**No. 15-15307**

**In the**
**United States Court of Appeals for the Ninth Circuit**

ARIZONA DREAM ACT COALITION, *ET AL.*,
*Plaintiffs-Appellees*,

v.

JANICE K. BREWER, *ET AL.*,
*Defendants-Appellants*.

**On Appeal from the**
**United States District Court for**
**the District of Arizona**

# Brief *Amicus Curiae* of English First Foundation, English First, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund in Support of Appellants' Petition for Rehearing *En Banc*


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## DISCLOSURE STATEMENT

The *amici curiae* herein, English First Foundation, English First, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 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 Herbert W. Titus, who is counsel of record, Robert J. Olson, William J. Olson, Jeremiah L. Morgan, and John S. Miles, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amicus* U.S. Justice Foundation also is represented herein by Michael Connelly of U.S. Justice Foundation, 932 D Street, Suite 2, Ramona, California 92065.

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English First Foundation, English First, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

Many of these *amici curiae* filed an *amicus curiae* brief in 2012 in the U.S. Supreme Court's review of this Court's decision in Arizona v. United States, challenging Arizona's S.B. 1070. In a challenge by 26 States to DAPA, the 2014 expansion of DACA, most of these *amici curiae* submitted an *amicus curiae* brief in United States v. Texas before the U.S. Court of Appeals for the Fifth Circuit, as well as an *amicus curiae* brief in the U.S. Supreme Court in the same case.

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[1] All parties have consented to the filing of this brief *amicus curiae*. 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.

## STATEMENT

On June 15, 2012, President Obama, through the Secretary of Homeland Security, announced the Deferred Action for Childhood Arrivals ("DACA") program. Under DACA, "certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal…."[2] As many as 1.7 million people may be eligible for DACA[3] and, as of March 2016, the federal government had given "lawful presence" status to 728,285 persons.[4]

## ARGUMENT

### I. THE PANEL'S OPINION IS UNTETHERED TO THE DISTRICT COURT'S DECISION AND ARGUABLY SUGGESTS JUDICIAL ANIMUS AGAINST THE STATE OF ARIZONA.

The panel described its decision as one affirming "the district's court's order that Arizona policy is preempted by the exclusive authority of the federal

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[2] "Consideration of Deferred Action for Childhood Arrivals (DACA)," U.S. Citizen and Immigration Services, https://goo.gl/aDu0po.

[3] J. Passel & M.H. Lopez, "Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules," Pew Research Center (Aug. 14, 2012). http://www.pewhispanic.org/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules/

[4] U.S. Citizenship and Immigration Services, DACA Statistics (March 31, 2016). https://goo.gl/G6EDYg.

government to classify noncitizens." Arizona Dream Act Coalition v. Brewer, 2016 U.S. App. LEXIS 6256, *4 (9th Cir. 2016) (hereinafter "Arizona Dream"). However, there was no such district court order. Instead, the district court had granted "Defendants' motion to dismiss the preemption claims [and] Plaintiffs [left] the preemption claims behind." Petition for Rehearing En Banc ("Az. Pet.") at 4-5. The district court's opinion was grounded exclusively on equal protection (Ariz. Dream Act Coalition v. Brewer, 81 F.Supp.3d 795, 808 (D. Ariz. 2015)). Preemption was not raised in this Court until oral argument. Az. Pet. at 5. Yet, before issuing its ruling based on preemption supposedly for reasons of "constitutional avoidance" (Arizona Dream at *9), the panel extensively addressed the merits of the equal protection claim.

Since the panel had determined not to rule on the equal protection issue, what reason could there be to include nearly four pages of analysis on an issue not determinative of the outcome? What is known is that the panel's discussion of the proffered reasons for the state action led directly to the "suggest[ion]" that "Arizona's policy [was based on] a dogged animus against DACA recipients…." Arizona Dream at *23. Notably, this political broadside was launched against

Arizona without any citation whatsoever to record evidence, and absent any such finding in the district court's opinion.[5]

Since Romer v. Evans, 517 U.S. 620 (1996), some federal judges appear to believe that they have *carte blanche* power to employ the epithet "animus" to demean state officials who enact laws the judges do not like, or citizens of the states who pass referenda the judges find offensive. Here, the accusation against Arizona, without any legal grounds, smacks of a partisan political opinion, not an impartial judicial judgment — arguably suggesting judicial animus toward a sovereign state. If perceived "animus" has now become a valid reason for a federal court to enjoin the operation a duly enacted state statute, will the perceived "animus" of a judge become a valid reason for a state to disregard a court order? Rehearing should be granted to foreclose the possibility of the panel's speculations of animus being cited as precedent. *See* Cir. Adv. Comm. Note to Rules 35-1 - 35-3 (3).

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[5] The panel's opinion (*id*. at *23) referenced a similar unsupported accusation of animus leveled when the case was before this court on the denial of a preliminary injunction. Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053, 1067 (9th Cir. 2014).

## II. ARIZONA'S DRIVER'S LICENSE POLICY IS NOT PREEMPTED BY THE FEDERAL GOVERNMENT'S CONSTITUTIONAL POWERS CONCERNING NATURALIZATION AND IMMIGRATION.

Summarizing its finding of preemption, the panel asserted:

> Arizona's policy **classifies noncitizens** based on Arizona's independent definition of "authorized presence," classification authority denied the states under the Immigration and Nationality Act ("INA")…. We therefore affirm the district court's order that Arizona's policy is preempted by the **exclusive** authority of the federal government to **classify noncitizens**. [Arizona Dream at *4 (emphasis added).]

The panel was mistaken on two points.

First, the panel's conclusion was based upon the erroneous assumption that, in America, citizenship is unitary. It is not. As the Supreme Court ruled in the Slaughter-House Cases, "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual." *Id.*, 83 U.S. 36, 74 (1873). And, as Justice Kennedy observed in U.S. Term Limits, Inc. v. Thornton, in the United States "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Id.*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

Second, the panel assumes that the Arizona policy, insofar as it "classifies noncitizens," erroneously intrudes on the federal government's authority to classify United States citizenship. It does not. Rather, the Arizona policy is designed to secure the integrity of its driver's licenses to serve as an identification system, "consistent with, their identity as citizens of the State of their residence." Term Limits at 840 (Kennedy, J., concurring). As the Supreme Court stated in Slaughter-House, a person "must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." *Id.*, 83 U.S. at 74.

Properly understood, then, the Arizona driver's license policy does not "encroach[] on the exclusive federal authority to create immigration classifications," and thus, is not "displaced by the INA," as the panel has ruled. *See* Arizona Dream at *25. Instead, Arizona's "regulation of driver's licenses is a quintessential exercise of state police power, unconnected to 'considerations of national sovereignty and foreign policy.'" Az. Pet. at 18.

The panel agreed with Arizona and the United States that regulating "the issuance of drivers' licenses [is] admittedly an area of traditional state concern." *See* Arizona Dream at *28. *See also* United States Brief as *Amicus Curiae* in Support of Appellees (Aug. 28, 2015) ("U.S. Br.") at 9; Az. Pet. at 18. The

panel also conceded, as it must, that "not all state regulations touching on immigration are preempted." Arizona Dream at *26. Nevertheless, the panel concluded that Arizona's policy governing the issuance of driver's licenses to those aliens who are "authorized under federal law"[6] only "ostensibly" concerns matters within its police power. Arizona Dream at *28. In fact, the panel insisted that, under the guise of issuance of driver's licenses, Arizona is concealing its real purpose: "creating immigration classifications according to its own design" (*id.* at *29), and thereby, usurping "the [federal government's] power to classify aliens for immigration purposes." *Id.* at *26.

In support of its claim of usurpation, the panel asserts that the Arizona statute alienage classifications "neither mirror[] nor borrow[] from the federal immigration classification scheme," but "[re]arrang[es] federal classifications in the way it prefers." *Id.* at *29. Completely missing from the panel's analysis is that Arizona's alienage classifications are designed to guide state officials in the issuance of Arizona's driver's licenses, not to enforce the nation's immigration laws. Is it any wonder, then, that the state's definitions do not conform to the federal classifications? The two serve the differing purposes of two

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[6] Az. Pet. at 3.

governments. The federal government classifications relate to United States citizenship; the State classifications relate to State citizenship.

The United States' *amicus* brief misses this distinction completely. It contends that none of Arizona's categories are "found in federal law." *Id.* at 2. *See also id.* at 12. Then it chides the Arizona legislature for having the temerity to "maintain" that, as a condition for an alien to obtain a state driver's license, the alien must prove that his "presence [is] authorized under federal law," a "concept [not] defined in federal law." *Id.* at 1.

But the state of Arizona is not a mere vassal of the U.S. Department of Homeland Security, nor is a statute prohibiting the issuance of certain driver's licenses a regulation of immigration mimicking federal law. Unlike the Arizona statutes struck down in Arizona v. United States, 567 U.S. __, 132 S.Ct. 2492 (2012), the Arizona driver's license law and policy do not make state officials co-enforcers in a "unified system to keep track of aliens within the Nation's borders." *Id.* at 2502. The issuance of a state driver's license is not the function of an immigration officer. Rather, "[i]n every State, including Arizona, state law determines eligibility for driver's licenses." Az. Pet. at 3.

Cognizant of the varied uses of a driver's license — especially as an official identity document — Arizona seeks to limit access to state services. On

their face, Arizona's alien classification categories reflect a state policy designed to identify those illegal aliens whose status with the federal government most likely would lead to citizenship of the United States and eventually citizenship of the State of Arizona. Thus, at the top of its priorities, Arizona placed those applicants who could produce an Employment Authorization Document ("EAD") that demonstrates that the applicant "has formal immigration status." Arizona Dream at *7. Next came those applicants whose EAD showed that they were "on a path to obtaining formal immigration status." *Id.* at *8. Then came a trinity of EAD holders, two of which could show that they were individuals who have applied for adjustment of status or applied for cancellation of removal. *Id.* at *7-*8. Excluded by the Arizona legislature from the list, as an exercise of its sovereign judgment, were those applicants whose EAD reflected only that they were but temporary beneficiaries of "deferred action" under DACA:

> immigrants [who] may remain in the United States for renewable two-year periods [but who] enjoy no formal immigration status, but the Department of Homeland Security does not consider them to be unlawfully present in the United States and allows them to receive federal EADs. [*Id.* at *5.]

The State's exclusion is for good and valid reasons. As the United States *amicus* underscores, deferred action is an "exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws, which

includes according deferred action and work authorization to certain aliens who, in light of real-world resource constraints and weighty humanitarian concerns, warrant deferral rather than removal." U.S. Br. at 1. *See also id.* at 22-28. But Arizona and her citizens face "humanitarian concerns" and "resource constraints" as well. Issuing a driver's license opens wide the door for certain state welfare and educational and commercial benefits. Regulation of activities related to the acquisition of such benefits would be well "within the mainstream of … police power regulation….," and therefore not preempted. *See* DeCanas v. Bica, 424 U.S. 351, 356 (1976).

## III. THE PANEL'S DECISION COULD FACILITATE SALE TO AND POSSESSION OF FIREARMS BY ILLEGAL ALIENS IN VIOLATION OF 18 U.S.C. §§ 922(d)(5) AND 922(g)(5).

If the panel decision stands, opening the avenue for DACA applicants to obtain an Arizona driver's license, it could facilitate the illegal sale to, and illegal possession of, firearms by illegal aliens. Specifically, 18 U.S.C. § 922(d)(5) prohibits the sale of any firearm to, and 18 U.S.C. § 922(g)(5) prohibits the possession of any firearm by, any alien who is "illegally or unlawfully in the United States," or "has been admitted to the United States under a nonimmigrant

visa."[7] Although the Department of Homeland Security contends that DACA applicants are not the recipients of "lawful status," the Department considers such applicants to be "lawfully present" and have "authorization" to be in the United States.[8]

### A. A State Driver's License Provides Identification and Evidences Residency.

Before a Federal Firearms Licensee ("FFL") may transfer a firearm, he must first "verif[y] the identity of the transferee by examining a valid identification document … of the transferee containing a photograph of the transferee." 18 U.S.C. § 922(t)(1)(C). Additionally, an FFL cannot sell a handgun to a person who is not a resident of the same state as the FFL. 18 U.S.C. § 922(b)(3). Prior to June 2012, aliens were subject to additional ATF regulations requiring them to provide additional documentation demonstrating

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[7] Four circuits have clearly held that illegal aliens do not enjoy Second Amendment rights. *See* United States v. Carpio-Leon, 701 F.3d 974 (4th Cir. 2012); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011); United States v. Flores, 663 F.3d 1022 (8th Cir. 2011); United States v. Huitron-Guizar, 678 F.3d 1164 (10th Cir. 2012). Only the Seventh Circuit seems to have reached an opposite conclusion. *See* United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015).

[8] "Frequently Asked Questions," Question 1, updated June 15, 2015, U.S. Citizen and Immigration Services, https://goo.gl/4WoqPL.

continuous residency in a state for 90 days. In June of 2012, however, the ATF "remove[d] the unique proof of residency requirements … for aliens purchasing a firearm," and since then, "**an alien lawfully present** in the United States acquiring a firearm will be **subject to the same residency and proof of residency requirements that apply to U.S. citizens**." 77 Fed. Reg. at 33631 (June 7, 2012) (emphasis added). Therefore, now, the only identification required from a purchaser is "proof of residence in the State, in the form of a government-issued identification document (for example, a driver's license)…." *Id.* By forcing the states to issue driver's licenses to DACA aliens, the panel would put into the hands of these aliens the critical document necessary for them to prove both their identity and residency, both prerequisites to an FFL transfer of a firearm.

### B. DACA Recipients May Believe that 18 U.S.C. § 922(g)(5) Does Not Apply to Them.

After verifying identity and residency, the ATF requires that an FFL obtain a completed Form 4473 from a buyer. 27 C.F.R. § 478.124(c). Federal law prohibits aliens from possessing firearms if they are "illegally or unlawfully in the United States," or if they are "admitted to the United States under a

nonimmigrant visa…." 18 U.S.C. § 922(g)(5). In turn, ATF's Regulations define "alien illegally or unlawfully in the United States" to include those:

> (a) Who unlawfully entered the United States without inspection and authorization by an immigration officer and who has not been paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act (INA);
> (b) Who is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted…. [27 C.F.R. § 478.11.]

A DACA recipient might plausibly believe that neither category precludes his purchase. Under category (a), it could be argued that DACA recipients never "unlawfully entered" the United States, being brought to the United States as children under the age of 16. Under category (b), "[a]n individual who has received deferred action is **authorized** by DHS to be present in the United States,"[9] and, under category (b), DACA's "authorized period of stay has [not] expired."[10]

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[9] "Frequently Asked Questions," Question 1, updated June 15, 2015, U.S. Citizen and Immigration Services, https://goo.gl/4WoqPL.

[10] "Deferred Action for Childhood Arrivals," Department of Homeland Security, July 17, 2015, https://www.dhs.gov/deferred-action-childhood-arrivals.

The ATF Form 4473 — required for firearm purchases at federal firearm dealers — asks two questions (11.k and 11.l)[11] which mirror the prohibiting categories in § 922(g)(5). DACA recipients could argue that they fall into neither of those prohibited categories. Since the federal government considers DACA recipients to be "lawfully present" in the United States, they could answer "no" to the question whether they are unlawfully in the United States, and since DACA recipients are not admitted under a nonimmigrant visa (indeed, they are admitted under no visa of any kind) they could answer "no" to the Visa question as well. Indeed, the ATF advises that "[a]n alien legally in the U.S. is not prohibited from purchasing firearms unless the alien is admitted into the U.S. under nonimmigrant visa [sic] and does not meet one of the exceptions…."[12]

Question 15 on the Form 4473 asks "If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number?" DACA recipients presumably would be issued an alien number ("A Number").[13]

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[11] https://www.atf.gov/file/61446/download. While the Form 4473 provides several pages of explanations and definitions, it strangely does not explain Question 11.k, what it means to be "illegally in the United States."

[12] ATF FAQ, "May aliens legally in the United States purchase firearms?" (Feb. 10, 2016), https://goo.gl/uKuScX.

[13] "Filling Out Form I-821D," Nolo.com, http://goo.gl/mWZQ33 ("If you applying [sic] to renew DACA, you have an A-number that was issued to

Additionally, DACA recipients who were granted Employment Authorization Document ("EADs") Cards have that additional photo identification that contains their alien number. The FBI NICS system recognizes the Employment Authorization Card as acceptable identification for all aliens, which apparently might include DACA recipients.[14]

### C. No Court Has Resolved the Issue of Firearm Ownership By DACA Recipients with "Lawful Presence."

These *amici* are not aware of any appellate court that has directly considered the issue of firearms and DACA recipients. Until that occurs, the only obstacle to DACA recipients purchasing firearms might be to the FBI's National Instant Criminal Background Check System ("NICS"), depending on how the FBI actually classifies each DACA recipient.

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you on your approval notice.").

[14] The FBI's "Tip Sheet" for FFLs processing non-citizen NICS checks states that if a non-citizen is not an immigrant alien (which DACA recipients are not) and does not have status as a nonimmigrant alien (which DACA recipients do not), and the sheet further states "Stop! Reassess your customer as **these are rare instances**. If they have an unusual status … you should process their check as an Immigrant Alien." *Id*. (emphasis added). It is not entirely clear how this flow chart applies to DACA recipients, although it appears that DACA might be an "unusual status," and it appears that, as such, the FBI's Tip Sheet instructs an FFL to proceed with the NICS check. "An FFL Tip Sheet for Processing NICS Checks for Non-U.S. Citizens/Aliens" (Jan. 2014), https://goo.gl/t067Oc.

*Amici* are aware of only one case, in a federal district court, where a defendant has claimed (albeit unsuccessfully) that, as a DACA recipient, he is eligible to possess firearms,[15] and the issue is currently on appeal in the U.S. Court of Appeals for the Fifth Circuit.[16]

Relatedly, in two separate cases, the Fifth Circuit has looked at the receipt of Temporary Protective Status ("TPS") as it applies to 18 U.S.C. § 922(g)(5). In United States v. Flores, 404 F.3d 320 (5th Cir. 2005), the Fifth Circuit considered the case of an illegal alien in possession of a firearm, who had submitted an **application** for Temporary Protective Status, determining that his pending application "did not alter Flores's status as an illegal alien for the purposes of § 922(g)(5)(A)." *Id.* at 326. The Court stated "it does not follow that an alien who has been granted limited temporary authorization (*i.e.*, a

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[15] United States v. Arrieta, 2:15-cr-00802, U.S. District Court for the Southern District of Texas. The defendant, a DACA recipient, moved to dismiss the indictment charging him with unlawful possession of a firearm and ammunition. Docket No. 15. The district court denied the motion to dismiss (Docket No. 31), and the defendant pled guilty, reserving his right to appeal the denial (Docket No. 35). The case involved possession of a firearm, and not an attempt by a DACA recipient to purchase a firearm.

[16] United States v. Arrieta, 16-40539, U.S. Court of Appeals for the Fifth Circuit.

temporary stay of removal and a temporary work permit) is in the country legally for all purposes…." *Id.* at 327.

However, just a month after the decision in Flores, the Fifth Circuit decided United States v. Orellana, 405 F.3d 360 (5th Cir. 2005), involving an illegal alien whose application for TPS had been **granted**. The government had argued that TPS "confers nothing more than a temporary stay of removal…." *Id*. at 362. Nevertheless, the Court determined that the granting of TPS (rather than mere application for such status) was widely recognized by courts as something that "renders an alien's **presence lawful**." *Id.* at 364 (emphasis added). The court also noted that TPS (in many ways similar to DACA) gives certain privileges, which DACA also provides.[17] However, it also found important that "an alien in receipt of TPS is in **lawful status**"(*id*. at 370 (emphasis added)), something that the federal government claims DACA recipients do not have. The court determined that it was unclear whether Congress intended to prohibit such persons from firearm possession under § 922(g)(5), and thus applied the rule of lenity to the case.

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[17] ATF FAQ, "May aliens legally in the United States purchase firearms?" Question #57, https://goo.gl/uKuScX.

In sum, by creating the DACA program outside of the legislative process (*see* Az. Pet. at 11-16), President Obama has created a class of persons who might argue that they fall outside the congressionally created categories of prohibited aliens in § 922(g)(5). Such persons were not admitted under nonimmigrant visas, nor are they considered unlawfully present in the United States — the two categories of aliens barred explicitly by statute from possessing firearms. Yet neither are they legal permanent residents or United States citizens — the two categories of persons who may possess firearms. Instead, DACA recipients — purportedly having been granted "lawful presence" but not "legal status" — fall into a legal no-man's-land, and could plausibly believe, and if necessary argue, that federal law does not prohibit them from firearms ownership. As the Montana Supreme Court recently has explained, "Federal law uses many defined terms for various purposes, including 'qualified alien,' … 'unauthorized alien,' … and 'eligible noncitizen,' … but it does not define the term 'illegal alien,' and it does not have a comprehensive definition of 'lawfully present'…." Montana Immigrant Justice Alliance v. Bullock, 2016 MT 104, ¶ 33 (2016). This Court must not allow a decision to stand that could facilitate the illegal purchase and possession of firearms by illegal aliens.

## CONCLUSION

The Petition for Rehearing should be granted.

Respectfully submitted,

/s/ Herbert W. Titus

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May 31, 2016

## 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 Federal Rule 29(d), because this brief contains 3,934 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/Herbert W. Titus
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Dated: May 31, 2016

## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of English First Foundation, *et al.*, in Support of Appellants' Petition for Rehearing *en banc*, was made, this 31st day of May 2016, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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