No. 08-7094
THIS CASE HAS NOT YET BEEN SCHEDULED FOR ARGUMENT

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

ROBERT L. ORD,

Plaintiff-Appellant,

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee.

Appeal from a Judgment of the
United States District Court for the District of Columbia
The Hon. John D. Bates, District Judge
(Dist. Ct. No. 08-CV-704)

BRIEF AMICI CURIAE OF SECOND AMENDMENT FOUNDATION, INC. AND AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA IN SUPPORT OF APPELLANT SEEKING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

CORPORATE DISCLOSURE STATEMENT, Cir. Rule 26.1

Amicus Curiae The Second Amendment Foundation, Inc., ("SAF") has no parent corporations. No publicly traded company owns 10% or more of amicus corporation's stock.

SAF, a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code, is a non-profit educational foundation incorporated in 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing throughout the United States.

The American Civil Liberties Union of the National Capital Area, Inc. ("ACLU-NCA") is a non-profit, non-stock corporation organized under the laws of the District of Columbia. The ACLU-NCA is an affiliate of the American Civil Liberties Union ("ACLU"), which is likewise a non-profit, non-stock corporation organized under the laws of the District of Columbia. No publicly held corporation owns any stock in either organization.

The ACLU is a membership organization with more than 500,000 members nationwide. Since its founding in 1920, the ACLU and its local affiliates have worked to protect and defend the civil liberties of all Americans.

Except for SAF and ACLU-NCA, all parties, intervenors, and amici appearing before the District Court and 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

Amici are unaware of any related cases.

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BRIEF OF AMICI CURIAE THE SECOND AMENDMENT FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOR THE NATIONAL CAPITAL AREA IN SUPPORT OF APPELLANT

INTERESTS OF AMICI CURIAE

The Second Amendment Foundation, Inc. ("SAF"), a non-profit educational foundation with over 650,000 members and supporters, seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF's members and supporters are directly impacted by this Court's standing doctrine, as it threatens to impede SAF's mission of achieving legal reform through civil rights litigation. SAF has substantial litigation expertise that would aid the Court in deciding this matter.

The American Civil Liberties Union of the National Capital Area ("ACLU-NCA") is an affiliate of the American Civil Liberties Union ("ACLU"), a non-profit membership organization with more than 500,000 members nationwide. Since its founding in 1920, the ACLU and its local affiliates have worked to protect and defend the civil liberties of all Americans, principally through the representation of plaintiffs in federal and state courts. Because access to the courts on behalf of its clients is an essential part of the ACLU's operation, the

ACLU-NCA has a strong and direct interest in the rules concerning standing, at issue in this appeal.

The ACLU-NCA has no position, and expresses no view, on whether the plaintiff in this lawsuit is entitled to the relief he seeks. But, for the reasons set out below, he is entitled to have his lawsuit considered on the merits.

CONSENT TO FILE

All parties have consented to the filing of this brief. On May 1, 2009, the Clerk granted SAF's motion for leave to participate as amicus curiae. The parties have consented to ACLU-NCA's motion to join this brief.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellants.

SUMMARY OF ARGUMENT

Individuals who live within or visit our Nation's capital should enjoy the same right to access an Article III court for the resolution of cases or controversies arising in the federal city as exists throughout the United States. Unfortunately, this Court has developed a unique

doctrine barring all pre-enforcement challenges to criminal enactments that neither raise First Amendment concerns nor arise out of agency action, absent showing a particularized threat of enforcement. In so doing, this Court has nullified the Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq., for most people. Many of the landmark cases defining the scope of our basic civil rights could never have been brought under such a restrictive doctrine.

Although the Court's unique standing hurdles theoretically allow for pre-enforcement challenges in those rare cases where the government issues a particularized threat, this case demonstrates that the right to access the courts under such circumstances remains illusory. In practice, it appears nothing the government can do to threaten an individual will reliably satisfy the courts that the requisite threat of particularized enforcement has been established.

This Court has repeatedly explained that its pre-enforcement standing doctrine is in conflict with Supreme Court precedent and the precedent of other appellate courts. And in applying its unique doctrine, this Court has declined to offer any rationale for it, other than that it reflects this Court's previous practice.

The District Court broke significant new ground expanding this Court's erroneous standing doctrine, holding that even the issuance of an arrest warrant does not threaten the law's enforcement, and that the issuance of a policy targeting a plaintiff does not threaten that plaintiff if it is addressed only to the law enforcement officials who would arrest him. Although it is possible to reverse the District Court simply for having gone a step too far, the better course of action would be for this Court to conform its practice with Supreme Court precedent, and abandon the erroneous and confusing particularized threat requirement.

ARGUMENT

I. STANDING TO ASSERT A PRE-ENFORCEMENT CHALLENGE IS ESTABLISHED WHENEVER A PLAINTIFF FOREGOES ACTIVITY BASED ON A CREDIBLE FEAR OF ENFORCEMENT.

Discussion of the federal courts' various standing doctrines can often devolve into abstractions, but it is important to recall what is essentially at stake: the right of an individual to access Article III courts for the vindication of civil rights claims. This right is to be enjoyed within the District of Columbia as it is elsewhere in the United States. *O'Donoghue* v. *United States*, 289 U.S. 516, 540 (1933).

The Supreme Court has fashioned pre-enforcement standing guidelines that reflect a practical, common-sense approach to distinguish those claims that are merely hypothetical from those that seek to resolve actual, live "cases or controveries." U.S. Const. art. III. Outside this Circuit, and before the Supreme Court, it is not a controversial legal principle that the government creates an actual case or controversy whenever its laws or policies cause reasonable people to forego behavior that should be held permissible by a competent court. As the Supreme Court declared in its most recent examination of standing to assert pre-enforcement actions under the Declaratory Judgment Act,

> [W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat -- for example, the constitutionality of a law threatened to be enforced. *The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.*

Medimmune, Inc. v. *Genentech, Inc.*, 549 U.S. 118,129 (2007) (emphasis added).

The Supreme Court proceeded to review its history of cases affirming the constitutionality of pre-enforcement standing, explaining,

> [i]n each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced.

Medimmune, 549 U.S. at 129.

The Supreme Court could not have spoken more clearly: standing exists even if "the imminent threat of prosecution" has been eliminated by the plaintiff's coerced compliance.

The touchstone of a pre-enforcement injury is thus not an "imminent threat of prosecution," *Medimmune*, 549 U.S. at 129, but "a *credible* threat of prosecution." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added). The existence of a credible prosecutorial threat plainly satisfies the elements of standing: injury in fact, causation by the defendants, and redressability by the requested relief. *Planned Parenthood* v. *Farmer*, 220 F.3d 127, 146 (3d Cir. 2000).

The requirement that a prosecutorial threat be "credible" is meant to eliminate those cases where plaintiffs are challenging a statutory relic which no prosecutor is likely to assert. For example, the Fourth Circuit

rejected the credibility of the prosecutorial threat in declining to hear a challenge to Virginia's ancient bans on fornication and cohabitation, the last recorded convictions for which had occurred in 1849 and 1883, respectively. *Doe* v. *Duling*, 782 F.2d 1202 (4th Cir. 1986); *see also Bronson* v. *Swensen*, 500 F.3d 1099 (10th Cir. 2007) (no standing to challenge polygamy laws unenforced under plaintiff's circumstances).

As a rule, however, pre-enforcement challenges are permitted where the statutes being challenged are "not moribund." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973). As recently as 1968, the Supreme Court let a teacher challenge Arkansas' "monkey law," notwithstanding the possibility that "the statute is presently more of a curiosity than a vital fact of life." *Epperson* v. *Arkansas*, 393 U.S. 97, 102 (1968).

If anything, "[t]here may be a trend in favor of . . . a practical approach" to standing, where "courts are content with any realistic inferences that show a likelihood of prosecution." *New Hampshire Hemp Council, Inc.* v. *Marshall*, 203 F.3d 1, 5 (1st Cir. 2000); *Maryland State Conf. of NAACP Branches* v. *Maryland Dep't of State Police*, 72 F. Supp. 2d 560, 565 (D. Md. 1999) ("plaintiffs' likelihood of injury

depends only on their status as a member of a minority group and their need to travel on I-95"). Courts routinely allow challenges to statutes immediately upon their effective date, without waiting for historical evidence of prosecution. *See, e.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 861 (1997) ("immediately after the President signed the statute, 20 plaintiffs filed suit against the Attorney General of the United States and the Department of Justice") (footnote omitted); *Carhart* v. *Gonzales*, 413 F.3d 791, 792 (8th Cir. 2005) ("[t]he day the President signed the Act into law, plaintiffs filed suit"), *rev'd on other grounds*, 550 U.S. 124 (2007). The government does not get one or several "free" pre-enforcement prosecutions under new laws.

II. THIS COURT HAS ACKNOWLEDGED THAT REQUIRING AN IMMINENT, AS OPPOSED TO A CREDIBLE PROSECUTORIAL THREAT, CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT PRECEDENT.

Notwithstanding the Supreme Court's clear instructions regarding the nature of the threat necessary to sustain pre-enforcement standing, this Court has adopted a requirement that the prosecutorial threat not only be "credible," but imminently so. *Navegar, Inc.* v. *United States*, 103 F.3d 994 (D.C. Cir. 1997).

Navegar concerned a challenge by weapons manufacturers to the now-expired federal ban on "assault weapons," 18 U.S.C. § 922(v)(1). The law specifically banned certain firearms by name, and banned others by characteristics. This Court held that as to the former category of guns, the plaintiffs had standing. *Navegar*, 103 F.3d at 999. After all, federal agents had visited plaintiffs on the day the law went into effect, and took inventories of previously manufactured, grandfathered weapons identified by name in the statute. Subsequently, the government instructed plaintiffs not to violate the new law. This much of *Navegar* is not controversial.

However, with respect to the second category of weapons, which arguably fell within the ambit of the ban, this Court held the plaintiffs were not suffering from a sufficiently imminent fear of prosecution so as to make their claims justiciable. *Navegar*, 103 F.3d at 1001. This Court would soon discover the problems inherent in this approach.

Navegar's difficulties surfaced in *Seegars* v. *Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005), a pre-enforcement challenge to Washington, D.C.'s bans on the possession of handguns and all functional firearms.

Applying *Navegar*, a reluctant 2-1majority held none of the plaintiffs had standing to challenge the gun bans because none could demonstrate that they, specifically, would be targeted for prosecution, notwithstanding the well-known fact that virtually all violators are prosecuted.

The *Seegars* majority observed, "[w]e cannot help noting that *Navegar*'s analysis is in sharp tension with standard rules governing preenforcement challenges to agency regulations," *Seegars*, 396 F.3d at 1253, and that "[t]here is also tension between *Navegar* and our cases upholding preenforcement review of First Amendment challenges to criminal statutes." *Id.* at 1254. This Court also conceded that *Navegar* was inconsistent with the pre-enforcement standing requirements of at least one circuit. *Id.* at 1255 (noting conflict with *People's Rights Organization* v. *City of Columbus*, 152 F.3d 522 (6th Cir. 1998)).

And as explained on petition for rehearing en banc, "[a]s a panel we were constrained by [*Navegar*], even though, as my opinion for the court made clear, it appeared to be in conflict with an earlier Supreme Court decision, [*United Farm Workers*]." *Seegars* v. *Gonzales*, 413 F.3d

1, 2 (D.C. Cir. 2005) (Williams, Senior Circuit Judge).

Having explained that *Navegar* stands in conflict with Supreme Court precedent and case law from another circuit, not to mention its "sharp tension with standard rules" in other cases, *Seegars*, 396 F.3d at 1253, and "tension" with yet another set of circuit precedent, *Seegars*, 396 F.3d at 1254, this Court searched for a rationale to justify applying the *Navegar* doctrine once more. All that could be said in *Navegar*'s defense was that "it represents the only circuit case dealing with a non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings." *Seegars*, 396 F.3d at 1254 (citations omitted). Among the votes for en banc review was that of the current Chief Justice of the United States.

The low point of *Navegar*'s imminence doctrine arrived with this Court's decision in *Parker* v. *District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd on other grounds sub nom District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), another, ultimately more successful challenge to the same laws at issue in *Seegars*. The record of pre-enforcement threats in *Parker* was quite stark. When the District Court

inquired whether the plaintiffs would be prosecuted for violating the law, defendants' counsel rejected the District Court's suggestion that plaintiffs would get "a free ride" on account of their litigation activity, and referred to "the fact that if, in fact, they break the law and we would enforce the law that they're breaking." Appellants' Br., 04-7041 at 9. Indeed, upon the filing of the litigation, city officials ominously proclaimed to a newspaper that the plaintiffs' behavior would harm children and "is not what we want." *Id.* at 10 (citation omitted).

This Court found the record insufficient to create an imminent risk of prosecution should the law be violated. *Parker*, 478 F.3d at 375. But this Court was not enthusiastic about rejecting pre-enforcement standing, repeating the belief that its doctrine is wrong:

> The unqualified language of *United Farm Workers* would seem to encompass the claims raised by the *Seegars* plaintiffs, as well as the appellants here. Appellants' assertions of Article III standing also find support in the Supreme Court's decision in *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) . . . In that case, the Court held it sufficient for plaintiffs to allege "an actual and well-founded fear that the law will be enforced against them," *id.* at 393, without any additional requirement that the challenged statute single out particular plaintiffs by name. In both *United Farm Workers* and *American Booksellers*, the Supreme Court took a far more relaxed stance on pre-enforcement challenges than *Navegar* and *Seegars* permit. Nevertheless, unless and until

> this court en banc overrules these recent precedents, we must be faithful to *Seegars* just as the majority in *Seegars* was faithful to *Navegar*.

Parker, 478 F.3d at 395 (footnote omitted).

In sum, this Court's imminence doctrine in pre-enforcement challenges is not merely wrong. It has been repeatedly declared by this Court to be at odds with Supreme Court precedent and the practice in other courts, and it lacks any persuasive rationale.

III. REQUIRING AN IMMINENT THREAT OF PROSECUTION, RATHER THAN A CREDIBLE THREAT OF PROSECUTION, HAS PROVED UNWORKABLE.

As this case demonstrates, *Navegar*'s imminence requirement has led to irrational and unjust results, effectively granting the government a pocket veto over a broad swath of pre-enforcement claims. Because the credibility of enforcement is now based not on the government's conduct, but its communication to the putative plaintiff, a plaintiff can be deprived of pre-enforcement standing merely if the government is silent or deliberately vague about its intentions. Indeed, as the court below reasoned, this is true even if the government communicates its enforcement plans to anyone *but* the plaintiff.

However, once the government initiates a prosecution, courts must ordinarily abstain from entertaining a pre-enforcement challenge. *Younger* v. *Harris*, 401 U.S. 37 (1971).[1]

> The challenger may not sue before he is truly injured; yet he may not wait until he is charged with a crime. He may invoke federal jurisdiction only if he can move through the narrow door between prematurity and exclusive state jurisdiction.

Peyote Way Church of God, Inc. v. *Smith*, 742 F.2d 193, 199 (5th Cir. 1984). *Navegar* slams this "narrow door" shut, rendering the Declaratory Judgment Act a nullity. Unless the government has personally threatened, yet refrained from arresting the plaintiff, the pre-enforcement challenge is either too early or too late. Ord's "predicament – submit to a statute or face the likely perils of violating it – is precisely why the declaratory judgment cause of action exists." *Mobil Oil Co.* v. *Attorney Gen. of Va.*, 940 F.2d 73, 74 (4th Cir. 1991).

This case continues the unhappy experience of *Navegar* foreclosing plainly credible pre-enforcement challenges, amply demonstrating the

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[1] The District of Columbia is treated as a state for purposes of *Younger* abstention. *JMM Corp.* v. *District of Columbia*, 378 F.3d 1117 (D.C. Cir. 2004); *Worldwide Moving & Storage, Inc.* v. *District of Columbia*, 445 F.3d 422 (D.C. Cir. 2006).

unusual control that the government now has over whether its actions are reviewed in an Article III court. Upon first learning that his client was being targeted for arrest, Ord's attorney successfully intervened with the city's lawyers, who assured counsel that the city would not proceed. But the city reneged on its agreement, prompting Ord to take legal action seeking to quash the warrant. Only after Ord moved to quash the arrest warrant did the city file a nolle prosequi. Appellant's Br. at 8. But there is no guarantee that the city will not again file charges against this law enforcement officer for exercising his rights under federal law.

Ord is not paranoid for wondering whether the city will arrest him for carrying a gun. Notwithstanding the fact that his Virginia commission on its face entitles him to the privileges of 18 U.S.C. § 926B, the city has already moved to arrest him for exercising his right under that statute, and the city's police department has been instructed to arrest Virginia Conservators of the Peace who may be exercising their Section 926 rights.[2] Nor is it a hypothetical matter that a Virginia

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[2]The police may be highly motivated to do so, because Virginia law enforcement officers are direct competitors with D.C. police officers in

law enforcement officer would find himself in the District of Columbia while armed. Congress enacted Section 926B precisely to protect officers such as Ord in their extra-jurisdictional travels.

Still, the District Court cannot be completely faulted for stretching *Navegar* beyond the breaking point. In *Seegars*, plaintiffs challenging among the most famous and zealously enforced of the city's laws were told that their fears of arrest for violating the law were too speculative. And in *Parker*, plaintiffs who had heard the city's lawyer threaten them with prosecution, in direct response to the District Court's inquiry into the city's prosecutorial intent, were likewise told that prosecution was insufficiently imminent. The District Court can reasonably wonder whether any sort of threat would ever suffice to establish standing under *Navegar*.

IV. THIS COURT SHOULD ABANDON *NAVEGAR* AND ITS PROGENY AS INCONSISTENT WITH HIGHER AUTHORITY.

To be sure, a faithful application of the *Navegar* doctrine would

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the market for private armed security when they are not on the public's clock. Virginia law enforcement officers are not dangerous to the public in Washington, D.C., only to the financial interests of certain Washington, D.C. police officers. The District Court's recitation of the facts only casually hints at this dispute's economic roots.

counsel reversal. It is difficult to imagine how, despite having been the subject of an arrest warrant, Ord has not "been singled out or uniquely targeted for prosecution." *Parker*, 478 F.3d at 375. Considering that the city's lawyers had earlier reneged on a promise not to enforce that warrant, and that a current memorandum issued to the District's police force calls for the arrest of officers such as Ord, it defies credulity to maintain that there exists no case or controversy here. Even in *Seegars*, this Court observed that "actual threats of arrest made against a specific plaintiff are generally enough to support standing as long as circumstances have not dramatically changed," *Seegars*, 396 F.3d at 1252 (citation omitted), an apt description of Ord's predicament.

Accordingly, the city's decision to nullify the warrant is meaningless. The District Court's statement that this decision "is strong evidence that the District does not presently intend to prosecute Ord," *Ord* v. *District of Columbia*, 573 F. Supp. 2d 88, 95 (D.D.C. 2008), is just that – evidence of present intent, irrelevant to the credible fear that the District would again change its mind tomorrow. The District Court's reasoning neatly exemplifies *Navegar*'s defect: had a warrant not

issued, Ord's claim would be unripe; and once the warrant was nullified, the harm had passed. But once a warrant issues, *Younger* abstention applies. The city can threaten, and it can issue and revoke arrest warrants at will, and never does the target have the ability to seek pre-enforcement review of his federal rights in an Article III court.

Also troubling is the suggestion that the enforcement memorandum provided the police force is irrelevant to Ord's standing because "this memorandum was not sent to him and does not include him as a member of its general audience." *Ord*, 573 F. Supp. 2d at 95. The issue here is whether Ord has a credible fear that the law would be enforced against him, such that he might refrain from legally protected conduct. Since there is no question of the memorandum's authenticity, or of the fact of its distribution to the police force, it does not matter *how* Ord learned of the memorandum. Nothing in *Navegar*, or *Seegars*, or *Parker* requires that the prosecutorial threat be made directly to the plaintiff, so long as it describes him and would cause a reasonable person to think twice about the matter.

Since *Navegar*, *Seegars*, and *Parker* all allowed at least some hypothetical room for a pre-enforcement claim, the District Court's completely restrictive application of the imminence requirement can safely be declared erroneous. However, that is not the only option open to this panel in dealing with the instant case, and it is not the best course of action.

The short history of *Navegar*'s imminence doctrine is one of progressively untenable and illogical results. Each time, this Court can say no more than that this is the approach to be taken in this circuit, even though it is wrong and inconsistent with higher authority. Rather than prolong this error, and attempt to meld *Navegar*'s broken imminence mechanism into the Supreme Court's more practical, correct inquiry into the credibility of prosecutorial threat, this Court should simply scrap *Navegar* and follow the Supreme Court's instructions in this area.

Doing so does not necessarily require hearing this case en banc, as suggested in *Parker*, 478 F.3d at 375 and by several current and former members of this Court on rehearing in *Seegars*, 413 F.3d at 1, although

that may well be the Court's preferred mechanism. Many circuits permit panels to overrule or decline to follow prior circuit precedent once it becomes clear that intervening Supreme Court authority has superseded it. For example, in the Ninth Circuit,

> we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.

Miller v. *Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (quoting *Galbraith* v. *County of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002) and *United States* v. *Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985)) .

"A court need not blindly follow decisions that have been undercut by subsequent cases . . . ." *United States* v. *Burke*, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985) (citations omitted); *Chisolm* v. *TranSouth Fin. Corp.*, 95 F.3d 331, 337 n.7 (4th Cir. 1996); *White* v. *Estelle*, 720 F.2d 415, 417 (5th Cir. 1983); *Dawson* v. *Scott*, 50 F.3d 884, 892 n.20 (11th Cir. 1995). Indeed, a failure to recognize that intervening Supreme Court precedent rendered obsolete a circuit court decision has been grounds for summary reversal. *United States* v. *Nachtigal*, 507 U.S. 1 (1993).

The Supreme Court's decision in *Medimmune*, a higher authority clarifying that standing exists even when there is no imminent prosecutorial threat, is plainly inconsistent with the earlier-decided *Navegar* and *Seegars*. Under ordinary principles holding a higher intervening authority as overruling an earlier, lower authority, *Medimmune* should be understood as overruling those two cases. *Parker* was decided shortly after *Medimmune*, which was brought to the *Parker* panel's attention; however, *Parker* does not mention *Medimmune*, an odd circumstance considering that decision's familiarity with several other Supreme Court precedents that are inconsistent with this Court's imminence doctrine. Under the circumstances, *Parker*'s clear inconsistency with *Medimmune* should render the circuit opinion non-authoritative to the extent of that inconsistency.[3]

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[3]The unsuccessful *Parker* plaintiffs filed a cross-petition for certiorari that was twice submitted to conference, and denied only on the last day of the Supreme Court's term, one day following the decision in *Heller*. *Parker* v. *District of Columbia*, Supreme Court No. 07-335, *cert. denied*, 128 S. Ct. 2994 (2008). The denial of certiorari is not a binding opinion, and the question of pre-enforcement standing was not before the Supreme Court in *Heller*.

CONCLUSION

The District Court misapplied this Court's pre-enforcement standing doctrine, which, in any event, is in need of significant reform. The judgment below should be reversed and the case remanded for further proceedings.

Dated: May 6, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,208 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 6, 2009

CERTIFICATE OF SERVICE

On this, the 6th day of May, 2009, I served two true and correct copies of the foregoing Amici Curiae Brief on the following by Federal Express:

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Also on this, the 6th day of May, 2009, I personally served two true and correct copies of the foregoing Amici Curiae Brief on the following:

Matthew August LeFande
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The brief was also filed this day by dispatch to the Clerk via hand delivery.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 6th day of May, 2009.

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Alan Gura