No. 01-55084

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOS ANGELES POLICE PROTECTIVE LEAGUE,

Plaintiff-Appellant

v.

UNITED STATES, JOHN ASHCROFT, in his official capacity,
CITY OF LOS ANGELES BOARD OF POLICE COMMISSIONERS,
LOS ANGELES POLICE DEPARTMENT,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

RULES: **PAGE**

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JURISDICTIONAL STATEMENT

The district court did not have jurisdiction to consider the Appellant's complaint because the Appellant's claims are not yet ripe for adjudication. The district court entered a final appealable order on November 29, 2000, when it dismissed the Appellant's complaint, thereby disposing of all issues in the litigation. The Appellant timely filed a notice of appeal on December 29, 2000.

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[1] Both the complaint and the Appellant's opening brief in this appeal name Janet Reno, in her official capacity, as a defendant in this action. Pursuant to Federal Rule of Civil Procedure 25(d)(1), Attorney General John Ashcroft, in his official capacity, "is automatically substituted as a party" for Janet Reno.

See Fed. R. App. P. 4. This Court has jurisdiction to hear this appeal according to 28 U.S.C. 1291.

ISSUE PRESENTED

Whether the district court was correct in dismissing the Appellant's complaint for failure to state a claim or controversy.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. *Procedural History*

1. After conducting an extensive investigation into the law enforcement practices and procedures of the Los Angeles Police Department (LAPD), the United States Department of Justice filed a suit against the City of Los Angeles, California, the Los Angeles Board of Police Commissioners, and the LAPD on November 3, 2001. *United States* v. *City of Los Angeles, et al.*, No. 00-11769 (C.D. Cal.) (R. 1).[2] The suit alleges that the defendants engage in a pattern or practice of depriving individuals of constitutional rights, including rights secured under the Fourth and Fourteenth Amendments, through the use of excessive force, false arrests, and improper searches and seizures (R. 1 at 2-5). The suit was filed under 42 U.S.C. 14141, which makes it unlawful for "any governmental authority * * * to engage in a pattern or practice of conduct by law enforcement officers * * *

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[2] References to documents filed in case number 00-11769 in the district court are styled as "R. __", referring to the district court docket number of the document as filed in that case. References to the Excerpts of Record filed in the instant case are to "ER __." References to "Br. __" are to pages in the Appellant's opening brief.

that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," and gives the Attorney General of the United States the power to bring a civil action to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."

The parties opted to settle the dispute through the mechanism of a consent decree, which they lodged in the district court the same day the United States filed its complaint. The stated purpose of the consent decree is to "provide for the expeditious implementation of remedial measures, to promote the use of the best available practices and procedures for police management, and to resolve the United States' claims without resort to adversarial litigation." (R.3, Decree at ¶ 6). The district court has not yet entered the decree.[3]

2. On November 8, 2000, the Los Angeles Police Protective League (League) filed a separate suit against the United States, the U.S. Attorney General, the City of Los Angeles Board of Police Commissioners, and the LAPD. The action sought declaratory and injunctive relief preventing entry of the consent decree between the United States and the LAPD and City of Los Angeles, and a

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[3] In its opening brief, the League makes a variety of allegations of bad faith and collusive behavior on the part of the United States, the City of Los Angeles, and the LAPD. See, *e.g.*, Br. 10 ("The United States has smeared the good name and reputation of every woman and man who serves as a Los Angeles police officer."); Br. 7 ("LAPPL is informed and believes that LAPD's management and the political candidates attending [the consent decree negotiation] meetings have self serving agendas."). Because not one of those allegations is or could be substantiated by a cite to any supporting document, this Court should disregard the League's baseless accusations.

declaration that 42 U.S.C. 14141 is unconstitutional (ER 1-7). Before any of the defendants had a chance to answer the complaint, the district court dismissed the complaint *sua sponte* on November 29, 2000, with a one-line order stating: "The complaint fails to state a claim or controversy, therefore, It is Ordered that this action be, and hereby is, Dismissed" (ER 8.) The League filed a notice of appeal on December 29, 2000 (ER 9-10).

Meanwhile, in the primary suit between the United States and the LAPD, the League filed a motion to intervene on December 9, 2000, claiming a right (1) to dispute the underlying allegations in the Complaint, (2) to protect the collective bargaining agreement between the City and the League against infringement by the Decree, and (3) to prevent violations the decree allegedly imposed on officers' constitutional rights and certain rights under state laws (R. 22 at 12). After holding a hearing on the motion on December 19, 2000 (R. 47, R. 51), the district court denied the motion to intervene on January 5, 2001 (R. 58). The League filed a notice of appeal from that decision on January 17, 2001 (R. 64). On the same day, the League filed a motion for a stay pending appeal in the district court (R. 65), which was denied on February 9, 2001 (R. 86). On February 20, 2001, the district court granted to the League amicus curiae status and invited it to submit a memorandum to the court "addressing any issue(s) that they see fit regarding the negotiated consent decree" (R. 88 at 2). The League presented its concerns to the district court in the form of an amicus brief on March 16, 2001 (R. 103). On March 12, 2001, the League filed a motion for a stay pending appeal of the denial

of intervention in this Court, which was denied on April 16, 2001. The appeal from the denial of the motion to intervene is pending before this Court (No. 01-55182).

B. *Facts*

The proposed consent decree between the United States and the parties to the primary suit does not enjoin the League or any specific police officers from engaging in any behavior. The decree enjoins the LAPD and the City to adopt and implement certain managing practices and procedures that will stem the pattern or practice of constitutional violations identified by the United States (R. 3, Decree ¶¶ 1-2).

The decree specifically protects the League's bargained-for and bargaining rights. Paragraph 8 of the proposed decree states:

> Nothing in this Agreement is intended to: (a) alter the existing collective bargaining agreements between the City * * * and LAPD employee bargaining units; or (b) impair the collective bargaining rights of employees in those units under state and local law. The parties acknowledge that as a matter of state and local law the implementation by the City of certain provisions of this Agreement may require compliance with the meet and confer process or consulting process. The City shall comply with any such legal requirements and shall do so with a goal of concluding any such processes in a manner that will permit the City's timely implementation of this Agreement. The City shall give appropriate notice of this Agreement to affected employee bargaining units to allow such processes to begin as to this Agreement as filed with the Court.

(R. 3, Decree at ¶ 8). Paragraph 184 of the proposed decree further explicates the manner in which the decree honors the state and local law that protects the collective bargaining rights of LAPD bargaining unit employees. Initially,

paragraph 184(a) explains the procedures by which the City and the League shall determine whether specific provisions of the proposed decree are subject to the "meet and confer" or "consulting" processes mandated by state labor law (R. 3, Decree at ¶ 184(a); see Cal. Gov't Code 3500, *et seq.*). As part of that procedure, the proposed decree provides that, if the City and the League cannot reach an agreement on the issue of what provisions are subject to collective bargaining, "the City shall seek declaratory relief from [the district court] to resolve such issue, provided that such bargaining unit shall receive notice and an opportunity to be heard by the Court on this issue" (R. 3, Decree at ¶ 184(a)). Once the City and the League determine what topics are subject to the "meet and confer" process, the remaining subparts of paragraph 184 instruct that the City "shall continue" with the meet and confer process as mandated by state law.

The decree then provides a mechanism through which the City and the United States may jointly move the district court to modify the consent decree if the collective bargaining process between the League and the City or any agreements reached or actions taken pursuant to that process will "impair the City's ability timely to implement" any provision of the decree (R. 3, Decree at ¶ 184(c)). Paragraph 184 further provides that, in the event that the collective bargaining process, or any agreements reached or actions taken pursuant to that process, will impair the City's ability timely to implement provisions of the decree, and the City and the United States are unable to agree on a proposed decree modification, "the City shall so report to the [district court] and shall seek appropriate declaratory or

injunctive relief" from the district court (R. 3, Decree at ¶ 184(c)). The decree instructs that, in resolving such disputes, the district court shall consider "whether the City has satisfied its labor relations obligations under state and local law" (R. 3, Decree at ¶ 184(d)). Finally, if the results of the collective bargaining process between the League and the City will preclude meaningful implementation of provisions of the consent decree, and the parties are unable to agree on an appropriate decree modification, the United States may move for dissolution of the decree and proceed with the underlying lawsuit (R. 3, Decree at ¶ 184(e)).

SUMMARY OF ARGUMENT

A litigant may not invoke the authority and jurisdiction of the federal courts unless it presents a "case or controversy" cognizable under Article III of the Constitution. Where a party has not suffered and is not in imminent danger of suffering a concrete and non-speculative "injury in fact," that party has not presented a ripe case or controversy, and thus does not have standing to bring suit in federal court. The district court here was correct in dismissing the Los Angeles Police Protective League's complaint for failure to state a claim or controversy.

In its complaint, the League seeks an order from the district court enjoining the United States, the Los Angeles Police Department, and the City of Los Angeles from entering into a consent decree that would settle a lawsuit filed before a different district court judge. The League seeks such an injunction because it claims that entry of the proposed consent decree will violate the bargained-for and bargaining rights of its members, the officers of the LAPD. Because the League's

claims are unsubstantiated, premature, and wholly speculative, the district court was correct in dismissing the complaint. The proposed consent decree fully protects both the existing Memorandum of Understanding between the League and the City, which governs the terms and conditions of employment of the rank and file LAPD officers, and the state law bargaining processes. The League has failed to identify any specific provision of the decree that has or definitely will in any way alter or abrogate either the MOU or the bargaining rights of its members. The fact that it is a hypothetical possibility that the City may at some point choose to forego some stage of the state law bargaining process in an effort to comply with some unidentified provision of the decree, once it is entered, is insufficient to establish a current Article III case or controversy.

Moreover, the district court was also correct in finding that the allegation in the League's complaint that 42 U.S.C. 14141 is "void for vagueness" fails to state a claim or controversy. Because a party may not assert a facial vagueness challenge to a statute unless the statute implicates First Amendment rights, which Section 14141 does not, the League may assert only an as-applied vagueness challenge. That challenge is not ripe, however, not only because Section 14141 has not yet been applied to any conduct of either the League or any of its members, but also because the proposed consent decree will not impose any relief directly on the League or its members.

ARGUMENT

The League's complaint in this case seeks a declaration "that permanently enjoins the defendants from any and all reliance on those portions of [42 U.S.C. 14141] that are unconstitutional on their face and all specified unconstitutional applications of 42 U.S.C. § 14141" (ER 2). The complaint makes three "claims." First, the complaint alleges that a consent decree entered in a suit brought under 42 U.S.C. 14141 "is invalid and void when it is entered in the absence of specific factual findings that a pattern or practice of unlawful conduct by the agents [of the governmental entity being sued] exists, and thus impermissibly confers subject matter jurisdiction on the district court" (ER 5). Second, the complaint alleges that such a decree "is invalid and void when it is entered in the absence of a record demonstrating compliance with [Fed. R. Civ. P.] 52 and 65" (ER 6). Finally, the complaint alleges that "42 U.S.C. § 14141 is void for vagueness because it fails to establish tort standards of care, to establish and allocate burdens and sequences of proof, to describe applicable immunities and to establish any statute of limitations" (ER 6). Because none of these allegations states a cognizable claim or controversy, the district court did not err in dismissing the complaint. This Court reviews a district court's dismissal of a complaint for failure to state a claim or controversy de novo. *United States ex rel. Lee* v. *SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001).

I. THE LEAGUE DOES NOT HAVE STANDING TO SEEK DECLARATORY OR INJUNCTIVE RELIEF PROHIBITING ENTRY OF A CONSENT DECREE BETWEEN THE UNITED STATES AND THE LAPD AND CITY OF LOS ANGELES

It is well settled that litigants seeking to invoke the powers of the federal courts must present a justiciable "case or controversy" under Article III of the Constitution. This requirement is no less applicable in cases where, as here, plaintiffs bring suit under the Declaratory Judgment Act, 28 U.S.C. 2201, which merely "provides an additional remedy but does not add to the jurisdiction of the District Courts." *California* v. *Oroville-Wyandotte Irrigation Dist.*, 409 F.2d 532, 535 (9th Cir. 1969). This Court has held that "[d]eclaratory judgment actions are justiciable if 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Seattle Audubon Soc'y* v. *Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996) (quoting *National Basketball Ass'n* v. *SDC Basketball Club*, 815 F.2d 562, 565 (9th Cir.), cert. dismissed, 484 U.S. 960 (1987)). Indeed, "[t]he 'actual controversy' requirement of the Act is the same as the 'case or controversy' requirement of Article III of the United States Constitution." *Aydin Corp.* v. *Union of India*, 940 F.2d 527, 528 (9th Cir. 1991) (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-240 (1937)).

The League asserts that it and its members are in imminent danger of suffering harm from the entry of the proposed consent decree between the United States and the LAPD and City of Los Angeles. The League bases this claim on its

allegations that the proposed decree will interfere with the Memorandum of Understanding (MOU) between the League and the City and with the contractual and state law rights of its members, presumably by allegedly implementing changes unilaterally in the terms and conditions of employment of the LAPD officers. The League also alleges that the proposed decree will improperly enjoin League members from engaging "in a pattern or practice of conduct including excessive force, false arrests, and improper searches and seizures." (Br. at 17). Because these allegations are conjectural and hypothetical, they are insufficient to allege the type of imminent danger or harm necessary to establish an Article III case or controversy.[4]

In order to present a valid case or controversy under Article III, and thus to assert an "actual controversy" for purposes of the Declaratory Judgment Act, a plaintiff must assert, *inter alia*, that he or she has suffered, or is in immediate danger of suffering, an "injury in fact." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Such an injury must be "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not

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[4] The district court judge who is presiding over the underlying litigation between the United States, the LAPD, and the City of Los Angeles has already ruled that the League is not in fact in any danger of suffering these alleged injuries. In its order denying the League's motion to intervene, the district court found that the consent decree does not enjoin the League or its members "from engaging in any activity," and that the League, therefore, "is not subject to the injunction" (R. 58 at 8-9). In addition, the court found that "the Proposed Decree itself does not infringe on the LAPPL's contractual or statutory rights, and the LAPPL has failed to show that the safeguards found at Paragraphs 8 and 184 are insufficient to protect its rights in implementing the Decree" (R. 58 at 11).

conjectural or hypothetical." *Ibid.* (internal quotation marks and citations omitted). Because the League has not alleged – and cannot allege – that it has suffered or is in imminent danger of suffering an injury in fact, the district court was correct in determining that the League's complaint failed to state a claim or controversy.

The League's claims that the proposed decree could potentially conflict with the MOU are far too conjectural to state an Article III claim or controversy. The League contends that, if the district court enters the proposed decree, the terms of the decree will compel the City and the LAPD to alter unilaterally the terms and conditions of employment for the League's members, thereby violating both the MOU and the state law bargaining rights of the LAPD officers. Both "the Supreme Court and Ninth Circuit have repeatedly found a lack of standing" in a claim such as this one, which "relies upon a chain of speculative contingencies." *Eggar* v. *City of Livingston*, 40 F.3d 312, 316 (9th Cir. 1994), cert. denied, 515 U.S. 1136 (1995).

As an initial matter, the League has not articulated any basis for its belief that anything in the proposed decree will violate either the MOU or the state law bargaining process. The League, both in its complaint and in its brief to this Court, has utterly failed to identify any provision of the proposed decree that will in any way impose unilateral changes in the terms and conditions of employment of its members.[5]

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[5] The League makes repeated unsupported assertions that the proposed

(continued...)

Nor can it, for the proposed decree contains specific provisions stating that it is not intended to interfere with the MOU and mandating that the City engage in the meet and confer or consulting processes mandated by state labor laws, including California Government Code 3500, *et seq.* (R. 3, Decree ¶¶ 8, 184).[6] As explained *supra*, pp. 5-7, these provisions of the proposed decree require that, before any provision in the decree that might affect the terms or conditions of employment of police officers may be entered, the City must initially work with the League to determine which sections of the decree are subject to the meet and confer process. The City must then continue with the meet and confer process with respect to those provisions of the decree until either the League and City agree on the collective bargaining issues or the process reaches a point where it will "impair

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[5](...continued)
decree will "have an adverse effect on law enforcement and violate the MOU" (Br. 11; see also Br. 19 (claiming that the League has a "reasonable apprehension that entering into the Consent Decree will change the wages, hours, and working conditions in violation of the MMBA and MOU."); Br. 7, 16-17, 21). Aside from being wholly unsubstantiated and speculative, these allegations are incorrect because the decree itself mandates that the City must engage in the state labor law "meet and confer" process before it may seek judicial authorization to implement provisions of the decree affecting terms of employment that are subject to collective bargaining.

[6] The League's contention (Br. 4) that "once the Consent Decree is executed and approved by the Court, the case will be over" is also without merit. The proposed decree specifically incorporates state law collective bargaining processes. The district court's approval of the consent decree is merely the first in a long line of steps toward ultimate implementation of the decree. The League's contention (Br. 3) that, "[s]hould the City be permitted to proceed in this manner, they will seek a Federal Court Order altering the terms of the current [MOU] between the LAPPL and the City before LAPPL's position is even considered," is similarly unsupported and meritless.

the City's ability timely to implement" any provision of the decree[7] (R. 3, Decree at ¶ 184(c)). At that point, either the City or the United States may seek declaratory relief from the district court, at which point the League obviously will be heard as the court considers "whether the City has satisfied its labor relations obligations under state and local law" (R. 3, Decree at ¶ 184(d)).[8] Thus, in order for the League to suffer the injury for which it seeks redress in this suit, several events must take place: (1) the district court must enter the proposed decree, (2) either the City and the League must reach an agreement or the district court must make a determination as to which provisions, if any, of the decree are subject to the collective bargaining process, (3) with respect to those provisions, the City and the

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[7] In addition, the proposed decree recognizes that *state law itself* provides that if, after meeting and conferring in good faith, the City and the League reach an impasse and then exhaust state law impasse procedures, the City may unilaterally implement a change in a term or condition of employment if that change is the last, best, and final offer the City made during the mandatory bargaining process. Cal. Gov't Code 3505.4, R. 3, Decree at ¶ 184(f).

[8] The League contends (Br. 20) that the proposed decree does "not provide for impasse resolution procedures pursuant to California Government Code § 3505 or the City's own Employment Relations Resolution." Again, this unsupported and speculative allegation misstates the provisions of the consent decree. Paragraph 184 of the decree provides that the City shall engage in the meet and confer process until such time as either a resolution is reached or the lack of a resolution will "impair the City's ability timely to implement" any provision of the decree, at which point the City shall seek "appropriate declaratory or injunctive relief" from the district court (R. 3, Decree at ¶ 184(c)). Nothing in this mechanism instructs the City to forego the state law impasse resolution procedures – if the City and the League are able to employ those procedures in a timely fashion, they will be employed. If not, the issue may be presented to the district court. This claim is not ripe at this time because it is entirely speculative and dependent on numerous contingencies, which may or may not come to pass.

League must reach an impasse in their bargaining process, (4) if the United States does not elect to dissolve the decree and proceed with the underlying lawsuit, either the City or the United States must seek declaratory relief from the district court as to that impasse, and (5) the district court must enter an order instructing the City to alter unilaterally some condition of employment that is subject to the meet and confer process without participating in some portion of the mandated state law bargaining process.

Such a chain of hypothetical events – all, some, or none of which may actually occur – is clearly inadequate to establish the type of imminent injury Article III requires. The League has failed to identify any particular provision of the proposed consent decree that will either violate the MOU or interfere with the League's state law bargaining rights. In *Ross* v. *Alaska*, 189 F.3d 1107, 1114-1115 (9th Cir. 1999), cert. denied, 528 U.S. 1155 (2000), this Court found unripe a political party's demand for a declaration that a state election law was invalid, where the party did not identify any provisions of the law that were in actual conflict with the party's rules. For the same reasons, this Court should find that the League has not alleged an actual case or controversy in this case. Moreover, the League has not identified any basis for its belief that any of the parties to the proposed consent decree have taken, contemplate taking, or will take any action that will violate the League's bargained-for or bargaining rights, particularly as the proposed decree specifically recognizes and protects those rights. Cf. *LSO, Ltd.* v. *Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) ("Courts have also considered the

Government's failure to disavow application of the challenged provision as a factor in favor of a finding of standing.").

The League argues that this case is similar to the situation this Court considered in *National Basketball Association* v. *SCD Basketball Club, Inc.*, 815 F.2d 562 (9th Cir.), cert. dismissed, 484 U.S. 960 (1987). But in so arguing, the League misapprehends the holding of *NBA*, in which this Court held that the NBA could seek a "declaratory judgment holding that it may evaluate and assess limits on franchise movement without violating the antitrust laws." *Id.* at 566. This Court in that case found that the NBA faced a "real and reasonable apprehension" that any action it took to sanction the Los Angeles Clippers for moving its franchise would result in antitrust liability. *Ibid.* The Court found that the NBA had presented an actual controversy because the NBA had averred that it would have assessed a charge against the Clippers absent the threat of antitrust liability, and because the Clippers had asserted throughout the litigation that the assessment of such a charge would violate the antitrust laws. *Ibid.* The instant case is not analogous to *NBA* because the Police Protective League is not threatened with any sort of liability, and no party has stated an intention to violate any of the League's contractual rights. Unlike the situation in *NBA*, here there is no event that imminently threatens any of the League's rights.

Moreover, the district court's dismissal of the League's complaint does not mean that the League has no avenue of redress should it find that implementation of the proposed decree does one day indeed pose an imminent threat of injury to its

members' bargained-for and bargaining rights. If the League ultimately believes, at the point at which the provisions of the decree are to be implemented, that its legally protected collective bargaining rights will in fact be jeopardized by implementation of the decree and have not been satisfactorily protected by the district court presiding over the primary action, it may again move to intervene in the action at that time. In the meantime, after denying the League's initial motion to intervene because the League had failed to show that the proposed decree would directly modify or invalidate its collective bargaining agreement, the district court granted the League amicus curiae status, inviting the League to submit a brief "addressing any issue(s) that they see fit regarding the negotiated consent decree" (R. 88 at 2). The League did in fact file such a brief on March 16, 2001 (R. 103). Thus, as long as the League's rights under the MOU and state labor laws are not in imminent danger of being injured by the consent decree, the League may continue to make its concerns known to the court, even if it does not enjoy full party status.

The League relies on *Seattle Audubon Society* v. *Moseley*, 80 F.3d 1401 (9th Cir. 1996), to support its contention that there is an actual controversy in this case. But *Seattle Audubon Society* in fact explains exactly why the League may not bring this declaratory action. In that case, an environmental group sued a federal agency in a district court in the State of Washington challenging certain regulatory actions and an environmental management plan for the agency. The environmental group simultaneously filed a lawsuit in the district court in the District of Columbia challenging the validity of the same environmental management plan. In order to

"help potential defendants avoid a multiplicity of actions," this Court allowed the federal agency defendant to counter-claim for a declaration of the validity of its environmental management plan. *Id.* at 1405-1406.

The League's reliance on that case, in which the Declaratory Judgment Act was used to avoid "the likelihood of confusion caused by differing judgments," *id.* at 1406, is misplaced. If the Court allows the declaratory action to go forward in this case, it would in fact *create* a likelihood or possibility of differing judgments. This lawsuit is a collateral attack on the proceedings of a separate action before a different district court judge – an action in which the League's interests are already fully protected. This Court has found that one purpose of the Declaratory Judgment Act is to avoid "duplicative litigation." *Government Employees Ins. Co.* v. *Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998). Allowing this collateral attack to proceed would pervert the goals of the Declaratory Judgment Act by affirmatively enabling unnecessarily duplicative litigation.

Finally, although the district court was correct in refusing to consider the merits of the League's underlying claims, those claims are without merit. The League's complaint seeks a declaration that a consent decree under Section 14141 may not be entered without a judicial finding of liability and without a "record demonstrating compliance with [Federal Rules of Civil Procedure] 52 and 65."[9]

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[9] Rule 52 is titled "Findings by the Court; Judgment on Partial Findings," and states that, "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its

(continued...)

(ER 5-6). But a rule that there must always be a finding of liability before parties may enter into a consent decree would virtually remove the mechanism of consent decrees from litigants' arsenal of available tools. The Supreme Court itself has upheld consent decrees entered without liability findings. *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986).[10]

With respect to the League's claim that the proposed consent decree will improperly subject members of the League to the coercive powers of the federal

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[9](...continued)
conclusions of law thereon." Fed. R. Civ. P. 52(a). Rule 65 is titled "Injunctions," and outlines the procedures by which a court may enter a preliminary injunction or temporary restraining order. Neither rule is applicable to the case between the United States and the LAPD and City of Los Angeles. Because the parties are attempting to settle the case prior to being "tried upon the facts," Rule 52 is inapplicable. Moreover, because no party is seeking either a preliminary injunction or a temporary restraining order, Rule 65 is similarly inapplicable. We will consider this claim as an alternative formulation of the League's claim that a consent decree under Section 14141 may not be entered without a judicial finding of liability.

[10] Moreover, although an employer "cannot alter [a] collective bargaining agreement without the Union's consent" in the absence of a judicial determination, even if the consent decree in this case ultimately does conflict with the MOU, the Supreme Court has found an employer is free to commit "itself voluntarily to two conflicting contractual obligations." *W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 767, 771 (1983). In that case, an employer entered into a conciliation agreement with the EEOC that conflicted with the seniority provision of its collective bargaining agreement. The Court found that the employer was permitted to enter such an agreement, but that the employer could also be held liable to the Union for breach of contract damages. *Id.* at 770 ("The Company was cornered by its own actions, and it cannot argue now that liability under the collective bargaining agreement violates public policy."). Thus, again, the League's actions are unripe and premature; in the highly unlikely event that the City ultimately feels obligated to abrogate the MOU in order to comply with the consent decree as entered, the League may at that point seek relief for breach of contract.

courts, the League has failed to state an actual controversy because neither the League nor its members would be signatories to the decree, if entered, and therefore would not be subject to the district court's powers of contempt in enforcing the decree.[11] Because "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree," *Local 93*, 478 U.S. at 522, parties to a consent decree cannot impose binding legal obligations on non-parties. See also *id.* at 529 ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement."). Because there is absolutely no risk that the League or its members will be directly enjoined by the district court as a result of the consent decree, the League has failed to state a claim or controversy.

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[11] In its opening brief (Br. 9, 17), the League claims that the United States seeks to enjoin individual officers from engaging in certain activities. Although the complaint in case number 00-11769 does seek an order that "the defendants, their officers, agents, and employees * * * refrain from engaging in any of the predicate acts forming the basis of the pattern or practice" of constitutional violations (R. 1 at 5), the complaint does not serve as a source of injunctive authority. Rather than pursue the underlying litigation, which may or may not have resulted in a finding of liability and a related injunction against members of the League, the United States and the City opted to enter a consent decree. As discussed in the text, because the consent decree is enforceable only against the signatories to the decree, it may not operate as an injunction against either the League or its members. This is exactly what the district court in the primary case found (R. 58 at 9 (finding that the consent decree does not enjoin the League or its members "from engaging in any activity," and that the League, therefore, "is not subject to the injunction")).

II. THE LEAGUE DOES NOT HAVE STANDING TO CHALLENGE SECTION 14141 AS VOID FOR VAGUENESS

In addition to attempting to stop the United States and the LAPD and City of Los Angeles from entering into the proposed consent decree, the League also seeks a declaration that 42 U.S.C. 14141 is "void for vagueness." (ER 6). Because the League does not have standing to assert such a claim, the district court was correct in ruling that the League's complaint failed to state a claim or controversy.[12]

The League may not assert a facial vagueness challenge to Section 14141. The Supreme Court has repeatedly held that "it is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Powell*, 423 U.S. 87, 92 (1975). In other words, unless a statute "reaches a substantial amount of constitutionally protected conduct" or "is impermissibly vague in all of its applications," an entity may not assert a facial vagueness challenge, but may challenge only the application of the statute in the particular case before the court. *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, 497 (1982); see also *Easyriders Freedom F.I.G.H.T.* v. *Hannigan*, 92 F.3d 1486, 1493 (9th Cir. 1996) ("Where a law at issue does not implicate First Amendment rights, it may be challenged for vagueness only as applied, unless the

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[12] The League does not appear to have reasserted this claim in its brief on appeal, and has therefore abandoned the vagueness challenge. *Eberle*, v. *City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). Nevertheless, we address the illegitimacy of the claim on the chance that this Court considers the claim properly presented.

enactment is impermissibly vague in all of its applications." (internal citations and quotation marks omitted)).

Section 14141(a) states, in its entirety:

> It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

A law forbidding law enforcement officers and departments from engaging in a pattern or practice of conduct that deprives persons of their constitutional or statutory rights certainly does not implicate any First Amendment rights. Nor does it reach a substantial amount of constitutionally protected activity, for it is axiomatic that law enforcement agents do not have a protected right to violate the constitutional and statutory rights of citizens. Thus, unless the League can demonstrate that Section 14141 "is impermissibly vague in all of its applications," *Flipside*, 455 U.S. at 495, it may not assert a facial challenge to the statute. Unless both the Constitution and all the laws of the United States are impermissibly vague in defining the "rights, privileges, or immunities" that they secure or protect – which clearly is not the case – Section 14141 cannot be impermissibly vague in all of its applications.

Because the League cannot assert a facial vagueness challenge, it may challenge the vagueness of Section 14141 only as applied to it in this particular

case. *United States* v. *Dischner*, 974 F.2d 1502, 1510 (9th Cir. 1992) ("Outside the first amendment context, however, a defendant has standing to raise a vagueness challenge only if the statute is vague as applied to his or her specific conduct."), cert. denied, 507 U.S. 923 (1993). Of course, Section 14141 has not been applied to the League at all. Because the League has not alleged that it or its members are in imminent danger of being subjected to an impermissible application of Section 14141, its claim that the statute is unconstitutional on vagueness grounds is not ripe. This Court has held that:

> Insofar as [a] complaint seeks an injunction against future enforcement of [a] law based on the possible vague application of the law to the individual plaintiffs, such a claim is not ripe for review. Where there are insufficient facts to determine the vagueness of a law as applied, the issue is not ripe for adjudication.

Easyriders, 92 F.3d at 1495; see also *Mack* v. *United States*, 66 F.3d 1025, 1033 (9th Cir. 1995) (holding that there was "no 'case or controversy'" in a vagueness challenge to the Brady Act where plaintiffs had neither been charged under the Act nor alleged that they faced a "credible threat of prosecution"), reversed on other grounds *sub nom. Printz* v. *United States*, 521 U.S. 898 (1996). If the members of the League are ever subject to suit under Section 14141 for engaging in a pattern or practice of violating some vague statutory or constitutional right, "the constitutional [vagueness] objection may be raised in defense at that time." *Mack*, 66 F.3d at 1033. Until such a time, the League's claim that Section 14141 is void for vagueness does not present a ripe Article III case or controversy, and the district court was therefore correct in dismissing the complaint.

CONCLUSION

This Court should affirm the district court's finding that the Appellant's complaint fails to state a claim or controversy.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is aware of two related cases pending before this Court. Both cases arise out of *United States* v. *City of Los Angeles, et al.*, No. 00-11769, which is pending in the District Court for the Central District of California, and is the subject of the instant litigation. The two related cases are:

- *United States* v. *Los Angeles Police Protective League*, No. 01-55182, and
- *United States* v. *Garcia*, No. 01-55453.

Both cases are appeals from the district court's denial of the respective appellants' motions to intervene.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points and contains 6,862 words.

May 30th, 2001

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the United States as Appellee was sent by first-class mail, postage pre-paid, to the following counsel of record on this 30th day of May, 2001:

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