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MALDEF

**STATEMENT OF ANTONIA HERNANDEZ**

**On Behalf Of The**

**Mexican American Legal Defense and Educational Fund**

**("MALDEF")**

**On The Nomination Of**

**Judge Anthony M. Kennedy**

**To Be An Associate Justice Of The**

**Supreme Court Of The United States**

**Senate Committee On The Judiciary**

**United States Senate**

**December 16, 1987**

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**STATEMENT OF ANTONIA HERNANDEZ**

Mr. Chairman, distinguished members of the Judiciary Committee:

I am pleased to have the opportunity today to present testimony on behalf of the Mexican American Legal Defense and Educational Fund ("MALDEF") concerning the nomination of Judge Anthony Kennedy to be an Associate Justice of the Supreme Court of the United States.

My name is Antonia Hernandez. I am President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). I am here before you today because I have grave concerns about how Judge Kennedy -- if he were confirmed by the Senate to become an Associate Justice -- would view the claims of discriminated-against Hispanics in the important civil and constitutional rights cases which come before and are decided by the United States Supreme Court.

My concerns are real, and they are indeed serious. They stem from such facts as Judge Kennedy's membership in private clubs that had not admitted into membership Hispanics, other minorities, and women. And they are based on the fact that although he has employed thirty-five law clerks, Judge Kennedy has never found himself able to employ an Hispanic or a black law clerk. Furthermore, the sum total of Judge Kennedy's minority employment consists of five women and one Asian law clerk.

My grave concerns, however, are primarily based on several of Judge Kennedy's judicial opinions on civil and constitutional rights in which he denied access to the courts to minorities, in which he denied the right to a trial to minorities, and in which he ruled against minorities by disregarding settled rules governing the scope of appellate review.

In this Statement, I address hereafter primarily two matters: (1) the historical importance of the Supreme Court to vindicating the rights of Hispanics; and (2) Judge Kennedy's several judicial opinions rejecting the rights of Hispanics and of other minorities.

## I. THE HISTORICAL IMPORTANCE OF THE SUPREME COURT TO HISPANICS

The history of discrimination against Hispanics in this country, particularly in the Southwest and especially from the mid-Nineteenth Century to date, has been not unlike that suffered by blacks. We Hispanics have been subjected to segregation in schools, in restaurants, and in hotels. We have been denied employment, and when employed, we have been intimidated and harassed, denied promotions, training and other opportunities. We have been denied the opportunity to serve on juries. And we have even been denied the most fundamental of rights: the right to vote.

But in 1954, Hispanics, blacks and other minorities in our country, were finally given hope by the United States Supreme Court. In fact, two weeks prior to the Supreme Court's unanimous

ruling in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (holding school segregation unconstitutional), the Supreme Court applied the protections of the Fourteenth Amendment to Mexican Americans in Hernandez v. Texas, 347 U.S. 475 (1954), unanimously holding that the exclusion of Mexican Americans from juries in Texas violated the Fourteenth Amendment's equal protection clause. In subsequent years, it again was the Supreme Court -- and thereafter also Congress -- that continued to recognize some of our basic civil rights.

This fight to establish our basic civil rights has not been an easy one. It in fact has required MALDEF attorneys to file and to litigate hundreds of lawsuits. And a number of our lawsuits have ended up in the United States Supreme Court.

A prime example of this is the voting rights case of White v. Regester, 412 U.S. 755 (1973). In this case, a unanimous Supreme Court struck down Texas' imposition of a multimember legislative district in Bexar County, a heavily Hispanic county where San Antonio is located. Based on such facts as the reality that only five Hispanics in nearly 100 years had ever been elected to the Texas Legislature from Bexar County, the Supreme Court upheld our claim that the challenged multimember district scheme diluted the votes of Hispanics in violation of the Fourteenth Amendment, and the Court thus affirmed the remedial redrawing of single member districts.

Apart from the Supreme Court's decision in White and its earlier decision in Hernandez, few of our victories have been the

result of unanimous decisions by the Supreme Court. Instead -- and increasingly in the past decade -- we have faced a divided Supreme Court, a Court which in fact has often been very closely divided on issues of special importance to Hispanics.

For example, in Plyler v. Doe, 457 U.S. 202 (1982), we challenged Texas' denial of a public school education to undocumented Hispanic children. These children were Texas residents most of whom would eventually become legal residents, but who, without an education, would become a permanent underclass. The Supreme Court in this case agreed that Texas' policy was unconstitutionally discriminatory in violation of the Fourteenth Amendment. But the Court reached this decision through a bare 5-4 majority, with Justice Powell joining that majority.

With Justice Powell no longer on the Supreme Court, and with the future of the Supreme Court hanging in the balance, I am of course concerned about his possible replacement, and I am particularly concerned about the capacity for fairness and compassion of the person nominated to succeed Justice Powell.

## II. JUDGE KENNEDY'S SEVERAL JUDICIAL OPINIONS ADVERSE TO THE RIGHTS OF HISPANICS

In his twelve years on the United States Court of Appeals for the Ninth Circuit (which encompasses nine states, including the states of California, Arizona, and Nevada), Judge Anthony Kennedy has authored nearly 500 judicial opinions. Roughly a dozen of his opinions, narrowly speaking, have had a particular

impact on the rights of Hispanics and of other minorities.

In reviewing these opinions, my staff and I have determine that Judge Kennedy, whether ruling for or against civil rights litigants, has in many instances carefully followed and applied settled law or judicial precedent. (Several of these opinions, in which he ruled in favor of civil rights litigants, are summarized and analyzed in Appendix B to this Statement.) In these instances at least, Judge Kennedy has demonstrated not only his adherence to precedent but his fairness as well.

In several other instances, however, Judge Kennedy's opinions reflect not only a deviation from precedent but also unfairness and even a serious insensitivity to the rights of minorities. (Several of these opinions, all adverse to the civil rights plaintiffs, are summarized and analyzed in Appendix A to this Statement.)

The point of my grave concern about these adverse opinions is not just that he ruled against civil rights plaintiffs in cases that I firmly believe could have been and should have been ruled upon differently. Rather, my serious concern arises primarily from the manner in which he reached his results adverse to civil rights.

Three of Judge Kennedy's opinions deserve, in my view, particularly close scrutiny.

A. Housing Discrimination, and Access to the Courts

TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976)

(Kennedy, joined by Chambers and Trask), cert. denied, 429 U.S. 859 (1977), is a housing discrimination case.

The plaintiffs, a fair housing organization and three individual homeowners, alleged that they were being denied the opportunity to live in integrated neighborhoods because of the racial steering practices of various real estate brokers. They sued the brokers directly in federal court under the federal Fair Housing Act. The defendants moved to dismiss the lawsuit on the grounds that the plaintiffs allegedly had not been sufficiently injured so as to be able to sue in court. The District Court disagreed and refused to dismiss the lawsuit.

On appeal, Judge Kennedy reversed the District Court and directed that the case be dismissed.

To reach this result, Judge Kennedy had to distinguish the Supreme Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), in which the Supreme Court recognized the injury-in-fact "standing" of apartment tenants to challenge a landlord's similar steering under the Fair Housing Act.

Judge Kennedy's narrow views were squarely rejected by the Supreme Court three years later in Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), in a 7-2 opinion by Justice Powell. In the course of that opinion, Justice Powell pointed out that his allowance of access to the courts was supported by nine federal court decisions. Id. at 108. "The notable exception is the Ninth Circuit in TOPIC v. Circle Realty." Id. Justice

Powell continued: "[T]he Court of Appeals in this case correctly declined to follow TOPIC." Id. at 109.

### B. Voting Discrimination, The Right to a Trial, and Appellate Review

Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979) (Barnes with Voorhees, and Kennedy concurring), aff'g 455 F. Supp. 625 (C.D. Cal. 1976), is a vote dilution case similar to the Supreme Court case of White v. Regester, 412 U.S. 755 (1973). But Judge Kennedy reached a result different from that reached by the unanimous Supreme Court.

The Hispanic plaintiffs in Aranda challenged the at-large elections used by the city of San Fernando, California. As of the early 1970s, the population of San Fernando had grown to become 50% Hispanic; 29% of the registered voters were Hispanic; and yet since the city's incorporation in 1911 only three Hispanics had ever been elected at large to the five-member City Council. The plaintiffs also alleged that there was a history of harassment and discrimination against Hispanics, and that the political process was not equally open to Hispanics. For example, more than half of the polling places had been ordinarily located in the homes of Anglos while pollings places had seldom been located in Hispanic homes.

Despite these allegations, the District Court summarily dismissed the case, thereby effectively denying the plaintiffs the opportunity to present their case at trial.

The Ninth Circuit affirmed the summary dismissal in a

majority opinion which set forth few of the facts, contained little legal analysis, and which primarily adopted the District Court's opinion.

Judge Kennedy filed a concurring opinion in which he filled in the facts and provided the precedential analysis missing from the majority opinion. His concurring opinion is remarkable in at least two respects.

First, Judge Kennedy never discussed the Supreme Court's stringent legal principles disfavoring summary dismissals. Judge Kennedy accordingly circumvented established Supreme Court precedent, possibly so as to reach the result he desired.

Second, Judge Kennedy itemized the plaintiffs' many factual allegations, and then concluded that such plaintiffs could never win:

> Assuming that plaintiffs' factual allegations are true, when taken together, they would not permit a reasonable person to infer that the at-large system for electing the mayor and city council members is maintained because of an invidious intent.

Aranda, 600 F.2d at 1277. Since the fact patterns underlying most at-large elections in California and in the other states within the Ninth Circuit were no more egregious than the facts alleged by the Hispanic plaintiffs in this case, Judge Kennedy's conclusion effectively ended constitutional challenges to at-large elections within the Ninth Circuit.

C. School Segregation, and Appellate Review

Spangler v. Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979) (Goodwin, with Anderson concurring, and with Kennedy concurring), is a school desegregation case.

At issue in this case was the Board of Education's request that the District Court relinquish its continuing jurisdiction on the grounds that the Board for many years had substantially complied with the court-ordered desegregation plan, and that the Board had passed a resolution promising not to engage in intentional discrimination in the future. This request was opposed by the plaintiffs and by the Justice Department because the Board in fact had been out of compliance on thirteen occasions, and primarily because recently elected Board members had expressed their intent to revoke the desegregation plan and thereby to resegregate the schools. The District Court denied the Board's request and retained continuing jurisdiction.

On the Board's appeal, the Ninth Circuit, in a short majority opinion, reversed and directed the termination of jurisdiction.

Judge Kennedy filed a lengthy concurring opinion setting forth the facts as he perceived them to be, and providing a legal analysis for the results reached. In doing so, he went far beyond the majority opinion both procedurally and as a matter of law in at least two respects.

First, Judge Kennedy substituted his version of the facts for those found by the finder of fact, the District Court. For

example, although the District Court found substantial noncompliance particularly after 1976, Judge Kennedy argued that "there has been no showing of noncompliance in any degree since that date." Spangler, 611 F.2d at 1243 (footnote omitted noting thirteen instances of noncompliance). Additionally, on the resegregation issue, Judge Kennedy acted as the trier of fact in finding that "the evidence does not support the conclusion that the school board harbors an intent to establish, or return to, a dual system." Id. at 1244. The problem with these conclusions is that Judge Kennedy never cited, and indeed circumvented, the Supreme Court's stringent principles which delegate fact finding to the District Courts.

Second, at somewhat of a loss to cite controlling law in support of his legal conclusion on the termination of jurisdiction, Judge Kennedy quoted from the Supreme Court's decision in Spangler several years earlier:

> At oral argument the Solicitor General discussed the Government's belief that if, as [the Board defendants] have represented, they have complied with the District Court's order during the intervening two years [from 1974 to 1976], they will probably be entitled to a lifting of the District Court's order in its entirety. Tr. of Oral Arg. 28-31.

Spangler, 611 F.2d at 1243 (brackets by Judge Kennedy), quoting from Pasadena Board of Education v. Spangler, 427 U.S. 424, 441 (1976). The problem with Judge Kennedy's reliance on this

quotation is that it was not adopted as law then by the Supreme Court, and it is not now the law. Instead, it was no more than an argument by Solicitor General Robert H. Bork.

## III. CONCLUSION

I no doubt need not stress to this Committee that Hispanics, and other minorities too, are deeply concerned about the prevalence of discrimination in the sale and rental of the very housing we need for our families; about our right not just to vote, but to a vote that counts; and about segregation and resegregation of our children in our country's public schools. In order to fight ongoing discrimination and injustice, we Hispanics and other minorities need access to the courts, as well as to our "day in court" to prove discrimination and injustice. And we need Supreme Court Justices that believe in and apply the noble inscription on the Supreme Court building's facade: **EQUAL JUSTICE UNDER LAW.**

The foregoing judicial opinions rendered by Judge Kennedy, and in particular the way in which he reached his results, have quite naturally caused me to conclude that Judge Kennedy -- if he becomes Associate Justice Kennedy on the Supreme Court -- may not be fair in adjudicating the rights of Hispanics and of other minorities. Alas, this possible unfairness could become particularly prevalent in cases not subject to compelling judicial precedent.

Many of you have read and analyzed the foregoing opinions,

among others. I am not yet convinced whether Judge Kennedy would be fair in adjudicating the rights of Hispanics and other minorities. I urge the Committee to seek further clarification and assurance--on the record--concerning his views on civil rights and on the rights of Hispanics.

## APPENDIX A

### A SUMMARY AND ANALYSIS OF SEVERAL OF JUDGE KENNEDY'S OPINIONS ADVERSE TO CIVIL RIGHTS

## APPENDIX A

In a number of his judicial opinions, on issues of particular importance to the civil rights and constitutional rights of Hispanics, Judge Kennedy has denied access to the courts, denied the right to a trial, and has disregarded settled judicial precedent on the scope and nature of appellate review. Four such opinions are summarized and analyzed hereafter: one each in the areas of housing discrimination; vote dilution and the right to vote; school segregation; and employment discrimination.

1. TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976) (Kennedy, joined by Chambers and Trask), cert. denied, 429 U.S. 859 (1977).

This housing discrimination case was filed under the Fair Housing Act. Judge Kennedy denied injury-in-fact standing to the individual and organizational plaintiffs. His anti-civil rights view was squarely rejected three years later in Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), a 7-2 decision with the majority opinion written by Justice Powell.

In TOPIC, a fair housing organization and three individual homeowners alleged that they were being denied the opportunity to live in integrated neighborhoods because of the racial steering practices of various real estate brokers. They sued the brokers directly in federal court under § 812 of the Fair Housing Act.

The District Court denied the defendants' motion to dismiss on grounds of standing. Judge Kennedy reversed and directed that the case be dismissed.

To reach this result, Judge Kennedy had to distinguish the Supreme Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), in which the Court recognized the injury-in-fact standing of apartment complex tenants to challenge a landlord's similar steering under ( 810 of the Fair Housing Act. He sought to distinguish Trafficante in two ways.

First, Judge Kennedy reached out to find that the injury allegedly suffered by the homeowners in TOPIC was probably much less direct than that suffered by the tenants in Trafficante. Having thus distinguished Trafficante in this manner, Judge Kennedy then declined to base his decision on this premise.

Second, Judge Kennedy instead limited Trafficante to it's holding under the less-used ( 810 of the Fair Housing Act, and held that ( 812 relied on in TOPIC did not authorize lawsuits by residents who had not themselves been directly discriminated against.

Both of Judge Kennedy's narrow views were squarely rejected by the conservative Burger Court three years later in Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), in a 7-2 opinion by Justice Powell. In the course of that opinion, Justice Powell pointed out that "[m]ost federal courts that have considered the issue agree that (( 810 and 812 provide parallel remedies to precisely the same prospective plaintiffs." Id. at 108, citing

nine federal court decisions. "The notable exception is the Ninth Circuit in TOPIC v. Circle Realty." Id. Justice Powell continued:

> [T]he Court of Appeals in this case correctly declined to follow TOPIC. Standing under ( 812, like that under ( 810, is "as broad as is permitted by Article III of the Constitution."

Id. at 109, quoting from Trafficante, 409 U.S. at 209.

**2. Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979) (Barnes with Voorhees, and Kennedy concurring), aff'g 455 F. Supp. 625 (C.D. Cal. 1976).**

**This vote dilution case challenged at-large elections under the Fourteenth and Fifteenth Amendments. In his separate concurring opinion which is longer than the majority opinion, Judge Kennedy provided a judicial roadmap which could have been used to preclude all future challenges to at-large elections in those states within the Ninth Circuit. If this was Judge Kennedy's intent, it became moot in 1982 when Congress amended ( 2 of the Voting Rights Act.**

The Hispanic plaintiffs in Aranda challenged the at-large elections used by the city of San Fernando since its incorporation in 1911. As of the early 1970s, the population of San Fernando had grown to become 50% Hispanic; 29% of the registered voters were Hispanic; and yet only three Hispanics had ever been elected at large to the five-member City Council.

In addition to the foregoing, plaintiffs alleged that there was a history of discrimination against Hispanics, and that the political process was not equally open to Hispanics in that, for example, few Hispanics had ever been appointed to the City's eighteen commissions: few Hispanics had been permitted to serve as election officials: volunteer Hispanic poll watchers were routinely harassed; more than half of the polling places were ordinarily located in the homes of Anglos while pollings places had seldom been located in Hispanic homes; racial appeals were made by Anglos in election campaigns; and all ballots and election materials were available only in English.

Despite these allegations, the District Court denied plaintiffs a trial, and granted the City's motion for summary judgment on the ground that even if plaintiffs could prove their allegations as true, this would not add up to the intentional discrimination necessary to establish liability.

The Ninth Circuit affirmed the summary judgment dismissal in a majority opinion which set forth few of the facts, which contained little legal analysis, and which primarily adopted the District Court's opinion.

Judge Kennedy filed a concurring opinion in which he filled in the facts and provided the precedential analysis missing from the majority opinion. His concurring opinion is remarkable in at least two respects.

First, although this case was decided not after trial when all the facts could have been fully developed but instead on

summary judgment. Judge Kennedy never discussed the stringent legal principles applicable to summary judgment motions. E.g., the moving party has the burden of proving that there are no material facts in dispute, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); and "all inferences to be drawn from the underlying facts contained in the [movant's] materials must be viewed in the light most favorable to the party opposing the motion," United States v. Diebold, 369 U.S. 654, 655 (1962) (brackets added). Judge Kennedy accordingly circumvented established Supreme Court precedent apparently so as to reach the result he desired.

Second, Judge Kennedy itemized plaintiffs' many factual allegations, and then concluded plaintiffs could never win:

> Assuming that plaintiffs' factual allegations are true, when taken together, they would not permit a reasonable person to infer that the at-large system for electing the mayor and city council members is maintained because of an invidious intent.

Aranda, 600 F.2d at 1277. Since the fact patterns underlying most at-large elections in California and in the other states within the Ninth Circuit were no more egregious than the facts alleged by the plaintiffs in this case, Judge Kennedy's conclusion effectively ended constitutional challenges to at-large elections within the Ninth Circuit. And he precluded such challenges despite the existence of similar fact patterns in

successful cases such as the Supreme Court case of White v. Regester, 412 U.S. 755 (1973).

Judge Kennedy's decision in Aranda did not, however, kill litigation challenges to at-large elections. In 1982, Congress amended ( 2 of the Voting Rights Act to clarify its intent that electoral practices which have a discriminatory effect are illegal. This 1982 amendment in turn was further clarified by a narrowly divided Supreme Court in Thornburg v. Gingles, ____ U.S. ____, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1976).

3. Spangler v. Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979) (Goodwin, with Anderson concurring, and with Kennedy concurring).

**This school desegregation case involved the question of whether the District Court's supervisory jurisdiction should be continued or terminated. Although Judge Kennedy agreed with the majority that jurisdiction should be terminated and the District Court decision thereby should be reversed, Judge Kennedy filed a concurring opinion (more than three times longer than the majority opinion) in which he disregarded settled judicial principles on fact finding, and in which he reached out to decide an issue which has become critical today in school desegregation litigation. This concurring opinion in Spangler is similar in many respects to his reaching-out concurring opinion in Aranda.**

In this decade-old school desegregation case, the Board of Education filed a motion requesting the District Court to relinquish its continuing jurisdiction on the grounds that the

Board for many years had substantially complied with the court-approved desegregation plan, and that the Board had passed a resolution promising not to engage in intentional discrimination in the future. This motion was opposed by the plaintiffs and by the Justice Department because the Board in fact had been out of compliance on thirteen occasions, and primarily because recently elected Board members had expressed their intent to revoke the desegregation plan and thereby to resegregate the schools. The District Court retained continuing jurisdiction.

On the Board's appeal, the Ninth Circuit panel reversed and directed the termination of jurisdiction. In a short majority opinion, Judge Goodwin found that the Board had substantially complied with the desegregation plan and that it was time for jurisdiction to be relinquished. Judge Anderson agreed in a one-sentence concurrence.

Judge Kennedy filed a lengthy concurring opinion setting forth the facts as he perceived them to be, and providing a legal analysis for the result reached. In doing so, he went far beyond the majority opinion both procedurally and as a matter of law.

First, Judge Kennedy substituted his version of the facts for those found by the finder of fact, the District Court. For example, although the District Court found substantial noncompliance particularly after 1976, Judge Kennedy argued that "there has been no showing of noncompliance in any degree since that date." Spangler, 611 F.2d at 1243 (footnote omitted noting thirteen instances of noncompliance). Additionally, on the

resegregation issue, Judge Kennedy acted as the trier of fact in finding that "the evidence does not support the conclusion that the school board harbors an intent to establish, or return to, a dual system." Id. at 1244. Irrelevant to Judge Kennedy were the political campaign statements of the newly elected Board members, the actual deliberations of the Board, and the credibility of the Board members as witnesses. Relevant instead to Judge Kennedy was his conclusion that a "policy of favoring [a return to] neighborhood schools is not synonymous with an intent to violate the constitution." Id. at 1245. Moreover, the Board's "resolution is further evidence that the Board is not likely to engage in new acts of intentional discrimination." Id. at 1245-46. Apart from Judge Kennedy's apparent willingness to overlook the facts in the face of a mere promise not to discriminate, compare Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (Kansas a year earlier had repealed the law which had permitted segregation in Topeka), Judge Kennedy's manner of appellate review is totally at odds with settled jurisprudence -- nowhere cited in his opinion -- governing the application of the clearly erroneous standard under Rule 52(a) of the Fed. R. Civ. P. According to that settled jurisprudence: "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); see also United States v. United States

Gypsum Co., 333 U.S. 364, 395 (1948). The reasons for this established principle were recently explained by Justice White for the unanimous Court in Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1985):

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

As Justice White further explained in Anderson, 470 U.S. at 575:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be

> aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

None of these basic principles, however, appear to have had any effect upon Judge Kennedy in Spangler.

Second, at somewhat of a loss to cite controlling law in support of his legal conclusion pertaining to an absence of intentional discrimination, Judge Kennedy relied on the "incremental segregative effect" theory advanced by Justice Rehnquist in Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1977). See Spangler, 611 F.2d at 1242. The problem with this reliance, as is pointed out later in Spangler, 611 F.2d at 1247-48, is that the Supreme Court abandoned this incremental segregative effect theory in Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) ("Dayton II"); and in Columbus Board of Education v. Penick, 443 U.S. 449 (1979).

Finally, and again at a loss to cite controlling law supporting his legal conclusion on the termination of jurisdiction, Judge Kennedy quoted from the Supreme Court's decision in Spangler several years earlier:

> At oral argument the Solicitor General discussed the Government's belief that if, as petitioners have represented, they have complied with the District Court's order during the intervening two years [from 1974 to 1976], they will probably be

entitled to a lifting of the District Court's order in its entirety. Tr. of Oral Arg. 28-31.

Spangler, 611 F.2d at 1243 (brackets by Judge Kennedy), quoting from Pasadena Board of Education v. Spangler, 427 U.S. 424, 441 (1976)). The obvious problem with Judge Kennedy's reliance on this quotation is that it was not adopted as law then by the Supreme Court, and it is not now the law. Instead, it was no more than an argument by Solicitor General Robert H. Bork.

The overall importance of Judge Kennedy's views in Spangler on resegregation and on termination of jurisdiction is that these matters had not, and have not yet, been resolved by the Supreme Court, although resegregation has in fact become a reality. See, e.g. Dowell v. Board of Education of Oklahoma City, 795 F.2d 1516 (10th Cir. 1976), cert. denied, 55 U.S.L.W. 3316 (U.S. Nov. 3, 1986); Riddick v. School Board of Norfolk, 784 F.2d 521 (4th Cir. 1976), cert. denied, 55 U.S.L.W. 3316 (U.S. Nov. 3, 1986).

**4. AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) (Kennedy, with Wright and MacBride), rev'g 578 F. Supp. 846 (W.D. Wash. 1983).**

**This simple and yet complex wage discrimination case presented a cutting-edge issue in employment discrimination law: whether an employer has engaged in illegal gender discrimination in violation of Title VII by setting lower wages for job classifications held predominantly by women. Although the purely legal answer to this question should have been a mainstream "yes," this issue nevertheless was and still is considered on the**

cutting edge simply because an affirmative legal answer could open the way to making vast numbers of employers guilty of illegal discrimination. Regardless of this potential effect, the District Court in this case reviewed extensive documentary and testimonial evidence, and ruled that the State of Washington's system of wage compensation constituted illegal employment discrimination under Title VII. Judge Kennedy, in total disregard of the evidentiary record in the case and based instead on a theory not proven in the case, reversed. Further appellate review became moot when Washington agreed to settle the case for nearly one hundred million dollars in wage adjustments, back pay, and front pay.

The union and the individual plaintiffs in this case alleged gender discrimination not on the grounds of some undefined "comparable worth" theory, but instead on the grounds that the State of Washington had determined and imposed a disparate wage scale based upon gender (just as other employers had done based upon race and/or national origin). To establish their claims, the plaintiffs presented evidence -- and proved to the satisfaction of the District Court -- that predominantly male jobs were paid significantly more than predominantly female jobs of equal skill, effort, responsibility, and working conditions; that there was a statistically significant and quite precise inverse correlation between gender and salary (i.e., that the monthly salary decreased by roughly $4.51 for every 1% increase in the female population of the classification); that the State's

own studies which established these disparities and the inverse correlation effectively eliminated nondiscriminatory factors which might account for the wage differentials; and that the wage differentials were part of a system based upon gender-segregated job classifications, gender-segregated advertising, subjective classification decisions, and admitted wage discrimination. Based upon these findings, among others, the District Court held that the State of Washington had violated Title VII both under a disparate impact theory and under a disparate treatment theory.

Judge Kennedy reversed both grounds of liability. In doing so, he committed at least three legal errors.

First, Judge Kennedy held that disparate impact liability could apply only to a single allegedly neutral practice and not to an aggregate of subjective practices. This narrow reading of Title VII disparate impact law was contrary to the precedent then existing in the Ninth Circuit, see, e.g., Peters v. Lieuallen, 746 F.2d 1390 (9th Cir. 1984); Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982); and is contrary to current precedent in the Ninth Circuit, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc).

Second, Judge Kennedy held that the evidence presented did not establish disparate treatment liability since illicit motive had not been established. In making this determination, however, Judge Kennedy declined to defer to, or even to discuss, the clearly erroneous standard of appellate review (which is discussed at 19-22 supra in the context of his similar reversal

in Spangler), a stringent standard of review applicable not only to underlying findings of fact but also to an ultimate finding of intentional discrimination. Pullman-Standard v. Swint, 456 U.S. 273, 287-89 (1982). Rather than applying the clearly erroneous standard, Judge Kennedy instead simply recharacterized the facts in a manner suitable to him.

Finally, although the State of Washington's own studies rebutted its alleged reliance on prevailing market rates, and although the District Court's opinion nowhere even uses the word "market," Judge Kennedy frequently invoked a free market defense in rebuttal to either disparate impact liability or disparate treatment liability. As to the former, for example, Judge Kennedy held that:

> A compensation system that is responsive to supply and demand and other market forces ... does not constitute a single practice that suffices to support a claim under disparate impact theory.

AFSCME, 770 F.2d at 1406 (ellipsis added). As to disparate treatment liability, Judge Kennedy commented:

> Neither law nor logic deems the free market system a suspect enterprise.

Id. at 1407. Judge Kennedy concluded his opinion with similar market-based sentiments:

> The State of Washington's initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in

> dissimilar female-dominated jobs is not in and of itself a violation of Title VII.... [T]he law does no permit the federal courts to interfere in the market based system for the compensation of Washington's employees.

Id. at 1408 (ellipsis and brackets added). Judge Kennedy, in other words, set up his own market-based straw man, and then buried him.

In summary, although the Supreme Court opened the door to wage discrimination challenges in Washington v. Gunther, 452 U.S. 161 (1981), Judge Kennedy sought to foreclose such challenges in his AFSCME opinion. His opinion, however, did not end the AFSCME litigation adversely to the plaintiffs. With plaintiffs-appellees' petition for rehearing en banc pending before the Ninth Circuit, the State of Washington agreed to settle the case for $97.2 million in wage adjustments, back pay, and front pay.

## APPENDIX B

### A SUMMARY AND ANALYSIS OF SEVERAL OF JUDGE KENNEDY'S OPINIONS FAVORABLE TO CIVIL RIGHTS

## APPENDIX B

In a number of his judicial opinions affecting the rights of Hispanics, Judge Kennedy has followed settled law or judicial precedent in ruling sometimes for and sometimes against civil rights plaintiffs. Three such opinions, in which he ruled in favor of civil rights litigants, are summarized and analyzed hereafter.

1. Flores v. Pierce, 617 F.2d 1386 (9th Cir. 1980) (Kennedy, joined by Pregerson and Bonsal).

**Two Hispanic restaurant owners, whose receipt of a liquor license was delayed, filed this damage action challenging as discriminatory the opposition mounted by various local government officials. Judge Kennedy affirmed the jury findings of intentional discrimination. Although supporters of Judge Kennedy have cited this opinion as illustrative of his sensitivity to civil rights, it would have been virtually impossible and hence outrageous for Judge Kennedy to have overruled the jury findings in this case.**

Plaintiffs Barbaro and Alma Flores, owners of a nearby restaurant with a predominately Hispanic clientele, planned to open a restaurant in Calistoga, California, and accordingly applied for a liquor license with the State Department of Alcoholic Beverage Control ("ABC"). Their application was opposed by the Calistoga police chief, the mayor, and members of

the city council. Given the governmental opposition, ABC initially denied the license. Following an appeal, ABC nine months later awarded the license.

Plaintiffs sued the local officials for damages under 42 U.S.C. ( 1983. At their jury trial, plaintiffs showed, inter alia, that the local officials engaged in racial stereotyping in their opposition papers, that the local officials had not objected to liquor licenses sought by Anglo applicants during the same time period, that the local officials had departed from their ordinary practices in opposing the license, and that the Flores were of good moral character as found by ABC. On this evidence, the jury found that the defendant local officials had intentionally discriminated against the plaintiffs in violation of the Fourteenth Amendment. And the jury awarded $48,500 in compensatory damages to cover for lost profits, for attorneys fees incurred before ABC, and for emotional distress.

On appeal, defendants argued that the jury verdict was wrong. The applicable standard of appellate review, however, all but doomed the appeal. Under the legal standard applicable then, as now, the Ninth Circuit was required to view the evidence in the light most favorable to the prevailing parties and to draw all inferences in the prevailing parties' favor, Fountila v. Carter, 571 F.2d 487, 490 (9th Cir. 1978); and the Ninth Circuit could reverse the jury verdict only if the evidence allowed only a contrary conclusion, Kay v. Cessna Aircraft Co., 548 F.2d 1370, 1372 (9th Cir. 1977).

In his opinion for the Ninth Circuit, Judge Kennedy properly cited the controlling standards of appellate review, and he thus affirmed the jury verdict because the "evidence here was more than sufficient to support a finding that the [defendants] acted with the purpose and intent of discriminating on the basis of race or national origin." Flores, 617 F.2d at 1390 (brackets added).

**2. James v. Ball, 613 F.2d 180 (9th Cir. 1979) (Kennedy, joined by Choy, dissent by Hall), rev'd, 451 U.S. 355 (1981).**

The issue in this case was whether voting in a special-purpose district could be limited to landowners or instead was subject to the one-person one-vote principle. The District Court held that the voting could be limited to landowners. Judge Kennedy, in a good opinion from a civil rights perspective, applied the one-person one-vote principle and reversed. In turn, Judge Kennedy was reversed by the Supreme Court on a 5-4 vote.

This lawsuit was a Fourteenth Amendment challenge to the constitutionality of several Arizona statutes which limited to landowners voting rights in elections for directors of the Salt River District, with votes essentially apportioned to owned acreage. The lawsuit was brought by persons precluded from the franchise, i.e., renters, and persons who owned less than one acre of land.

At the time this case was brought, the controlling law generally favored application of the one-person one-vote principle initially articulated in Reynolds v. Sims, 377 U.S. 533



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(1964). Not only had the one-person one-vote principle been widely applied, but it had been specifically applied to strike down laws which limited voting to landowners, i.e., Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. Houma, 395 U.S. 701 (1969). In one instance, however, the Supreme Court had allowed voting to be limited to landowners so long as the jurisdiction had a "special limited purpose" which in turn had a significantly disproportionate effect on landowners as a group, Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973).

The Arizona defendants in James argued that Salyer permitted the challenged limitation on voting. Judge Kennedy disagreed. Salyer, he pointed out, involved a water district which consisted entirely of agricultural land farmed by four corporations which bore all the expenses of the district. The Salt River District in James was entirely different. First, as to its water operations, the District encompassed not just agricultural lands but also eight municipalities including major portions of Phoenix. Second, the District was Arizona's second largest electric utility servicing nearly a quarter of a million persons. And finally, the activities of the District did not disproportionately affect landowners. Based on these differences, Judge Kennedy distinguished Salyer, applied the one-person one-vote principle, and held the challenged statutes unconstitutional. He concluded:

> The rationale for departing from the one-person one-vote standard is ... that under certain conditions, of most narrow dimension, there may exist a state created entity, limited to operations with little effect on the general electorate and a substantially disproportionate effect on the interests of a discrete group permitted to vote. If, on the other hand, the operations of a state entity affect a diverse group of citizens, the franchise cannot be restricted to exclude those who have an interest in the election.

James, 613 F.2d at 185 (citations omitted).

In a 5-4 decision which substantially expanded the Salyer exception, the Supreme Court reversed Judge Kennedy and upheld the franchise limitation. Ball v. James, 451 U.S. 355 (1981). Justice White, with Brennan, Marshall, and Blackmun, dissented. Id. at 375-89.

**3. National Labor Relations Board v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979) (Wright, joined by Hall, with Kennedy concurring).**

The Ninth Circuit in this case held that undocumented workers were "employees" within the meaning of, and hence protected by, the National Labor Relations Act. Judge Kennedy filed a two-sentence concurring opinion. As to the issue on the merits, the Supreme Court in another case subsequently agreed with the Ninth Circuit.

Several undocumented workers filed charges with the NLRB claiming that they had been denied overtime wages. They thereafter were laid off, and they were later denied reinstatement. The NLRB found in favor of the workers, and issued a cease and desist order. The NLRB then sought judicial enforcement of its order.

The employer argued before the Ninth Circuit that undocumented workers were not "employees" within the meaning of § 2(3) of the NLRA, 29 U.S.C. § 152(3). The Ninth Circuit rejected this defense. Judge Wright, in his majority opinion, pointed out that the inclusion of undocumented workers was consistent with the statutory structure of the NLRA, consistent with NLRB interpretations of the law, and consistent with the only other court of appeals' ruling on this issue.

Judge Kennedy filed a nonanalytical and sensitive concurring opinion, Apollo Tire Co., 604 F.2d at 1184, which stated in its entirety:

> I concur. If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case.

As to the legal issue resolved on the merits, the Supreme Court in another case eventually agreed with the Ninth Circuit. Sure-Tan, Inc. v. National Labor Relations Board, 467 U.S. 883 (1984).