

CASE NO. 24-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B.B., a minor by and through her mother, CHELSEA BOYLE,
Plaintiff-Appellant,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, *et al.*,
Defendants-Appellees,

On Appeal from the United States District Court
for the Central District of California
Case No. 8:23-CV-00306-DOC-ADS

**BRIEF OF *AMICI CURIAE* MANHATTAN INSTITUTE,
INSTITUTE FOR FREE SPEECH, YOUNG AMERICA'S FOUNDATION,
CENTER FOR THE RIGHTS OF ABUSED CHILDREN, AND
AMERICANS FOR PROSPERITY FOUNDATION
SUPPORTING PLAINTIFF-APPELLANT**

Madison Hahn
Young America's Foundation
11480 Commerce Park Dr., Suite 600
Reston, VA 20191
(800) 872-1776

Timothy D. Keller
Center for the Rights of Abused Children
3900 Camelback Rd., Suite 300
Phoenix, AZ 85018
(602) 710-1135

Cynthia Fleming Crawford
Casey Mattox
Americans for Prosperity Foundation
4201 Wilson Blvd., Suite 1000
Arlington, VA 22203
(571) 329-2227

Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

Alan Gura
Institute for Free Speech
1150 Conn. Ave., N.W., Suite 801
Washington, DC 20036
(202) 301-3300

July 22, 2024

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Dated: July 22, 2024

s/ Ilya Shapiro

Ilya Shapiro

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INTEREST OF *AMICI CURIAE*¹

The **Manhattan Institute** (MI) is a nonprofit policy research foundation whose mission is to develop and disseminate ideas that foster individual responsibility and agency across multiple dimensions. It has sponsored scholarship and filed briefs opposing regulations that interfere with constitutionally protected liberties. MI has a particular interest in defending constitutional speech protections because its scholars have been targets of speech-suppression efforts.

The **Institute for Free Speech** is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Challenging unreasonable and discriminatory burdens on public advocacy is a core aspect of the Institute's mission.

Young America's Foundation (YAF) is a nonprofit organization that ensures young Americans understand the ideas of individual freedom, a strong national

¹ Pursuant to Fed. R. App. P. 29, counsel states that plaintiff-appellant consented to the filing of this brief, but defendants-appellees never responded. Accordingly, a motion for leave has been filed alongside this brief. Further, no party's counsel authored any part of this brief and no person other than *amici* made a monetary contribution to fund its preparation or submission.

defense, free enterprise, and traditional values. Young Americans for Freedom, YAF's membership project, has thousands of middle school, high school, and college members across the country, who exercise their First Amendment rights through campus dialogue and activism on a variety of issues. When members encounter pushback from administrators and faculty, YAF stands with the students against suppression and indoctrination, including by filing *amicus* briefs.

The **Center for the Rights of Abused Children** advocates in courtrooms nationwide to protect the constitutional and educational rights of children. Too often in legal proceedings involving children, their rights are not centered, their voices are unheard, and their participation is minimal. But the Constitution is not for adults alone. Nor do its protections cease at the schoolhouse door.

Americans for Prosperity Foundation (AFPF) is a 501(c)(3) organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF works toward these goals by defending the individual rights that are essential to all members of society, including the freedom of expression and association. As part of this mission, it appears as *amicus curiae* before federal and state courts.

Amici are all free-speech advocates and this case presents a blatant violation of the freedom of speech. Educational institutions are not just places where First

Amendment rights should be protected; that protection is vital to their mission. They are uniquely positioned to instill in the next generation an appreciation for free speech. *Amici* have a strong interest in protecting students from government attempts to confuse them with harmful ideology and penalize them for perceived “wrongs.”

SUMMARY OF ARGUMENT

The Constitution does not limit its free-speech guarantee to those who have completed fourth or fifth or sixth grade. Such an arbitrary distinction makes little sense and would serve equally little purpose. Yet there are those who would whittle the speech rights of public elementary-school students out of existence. This lack of respect for the speech rights of America’s children is alarming, and the decision of the lower court, failing to uphold B.B.’s constitutional rights, amplifies this alarm.

Although the Supreme Court has infrequently addressed the speech rights of public elementary school students as such, courts across the country have articulated the contours of these rights directly. The right to freedom of speech for these elementary-school students is consistently recognized by circuit and district courts alike. These courts, which impose some limits on the students’ speech so as not to disrupt schools’ educational missions, nonetheless acknowledge the students’ rights to speak. The few outlying courts suggesting that young students do not partake in substantial First Amendment protections have been rebuked by others.

Indeed, there is no jurisprudential reason for this Court to abandon the lead of courts respecting the speech rights of elementary school students, and every reason to respect those rights. And from a policy perspective, enforcing student speech rights provides significant pedagogical benefits. When elementary-school students enjoy speech protections, they learn critical thinking, benefit from enhanced teacher engagement, and become engaged and thoughtful members of society.

ARGUMENT

I. Courts Nationwide Regularly Protect the Speech of Public Elementary-School Students

Whether elementary school students enjoy the constitutional guarantee of free speech is not, and should not be, a difficult question to answer. They do. The Supreme Court has long recognized that students in public schools maintain such rights, with the Court recently reaffirming the idea that students do not “‘shed their constitutional rights to freedom of speech or expression,’ even ‘at the school house gate.’” *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 187 (2021) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). While much of the jurisprudence on student speech rights involves high schoolers and college students, ample case law confirms that public-elementary-school

students also enjoy significant protection of their speech. Unfortunately, the district court below did not accurately reflect this dynamic.

A. Courts Frequently Hold School Restrictions on Young Students' Speech to Be Violations of Their First Amendment Rights

When public schools restrict the speech of elementary school students, courts consistently find that the school violate that student's constitutional protection of free speech, reinforcing the tenet that elementary school students are not devoid of speech protections. *Tinker* governs most elementary school speech disputes by *Tinker*, unless they fall into one of the several exceptions to the broad speech protections that *Tinker* outlines. *See Tinker*, 393 U.S. at 506. It is often in the context of *Tinker*'s general rule—that a school may not restrict a student's speech unless that speech causes a substantial disruption of school activity or is reasonably foreseen to cause such a disruption—that courts analyze these disputes. *Id.* at 514. And it is in the decision of whether and how much to apply this rule that courts have largely determined the speech rights of elementary school students. Time and again, and in situations dealing with different forms of student speech, courts have applied the protections outlined in *Tinker* to elementary school students, protecting them from constitutional violations perpetuated by their schools.

Although the Supreme Court has not directly addressed the question of what level of speech rights elementary-school students possess, numerous circuit and district courts have. Those courts show that young students enjoy robust free speech rights. In one such case, the Third Circuit explicitly upheld the speech rights of an elementary-school student whose speech was restricted by her school. *See K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 107 (3d Cir. 2013). There, an elementary school prohibited a fifth-grade student from distributing invitations for a Christmas party at her church to her fellow students. *Id.* at 102. The court directly addressed the question “of the extent to which *Tinker* applies in the elementary school context.” *Id.* at 107. Finding that the school likely violated the student’s free speech rights, as it could not show substantial disruption of school activities, the court held “that the *Tinker* analysis has sufficient flexibility to accommodate the educational, developmental, and disciplinary interests at play in the elementary school environment.” *Id.* at 111. The court recognized that an elementary school student’s exercise of speech that causes no disruption and is perfectly age-appropriate should be protected, something the lower court here failed to do for B.B.

The Third Circuit is not alone in this view; two years earlier, the Fifth Circuit also upheld the speech rights of an elementary school student. *See Morgan v.*

Swanson, 659 F.3d 359, 385-86 (5th Cir. 2011) (en banc). *Morgan* dealt with several speech challenges in different elementary schools and chose to review the constitutionality of only one incident: a second-grade student was prohibited from distributing religious pencils to her friends after school. *Id.* at 388. Finding that the student’s action did not interfere with the work of the school nor with the rights of other students, and that the school restricted her speech solely because of the message, the court held that the student’s free speech rights were violated. *Id.*

While *Morgan*’s outcome serves as another relevant example of a young student’s speech being protected, it is the *Morgan* court’s analysis of that right that is most salient. The en banc court made a point to explain “that the student-speech rights announced in *Tinker* inhere in the elementary-school context,” further elaborating that “it is difficult to identify a constitutional justification for cabining the First Amendment protections announced in *Tinker* to older students.” *Id.* at 386. The court provides a clear and definitive recognition of elementary school student speech rights, relying on the ability of the Constitution and the protections of *Tinker* to provide guidance for speech disputes. Suffice it to say, the district court here declined to follow the Fifth Circuit’s lead, and instead effectively chose to limit *Tinker*’s speech protections to older students.

Various district courts also recognize elementary-school students' robust First Amendment rights, protecting them from school restrictions. *See Gilio ex rel. J.G. v. Sch. Bd. of Hillsborough Cnty., Fla.*, 905 F. Supp. 2d 1262, 1264 (M.D. Fla. 2012) (finding a student's First Amendment rights violated when a school prohibited her from passing out invitations to an Easter egg hunt during non-instructional school time); *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 649 (D.N.J. 2007). *DePinto* dealt with two fifth-grade students who faced suspension if they continued to wear buttons protesting the district's uniform policy; the buttons seemed to depict Hitler Youth with a text overlay saying, "No School Uniforms." *DePinto*, 514 F. Supp. 2d at 636.² The court ruled for the students, enjoining the schools from prohibiting them from wearing their buttons, as they had caused no disruption of school activities, nor did the buttons fall under any of the *Tinker* exceptions. *Id.* at 650. That some may have found the buttons problematic or offensive was no reason to curtail the rights of these elementary-school students. The court faithfully applied *Tinker* and affirmed their speech rights.

In addition to cases dealing exclusively with elementary-school students, courts have also reaffirmed the speech rights of middle-school students. While a bit

² The depiction of Hitler youth did not display any Nazi symbols or specific reference to the organization. *DePinto*, 514 F. Supp. 2d at 636.

older than elementary-school students, middle schoolers nonetheless remain on the younger end of students involved in free-speech disputes, so the jurisprudential logic as applied to them transfers easily to their younger peers. This logic finds that middle-school students are also afforded speech rights and that the traditional tests, like *Tinker*'s, serve as adequate and flexible standards through which a school's restriction of student speech can be analyzed. See *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 298 (3d Cir. 2013) (finding that a school district violated the speech rights of middle-school students when they banned them from wearing bracelets reading "I ♥ boobies! (KEEP A BREAST)," supporting breast-cancer awareness); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 330-31 (2d Cir. 2006) (finding that a school violated a student's speech rights when it prevented him from wearing a shirt depicting George Bush in an unsavory manner).³ The *Guiles* court noted that "only when a fellow student's mother—who had different political views from plaintiff—protested" did the school restrict the student's speech. 461 F.3d at 331. Similarly, only when the mother of the recipient of B.B.'s drawing raised an issue was B.B. punished, even though no disruption occurred.

³ The shirt depicted images of drugs, so the case would now face potential scrutiny under *Morse v. Frederick*, in which the Supreme Court allowed schools to restrict student speech that can be reasonably viewed as promoting illegal drug usage. 551 U.S. 393, 403 (2007).

All of this jurisprudence shows that elementary-school students retain speech rights—and that courts can and do step in to ensure that these rights are protected.

B. Courts Recognize Elementary-School Students’ Speech Rights Even When They Impose Limits

When courts ultimately conclude that a specific instance of student speech is not protected, they do so in ways that in no way lessens the rights of elementary-school students. In one such case, the Second Circuit okayed a school’s suspension of a fifth-grade student for a drawing in which he desired to “blow up the school with the teachers in it.” *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 110-12 (2d Cir. 2012). The court applied a *Tinker* analysis, noting the significance that the drawing threatened violence and finding it reasonable to suspect a potentially substantial disruption of school activities. *Id.* at 113-14. While the court ultimately came down on the school’s side, its opinion fully recognized that elementary schoolers enjoy speech protections.⁴ That a school may discipline a student for a drawing threatening violence is relatively unremarkable and does little to diminish

⁴ Indeed, one member of the court dissented, asserting that “the First Amendment should make us hesitate before silencing students who experiment with hyperbole for comic effect, however unknowing and unskillful that experimentation may be.” *Cuff*, 677 F.3d at 124 (Pooler, J., dissenting).

the fundamental speech rights of other young students. The drawing at issue here, for example, portrays no hint of violence—or any other sentiment than compassion.

When courts venture so far as to suggest that elementary-school students may lack substantial First Amendment rights, those suggestions are rebuked by other members of their court and read narrowly by other judges. In a case where a fourth-grade student was prohibited from distributing invitations to a religious meeting at his church, the Seventh Circuit performed a worrisome free-speech analysis, but ultimately backed off from its more problematic suggestions. *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996). The court properly noted that “age is a critical factor in student speech cases,” but extended that consideration too far when it suggested, “especially considering the important role age plays in student speech cases . . . it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students.” *Id.* at 1538-39. Holding that *Tinker* protections should not apply to elementary-school students would effectively strip those children of their First Amendment rights and leave them with extremely limited protection.

Thankfully, the Seventh Circuit did not take that step, instead holding that “because the Supreme Court has not directly decided this question, the following analysis will assume that grade schoolers partake in certain of the speech rights set out in the *Tinker* line of cases.” *Id.* at 1539. Not only did the court decline to adopt

its hinted-at more-drastic view, one judge explicitly noted that she “disagree[d] with the suggestion that the standard articulated in *Tinker* is unlikely to apply to grammar school students.” *Id.* at 1546 (Rovner, J., concurring in part and in the judgment). The view that elementary-school students have few speech rights, especially under a *Tinker* analysis, is not and should not be accepted in America’s jurisprudence.

In a later case, the Third Circuit considered the First Amendment speech rights of a third-grade student who was asked to put away a petition protesting her class’s planned trip to the circus. *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 414 (3d Cir. 2003). The court held the school’s actions to be permissible because the school never punished the student and the student was unable to show any speech suppression. *Id.* at 419. Although the court noted in passing that, “if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited,” and that “much—perhaps most—of the speech that is protected in higher grades” may be regulated by elementary schools, *id.* at 417-18, some members of the court did not support that dictum. One judge asserted that it was “unacceptable” to suggest that the elementary school students lacked “sufficient maturity to express or form valid opinions concerning the proposed class trip.” *Id.* at 421 (Fullam, J., concurring).

Tellingly, the Third Circuit has since read that treatment narrowly. *See, e.g., K.A. ex rel. Ayers*, 710 F.3d at 110. That court read “*Walker–Serrano* to suggest that

Tinker analysis can apply even in the elementary school context” and noted that the *Walker-Serrano* court’s suggestion that the speech rights of elementary school students under *Tinker* are severely limited was “however, dicta.” *Id.* Thus, *Walker-Serrano*’s suggestion was not received well and has not been adopted, as most courts continue to recognize and respect the speech rights of elementary school students.

II. Free Speech Provides Significant Pedagogical Benefits to Elementary-School Students

A. Free Speech Cultivates Critical Thought and Enhances Teacher Engagement

The protection of speech rights for elementary-school students plays a crucial role in ensuring they develop critical thinking skills at a young age. The ability to analyze information and claims, and discern truth from mistruth, is an invaluable skill that students must learn to become successful in life. Indeed, “developing critical thinking in students has been proposed as the most important skill set the education system can develop in students.” Catherine O’Reilly et al., *Critical Thinking in the Preschool Classroom—A Systematic Literature Review*, Thinking Skills and Creativity, Dec. 2022, at 1 (literature review of 25 empirical studies analyzing critical thought teaching methods in early education). Young children, as early as three and four years old have already begun to develop these critical thinking skills. See Gail D. Heyman, *Children’s Critical Thinking When Learning From*

Others, 17(5) *Current Directions in Psych. Sci.* 344, 344 (2008). When children are in elementary school, receiving some of their first formal education, they continue to develop these critical thinking skills every day. Protection of their speech rights provides a significant pedagogical benefit in cultivating those skills.

Free speech protections allow students to hear varied perspectives and to think critically about those perspectives. If speech in elementary schools lacks meaningful protection and students are unable to express their opinions on certain matters, a chilling effect arises that dampens that skill development. While these youngsters may be unlikely to discuss complex political issues, they nonetheless have the ability to discuss controversies that lead to disagreement, necessitating speech protections.

The story of *Walker-Serrano* serves as a prime example of such a scenario. There, the third-grade student encouraged more than 30 of her peers to sign a petition protesting her school's field trip to the circus due to animal cruelty concerns. *Walker-Serrano*, 325 F.3d at 414. Though the school eventually prevented her from circulating the petition, they provided her with alternative avenues to express her views, such as passing out coloring books discussing animal cruelty to her classmates. *Id.* Additionally, District Judge Fullam's concurrence lamenting the proposition that elementary school students lacked "sufficient maturity to express or form valid opinions concerning the proposed class trip," supports the idea that young

students are fully equipped to critically consider such issues. *Id.* at 421 (Fullam, J., concurring). While the *dicta* from the Court itself was concerning, the background facts of the case are illustrative. Without free speech protections, these students, and others like them would miss out on valuable opportunities to think critically about challenging topics and the growth potential from those discussions.

Free speech protections of elementary school students also enhance teacher engagement. The important role of teachers in the growth of school children cannot be overstated; empirical studies show that “teachers can and do help develop attitudes and behaviors among their students that are important for success in life.” David Blazar & Matthew A. Kraft, *Teacher and Teaching Effects on Students’ Attitudes and Behaviors*, 39(1) *Educ. Evaluation and Pol’y Analysis* 146, 161 (2017). Because of their significant role, it is imperative that teachers engage effectively with students to aid their growth. When teachers arbitrarily silence student speech and resort to punishment, they do not engage students in their speech and thus do not help them learn. To be sure, elementary school teachers require a sufficient scope of authority over students to ensure what they learn and discuss is age appropriate, but just because some speech is uncomfortable does not mean it should be stifled.

In that context, the school’s actions towards B.B. are illustrative of precisely what schools should *not* do and serve as an example of how respect for free speech

protections benefit the elementary school student. Following instruction on racial issues in America, a first grade-student wanted to make a compassionate gesture and decided to draw a picture for her friend, not realizing that adding the phrase “any life” underneath “Black Lives Matter” had certain negative connotations to many people. Instead of using this as a learning opportunity, the school punished B.B.: this first-grader’s drawing was deemed “racist”—meaning that she herself was racist or at least had racist thoughts—she was forced to apologize, banned from recess, and barred from drawing any more pictures, even pictures that had nothing to do with racial issues. Far from doing any good for B.B. and her education, these actions served no pedagogical use. Had B.B.’s teachers respected her constitutional right and not punished her, the situation could have instead yielded significant pedagogical benefits for B.B. The teachers would have been incentivized to engage B.B. and explain the implications of her drawing. She could have learned more, and the teachers could have become more effective educators. When teachers respect the speech rights of those in their tutelage, they do not simply resort to punitive or silencing measures and thus do not neglect their pedagogical responsibility. Cases like this illustrate the importance of protecting the speech rights of elementary school students, and the harms that can follow when they do not receive those protections.

B. Protection of Elementary-School Students' Speech Rights Aids Their Growth as Members of Society

Robust and intellectually free education at the elementary school level, for which speech protections are indispensable, is essential in preparation for life. Not only does it provide the crucial pedagogical benefits outlined above, but it helps prepare students to be good citizens later in life. The Supreme Court has time and again recognized this, noting the important role schools play in raising America's youth. *See Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954) (asserting that education "is the very foundation of good citizenship"); *Mahanoy*, 594 U.S. at 190 (2021) (noting that "America's public schools are the nurseries of democracy"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)) (noting the importance of public education is its "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system"). Further, if higher education is the "marketplace of ideas," *Tinker*, 393 U.S. at 512, students must learn to express their unique ideas prior to joining the marketplace to add value. Students who learn only to regurgitate their teachers' points of view are deprived of the opportunity to develop new ideas. *Cf.* Lauren A. Wright, *How Liberal Colleges Benefit*

Conservative Students, The Atlantic, July 8, 2024, <https://tinyurl.com/22njrvf7>. The role of schools in raising the next generation of citizens is evidently crucial and cannot be accomplished without respect for the speech rights of young students. From an early age, it is important that elementary school students understand and benefit from their right to free speech, otherwise the country runs the risk of “strangl[ing] the free mind at its source and teach[ing] youth to discount important principles of our government as mere platitudes.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). If students like B.B. are not afforded the speech protections they are due at a time when they have already begun to think critically and form their own opinions, what kind of respect will they have for such “important principles” later in life? *Id.*

In addition to cultivating respect and understanding of such a fundamental constitutional protection, ensuring that elementary-school students partake in free speech fosters the kind of discussion and engagement that is crucial to their future. The ability to speak freely and critically engage with one another in discussion are fundamental skills necessary for a successful life. It is imperative that schools foster this engagement and discussion, not just for the benefit of each individual student, but for the benefit of society at large in the future. As one study notes, “preparing students to participate in a strong democracy requires the apprenticeship of students

to democratic talk.” Terence A. Beck, *Tools of Deliberation: Exploring the Complexity of Learning to Lead Elementary Civics Discussions*, 33 *Theory and Resch. in Soc. Educ.* 103, 103 (2005) (discussing the complexities of leading civics discussions in elementary school for teachers). In other words, elementary school students must be taught, and have the opportunity, to practice the critical thinking and discussion skills on which they will rely later in life. They cannot do this without adequate free speech protections. If the school in *Walker-Serrano* had prevented the young student from discussing her concerns about animal cruelty, the student and her peers would be worse off for it. If the students in *DePinto* had been barred from wearing their protest buttons, they too would have been worse off. And if B.B.’s speech rights had been respected, she would have learned more and benefited from superior teacher engagement. In each scenario, the protection of these speech rights leads to the optimal outcome for these young students’ education and future growth.

CONCLUSION

For the foregoing reasons, and those stated by the Plaintiff-Appellant, the judgment below should be reversed.

Respectfully submitted,

Madison Hahn
Young America's Foundation
11480 Commerce Park Dr., Suite 600
Reston, VA 20191
(800) 872-1776
mhahn@yaf.org

Timothy D. Keller
Center for the Rights of Abused Children
3900 Camelback Rd., Suite 300
Phoenix, AZ 85018
(602) 710-1135
tim@thecenterforchildren.org

Cynthia Fleming Crawford
Casey Mattox
Americans for Prosperity Foundation
4201 Wilson Blvd., Suite 1000
Arlington, VA 22203
(571) 329-2227
ccrawford@afphq.org

s/ Ilya Shapiro

Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

Alan Gura
Institute for Free Speech
1150 Conn. Ave., N.W., Suite 801
Washington, DC 20036
(202) 301-3300
agura@ifs.org

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- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties.
 - a party or parties are filing a single brief in response to multiple briefs.
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated _____.
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Ilya Shapiro

Date July 22, 2024

(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

DATED: July 22, 2024

s/ Ilya Shapiro
Counsel for *Amici Curiae*