Nos. 15-55446 & 15-55911

In the
United States Court of Appeals for the Ninth Circuit

AMERICANS FOR PROSPERITY FOUNDATION,
Plaintiff-Appellee,
v.
KAMALA D. HARRIS,
Defendant-Appellant.

THOMAS MORE LAW CENTER,
Plaintiff-Appellee,
v.
KAMALA D. HARRIS,
Defendant-Appellant.

On Appeals from the
United States District Court for
the Central District of California

Brief *Amicus Curiae* of Free Speech Defense and Education Fund, Free Speech Coalition, United States Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, Citizens United Foundation, Conservative Legal Defense and Education Fund, Freedom Alliance, Law Enforcement Alliance of America, and Public Advocate of the United States in Support of Petition for Rehearing *en Banc*

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DISCLOSURE STATEMENT

The *amici curiae* herein, Free Speech Defense and Education Fund, Inc., Free Speech Coalition, Inc., United States Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, Citizens United Foundation, Conservative Legal Defense and Education Fund, Freedom Alliance, Law Enforcement Alliance of America, and Public Advocate of the United States, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1, 29(c).

These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. The *amici curiae* are represented herein by Jeremiah L. Morgan, who is counsel of record, William J. Olson and Herbert W. Titus of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amicus* United States Justice Foundation also is represented herein by Michael Connelly, 932 D Street, Suite 2, Ramona, California 92065. *Amici* Free Speech Defense and Education Fund and Free Speech Coalition are also represented herein by Mark Fitzgibbons, 9625 Surveyor Court, Manassas, Virginia 20110. *Amicus* Citizens

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s/Jeremiah L. Morgan
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INTEREST OF *AMICI CURIAE*

Free Speech Defense and Education Fund, Inc., Free Speech Coalition, Inc., United States Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, Citizens United Foundation, Conservative Legal Defense and Education Fund, Freedom Alliance, Law Enforcement Alliance of America, and Public Advocate of the United States are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code ("IRS"). Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. Their interest also includes protecting the constitutional rights of their donors.[1]

INTRODUCTION

The district court issued its preliminary injunctions in the Americans for Prosperity Foundation ("AFPF") litigation on February 23, 2015, and in the Thomas More Law Center ("Thomas More") litigation on April 29, 2015. Both

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[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

injunctions against the California Attorney General were designed to preserve the *status quo* while the two challenges were being litigated as to the long-established filing requirements imposed on charities seeking to solicit contributions from Californians. The AFPF trial is now scheduled to begin on February 23, 2016, followed by the Thomas More trial beginning on June 28, 2016, which will lead to a resolution of the cases on the merits. Although the arguments made herein apply equally to both of these cases (which were argued to the same panel and decided together), this brief focuses on the AFPF litigation.

In the district court below, AFPF challenged the constitutionality of the new compelled donor disclosure demands made by the Attorney General, which is based not on a statutory or regulatory change, but merely on the Attorney General's brand new "interpretation" of California's Supervision of Trustees and Fundraisers for Charitable Purposes Act ("Charitable Purposes Act"). The district court preliminarily enjoined the Attorney General:

> from demanding, and/or from taking any action to implement or to enforce her demand for, a copy of the Foundation's Schedule B to IRS Form 990 or any other document that would disclose the names and addresses of the Foundation's donors, until this Court issues a final judgment.

After a hearing, and in support of its injunction, the district court found that its order would impose "no burden" whatsoever on the Attorney General. Indeed, when considering the balance of the hardships, the district court emphasized that "Defendant has not suffered harm from not possessing Plaintiff's Schedule B for the last decade." AFPF, Order Granting Motion for Preliminary Injunction at 3 (Feb. 23, 2015).

On December 29, 2015, a panel of this Court vacated the AFPF preliminary injunction, ordering the district court to issue an injunction prohibiting only the public disclosure of the unredacted Schedules B. Now that trial is just weeks away, it makes even less sense for the injunction to be challenged by the Attorney General, much less lifted and modified by a panel of this Court. Lifting the injunction has the net effect of validating the merits of the Attorney General's claim to broad, new, constitutionally illegitimate powers, as explained by AFPF in its Petition, and for the additional reasons set out herein.

These *amici* contend that the panel's decision is deeply flawed and should be overturned, reinstituting the District Court's injunction. As discussed in Section I.B., *infra*, the panel decision wholly ignores the principal U.S. Supreme Court case which explains the First Amendment's foundational anonymity

principle. Further, as discussed in Section I.C., *infra*, the panel decision wholly ignores the principal line of U.S. Supreme Court cases from the 1980s which govern state regulation of charitable solicitations by nonprofit organizations. Known as the Village of Schaumburg trilogy, these cases were more recently supplemented by the U.S. Supreme Court in 2003 in Illinois *ex rel.* Madigan v. Telemarketing Associates.[2] Lastly, as discussed in Section II, *infra*, the panel decision ignores the fact that, by demanding charities file their IRS Form 990 Schedule B, the Attorney General herself violates a federal law which is specifically designed to protect the anonymity of donors to nonprofit organizations — an act which is sanctioned by the panel's injunction.

[2] Several of these *amici* filed an *amicus* brief in Telemarketing Associates, then named Ryan v. Telemarketing Associates, Inc. Brief *Amicus Curiae* of Free Speech Defense and Education Fund, Inc., *et al.* (Jan. 23. 2003), http://lawandfreedom.com/site/nonprofit/Ryan.pdf.

ARGUMENT

I. THE PANEL DECISION FAILED TO APPLY GOVERNING CONSTITUTIONAL PRECEDENTS.

A. Election Law Cases Do Not Apply Here.

In its injunction in the AFPF litigation, the district court considered and rejected the arguments raised by the Attorney General, ruling that the Plaintiff AFPF had the better case:

> Plaintiff has [i] raised serious questions going to the merits and [ii] demonstrated that the balance of hardships sharply favor Plaintiff … [and iii] offered numerous, less intrusive alternatives which could satisfy Defendant's oversight and law enforcement goals. [Order of February 23, 2015, reprinted in AFPF Petition at App. 31.]

Remarkably, however, the panel appeared to wholly disregard this considered analysis. Moreover, the panel reached its decision in part from reliance on cases drawn from the world of campaign finance disclosure law which are wholly irrelevant here.[3] The panel appears not to understand that some of the cases on which it relied are predicated on a judicially recognized narrow exception to the principle of anonymity that applies only in the campaign finance area. In

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[3] *See* the panel's references to Brown v. Socialist Workers, 459 U.S. 87 (1982), Chula Vista v. Norris, 782 F.3d 520 (9th Cir. 2015) (a ballot measure case decided by application of campaign finance authorities), and Human Life of Washington v. Brumsickle, 624 F.3d 990 (9th Cir. 2010).

campaign finance jurisprudence, "corruption and the appearance of corruption" of candidates/incumbents has been said to justify a modification of the anonymity principle which otherwise lies at the heart of the First Amendment and Freedom of the Press.[4]

Likewise, the Supreme Court rejected application of campaign finance disclosure principles to Mrs. McIntyre's handbills in 1995:

> [C]omments [about disclosure requirements] concerned contributions to the candidate or his responsible agnet. They had no reference to the kind of independent activity pursued by Mrs. McIntyre. Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case.... Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests.... In candidate elections, the Government can identify a compelling state interest in voiding the corruption that might result from campaign expenditures. [McIntyre v. Ohio Elections Commission, 514 U.S. 334, 354, 356 (1995).]

The Attorney General has failed to assert a corruption rationale for its defense of its new interpretation of law. Indeed, she could not make such an

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[4] *See* Brief *Amicus Curaie* of RealCampaignReform.org (now DownsizeDC.org) in Support of Petitioners at 21-30 in Watchtower Bible & Tract Society v. Stratton, 536 U.S. 150 (2002) http://www.lawandfreedom.com/site/constitutional/Watchtower.pdf. *See also* R. Natelson, Does "the Freedom of the Press" Include a Right to Anonymity? The Original Meaning, 9 N.Y. UNIV. JOUR. OF LAW & LIBERTY 160 (2015).

assertion, as the California law applies to organizations exempt from federal income taxation under IRC section 501(c)(3), which are prohibited from electioneering by federal law. Indeed, a very different rule has long applied outside the candidate/incumbent corruption area, where anonymity has been a foundational attribute of the First Amendment freedom applicable to communications of the sort traditionally engaged in by nonprofit organizations.

The panel appeared to believe that no one could reasonably object to providing donor information to the government, and that the only dissemination that may be problematic would be to the public — which would not be allowed under the panel's injunction. Both the Attorney General and the panel assumed that the government has every right to know anything that it wants to know about the identity of donors. Thus, the panel demonstrated that it was wholly blind both to any danger arising from allowing the government to have donor information, and to the legal authorities governing that very issue.

Indeed, there is a timeless U.S. Supreme Court precedent which protects the identity of those disseminating information — a fact completely overlooked by the panel — demonstrating that those disseminating information may not be compelled to divulge their identity. And in that venerable precedent, the U.S.

Supreme Court made no distinction between forced disclosure to the government and forced disclosure to the public — both being viewed as impermissible.

B. The Panel's Decision Conflicts with the First Amendment's Anonymity Principle.

In Talley v. California, 362 U.S. 60 (1960), Justice Hugo Black explained why First Amendment press principles cannot give way to government demands to know the identity of the speaker. Talley involved a criminal prosecution for violation of a Los Angeles municipal ordinance which restricted the distribution of handbills:

> "No person shall distribute any **hand-bill in** any place under any circumstances, which does not have printed on the cover, or the face thereof, the **name and address** of the following
> "(a) [t]he person who printed, wrote, compiled or manufactured the same" [and] (b) [t]he person who caused the same to be distributed…. [*Id.* at 60-61 (emphasis added).]

Hand-bills were defined broadly to include "any hand-bill, dodger, commercial advertising circular, folder, booklet, **letter,** card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public." *Id.* at 64 (emphasis added). The Court struck down the ordinance, based on the principle of anonymity.

Indeed, the Los Angeles ordinance in Talley banned the distribution of printed materials within Los Angeles, California without the identification of the persons responsible. Of course, in the present case, the organization sending the letter (AFPF) has been identified, and yet the government demands the right to know more, to learn the identity of those large donors who support that organization financially and make the sending of those letters possible. Therefore, the Attorney General's demand for information in this case is even more intrusive than was the Los Angeles municipal ordinance struck down in Talley.

The Talley case is instructive in at least two respects: first, for the approach taken by the Court to reach its result, and second, for the historical analysis applied to better understand the interests that the First Amendment were intended to protect.

First, the Talley Court rehearsed the state of the law, noting that its decision in Lovell v. Griffin, 303 U.S. 444 (1938), "held void on its face an ordinance that comprehensively forbade any distribution of literature … without a license." In the instant case, the requirement that a charity must maintain "membership" on the list of approved charities maintained by the California

Attorney General is tantamount to requiring charities to obtain a license before communications may be sent. *See* AFPF at *2-3. The Talley Court then discussed Schneider v. State, 308 U.S. 147 (1939), which rejected efforts by Irvington, New Jersey; Milwaukee, Wisconsin; Worcester, Massachusetts; and Los Angeles, California, to find a way around Griffin, arguing that those "ordinances had been passed to prevent either frauds, disorder, or littering…." However, the result in the Supreme Court was the same, as the court explained:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin*, 303 U.S. at 452. [Talley at 64.]

Applied here, the nonprofit's right to mail into California to spread its message and solicit contributions cannot be conditioned on a state's demand for information about the persons responsible.[5] Freedom of the Press is wholly inconsistent with any form of government licensure.[6]

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[5] Based on the principles articulated herein, *inter alia*, these *amici* have long believed that the entire scheme of state charitable solicitation laws cannot withstand a proper constitutional challenge, but that challenge is not before this Court, and resolution of that issue will need to await another day.

[6] The Attorney General's requirement harkens to the "Decree of Star Chamber of July 11, 1637" and the "Licensing Order of June 14, 1643," which

The Talley Court also considered and rejected Los Angeles' rationale for its ordinance, explaining that the real threat presented by the ordinance was not so much in the public knowing the identity of the person putting out the hand-bill, but in the government having that information.

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to **criticize oppressive practices and laws** either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of **literature critical of the government**. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for **books that were obnoxious to the rulers**. [Talley at 64-65 (emphasis added).]

Lastly, if Talley stands for the proposition that AFPF could mail letters into California without identifying they came from AFPF — and it does — it stands even more strongly for the proposition that California cannot demand the names of those who made the mailing of those letters financially possible.

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required, *inter alia*, pre-publication application by and licensing of publishers, provoking John Milton's monumental defense of freedom of the press. J. Milton, *Areopagitica* (Liberty Fund: 1999).

C. The Panel Decision Wholly Ignored the U.S. Supreme Court Precedents which Govern State Charitable Solicitation Laws.

In considering AFPF's First Amendment challenge, one would have expected the panel to have first sought guidance from those Supreme Court precedents assessing charitable solicitation statutes. *See* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); and Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). However, the panel did not even consider them. Just 13 years ago, the U.S. Supreme Court broadly proclaimed: "The First Amendment protects the right to engage in charitable solicitation." Madigan v. Telemarketing Associates, 538 U.S. 600, 611 (2003). Indeed, in Madigan, the Court reaffirmed its line of cases which protected a broad right of charities to make communications and solicit funds under the First Amendment, despite continuing efforts by states to restrict those solicitations. Known as "the Village of Schaumburg trilogy," these cases addressed an unrelated issue of state efforts to limit the cost of fundraising, but also they established that broad "prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation" unconstitutionally abridge the freedom of speech (Madigan at 612). These cases left only "a corridor open for fraud

actions … trained on representations made in individual cases…." Madigan at 617. *See* Village of Schaumburg, 444 U.S. at 628-32; Munson, 467 U.S. at 959-64; and Riley, 487 U.S. at 787-88.

Instead, the panel below stated that it felt "bound by [its] holding in *Center for Competitive Politics* … that the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional." AFPF at *4. As the petition for rehearing correctly points out, "the panel [erroneously relied] on caselaw from the electoral context…." *See* Petition for Rehearing at 10. Petitioners explain that "both *Chula Vista* and *Brumsickle* [upon which the panel below relied] involved mandatory disclosure for *elections*,[7] a context categorically removed from 501(c)(3) donations." *Id*. at 11. Quite simply, cases such as those cited in Center for Competitive Politics v. Harris ("CCP"), 784 F.3d 1307 (9th Cir. 2015), involve campaign finance laws.

Since Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court has ruled that considerations of "corruption or the appearance of corruption" among candidates/incumbents are so compelling that they require disclosure to the public

[7] Buckley v. Valeo, 424 U.S. 1 (1976); Davis v. FEC, 554 U.S. 724 (2008); Citizens United v. FEC, 558 U.S. 310 (2010); and Doe v. Reed, 561 U.S. 186 (2010).

the names and addresses of those making campaign-related contributions and expenditures. However, considerations of "corruption or the appearance of corruption" in the electoral process do not apply to the requirement that nonprofit organizations file Schedule B donor lists. Not only are such organizations absolutely barred by statute from making contributions to candidates for elective office, and also barred from even making statements in support of or opposition to candidates for office. *See* IRC § 501(c)(3) and 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii).

Presumably, the Attorney General bases her demand for all applying organizations' Form 990 Schedule B on enforcement of California charitable solicitation registration laws. *See* Cal. Busi. and Prof. Code, §§ 17510, *et seq*. and Cal. Gov't Code, §§ 12580, *et seq*. The Attorney General's purpose for requesting the Schedules B is in serious contention, of course. *See* AFPF Petition at 14. That statute states the purpose of California's charitable solicitation laws:

> The Legislature declares that the purpose of this article is to **safeguard the public against fraud, deceit** and imposition, and to foster and encourage fair solicitations and sales solicitations for charitable purposes, wherein the person from whom the money is being solicited will know what portion of the money will actually be

> utilized for charitable purposes. [Cal. Busi. and Prof. Code, § 17510(b) (emphasis added).]

Likewise, the Attorney General's website explains that: "The purpose of [the Attorney General's] oversight [over charitable solicitation] is to protect charitable assets for their intended use and to ensure that the charitable donations contributed by Californians are not misapplied and **squandered through fraud or other means**."[8] Disclosure of the names of donors as they appear on Schedule B does nothing to further this purpose.

In determining the lawfulness of the Attorney General's actions at issue in this case, the panel below ignored both the claimed purpose of the charitable solicitation registration statute and the text of the statute itself. The panel described the purpose of the Attorney General's actions as "California's compelling interest in **enforcing its laws**." AFPF, 2015 U.S. App. Lexis at *4 (emphasis added), citing CCP, 784 F.3d at 1317 ("as CCP concedes, the Attorney General has a compelling interest in **enforcing the laws** of California." Emphasis added.). Regardless of what CCP may have conceded in its case, a general claim to enforcement of laws is not a legitimate end in itself, especially when the Attorney General's actions bear no relation to stated purpose of the

[8] https://oag.ca.gov/charities (emphasis added).

underlying law and are not specific to any organization. Even though the Attorney General claims a "law enforcement" rationale and invokes the word "fraud," this is not fraud in individual cases, but rather a "broad prophylactic" measure of the sort that has repeatedly failed Supreme Court review. *See*, *e.g.*, Madigan, 538 U.S. at 612.

Lastly, the panel was loathe to believe that the disclosure of the names of donors could adversely affect the ability of nonprofit organizations to raise funds from donors whose names would be openly revealed to the powerful Attorney General of the largest state in the Union (who is now a candidate for higher office). These *amici*, however, would be remiss if they did not inform this Court that this is exactly what happens in the real world. Large donors increasingly ask where and how their names will be disclosed before making contributions. Generally, donors accept the risk associated with their gifts being revealed to the IRS on Schedule B, because they know there are laws which make disclosure of that information a felony punishable by up to $5,000 fine and five years in jail,[9] and understand that the nonpolitical civil servants' reason for obtaining this information is narrow, primarily related to ensuring that charities maintain

[9] *See* 26 U.S.C. § 7213.

necessary levels of public support to qualify as public charities under federal law. *See* IRC § 509(a).[10] However, donors express little or no similar confidence when their contribution history is distributed across the nation, especially where the disclosure is made to politicians serving as Secretaries of State or Attorneys General. Those elected officials have both the motivation and the ability to punish donors who contribute to groups with which the politicians disagree. Donors understand that sometimes the politician lurking within can cause a public servant to abuse the public trust.

II. THE PANEL'S INJUNCTION AUTHORIZES THE ATTORNEY GENERAL TO VIOLATE FEDERAL LAW.

Although not raised by the plaintiffs below, this Court should consider whether, under the authority of the panel's injunction, the Attorney General will be violating federal tax law by demanding each charity provide its Schedule B list of donors. Quite unlike the rest of IRS Form 990, a charity's Schedule B constitutes tax "return information" protected under 26 U.S.C. § 6103.[11]

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[10] *See* IRS, "Exempt Organizations Annual Reporting Requirements - Form 990, Schedules A and B: Public Charity Support Test," https://www.irs.gov/Charities-&-Non-Profits/Exempt-Organizations-Annual-Reporting-Requirements-Form-990,-Schedules-A-and-B:-Public-Charity-Support-Test.

[11] The IRS Form 990 Schedule B is exempted from the federal requirement that organizations must provide their IRS Forms 990 for public

Federal law authorizes the Attorney General to request the Schedules B from the IRS, but only pursuant to a specific investigation for cause, subject to the approval of the United States Secretary of Treasury. *See* 26 U.S.C. § 6104(c)(2)(D). Absent such cause, there is no authority for the IRS to disclose donor information to state officials. Here, the Attorney General seeks to circumvent § 6104(c)(2)(D), by demanding the Schedule B directly from the charity. The Attorney General's dragnet requirement for applying charities to turn over their Schedules B is an end-around to the federal scheme put in place by Congress.

Moreover, by conditioning approval of a charity's application on its provision of its "tax return information," the Attorney General would appear to commit the federal tax crime of solicitation:

> It shall be unlawful for any person willfully **to offer** any **item of material value** in exchange for any **return** or return information (as defined in section 6103(b)) **and to receive** as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount

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inspection. *See, e.g.*, IRS, "Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors' Identities Not Subject to Disclosure," https://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations-Returns-and-Applications:-Contributors'-Identities-Not-Subject-to-Disclosure.

> not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution. [26 U.S.C. § 7213(a)(4) (emphasis added).]

Although no case on point has been identified, approval of a charity's application which allows it to solicit contributions in California is most certainly an "item of material value." By demanding Form 990 Schedules B be filed, the Attorney General violates the "offer" prohibition in the statute. Moreover, the panel's injunction allows her to violate the "receive" prohibition in the statute. Indeed, the Attorney General compounds the problem by threatening fines and penalties for failure to provide the protected return. The panel's injunction appears to authorize the Attorney General to violate federal law. This it may not do.

CONCLUSION

For the foregoing reasons, the appellees' petition for panel rehearing and *en banc* rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the word limitation set forth by Circuit Rule 29-2, because this brief contains 3,975 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point CG Times.

/s/ Jeremiah L. Morgan

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Dated: January 21, 2016

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.*, in Support of Petition for Rehearing *en Banc*, was made, this 21st day of January 2016, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ Jeremiah L. Morgan

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