquy before we were interrupted by the vote, let me ask and clarify something before we go on. Is it correct to say that one who is aggrieved by failure of anybody to comply with this act must exhaust, as we lawyers say, his or her administrative remedies before they proceed to file suit.

MR. HARKIN. That is affirmative.

MR. BUMPERS. In that connection, Senator, if somebody who is disabled goes into a place of business, and we will just use this hypothetical example, and they say, "You do not have a ramp out here and I am in a wheelchair and I just went to the restroom here and it is not suitable for wheelchair occupants," are they permitted at that point to bring an action administratively against the owner of that business, or do they have to give the owner some notice prior to pursuing a legal remedy?

MR. HARKIN. First of all, Senator, there would be no administrative remedy in that kind of a situation. The administrative remedies only apply in the employment situation. In the situation you are talking about --

MR. BUMPERS. That is true. So one does not have to pursue or exhaust his administrative remedies in title III if it is title III that is the public accommodations.

MR. HARKIN. Title III.

CONCLUSION

The judgment below denying the motion to dismiss for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, I certify that the attached Brief for the United States as Amicus Curiae Supporting Appellee and Urging Affirmance is monospaced, has 10.5 characters per inch and contains 4,579 words and 522 lines of text.

MIRIAM R. EISENSTEIN
Attorney

August 9, 1999

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 1999, I served the parties to this case with the attached Brief for the United States as Amicus Curiae Supporting Appellee and Urging Affirmance by mailing two (2) copies to each of counsel, postage prepaid, at the following addresses:

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