No. 13-15023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH, ET AL.,
Plaintiffs/Appellees,

v.

EDMUND G. BROWN, ET AL.,
Defendants/Appellants.

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

No. 2:12-CV-02484-WBS-KJN
The Honorable William B. Shubb
United States District Court Judge

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING OR REHEARING EN BANC

INSTITUTE FOR JUSTICE
Paul M. Sherman *
Robert J. McNamara
Dana Berliner
Jeff Rowes
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

Counsel for *Amicus Curiae* Institute for Justice

Counsel of Record

CORPORATE DISCLOSURE STATEMENT

The Institute for Justice is a nonprofit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Institute for Justice does not have a parent corporation and does not issue stock. There are no publicly held corporations that own ten percent or more of the stock of the Institute for Justice.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

Rules

Other Publications

STATEMENT OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, the Institute has challenged laws across the country that regulate a wide array of occupational speech, including parenting advice, dietary advice, veterinary advice, and historical tours. *Amicus* believes that the decision of the panel below, if allowed to stand, represents a serious threat to the constitutional protection afforded to these and countless other types of occupational speech.

[1] No party counsel authored any portion of this brief, and no party, party counsel, or person other than *Amicus* or its counsel paid for this brief's preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case concerns speech that a great many people believe is backwards, bigoted, ignorant, and even immoral. *Amicus* does not file this brief to dispute those assessments. But the First Amendment protects even outrageous speech by people who arouse public contempt. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Nat'l Socialist Party v. Vill. of Skokie*, 432 U.S. 43 (1977). This Court should not allow the debate over the merits of Plaintiffs' speech to distract from the central constitutional issue in this case: whether talking with minors in an effort to change their sexual orientation is speech, the regulation of which triggers heightened judicial scrutiny, or mere conduct, the regulation of which triggers far more deferential review. The resolution of that question has repercussions far beyond the contentious debate at the center of this case; it affects everyone who speaks for a living, from tour guides to dietitians to political consultants and beyond.

This Court should grant rehearing or rehearing en banc because the panel, in resolving that question, failed to apply the U.S. Supreme Court's controlling decision in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), which is the Supreme Court's most recent and most authoritative pronouncement on the speech/conduct distinction. Although *Holder* is clearly on point and, indeed, formed a significant basis of the district court's opinion granting Plaintiffs' motion

for a preliminary injunction, the panel failed to even cite *Holder*, let alone distinguish it.

Because the panel disregarded *Holder*, it issued an opinion under which the government has virtually unfettered authority to re-label pure speech as "conduct" and then ban that speech, subject only to rational-basis review. That result cannot be squared with the First Amendment. When government attempts to prevent one person from communicating a message to another, it regulates speech, and it must justify that regulation with real evidence. This does not necessarily mean that Plaintiffs are entitled to prevail on the merits, but it does mean that, under binding Supreme Court precedent, this Court must require California to carry its burden of supporting the challenged regulations.

ARGUMENT

This Court should grant rehearing or rehearing en banc because (1) the panel's opinion conflicts with controlling precedent from the U.S. Supreme Court, and (2) the panel's opinion directly conflicts with existing opinions from other circuits on the speech/conduct distinction. *See* Fed. R. App. P. 35(b); Cir. R. 35-1. Absent rehearing, the panel's opinion will endanger an enormous amount of valuable speech that has nothing to do with the controversial speech underlying this case.

As explained in Section I, the panel's opinion conflicts with *Holder v. Humanitarian Law Project*, which required the panel to review SB 1172 as a content-based restriction on speech. As explained in Section II, the panel's contrary ruling, that SB 1172 was a restriction on conduct subject only to rational-basis review, conflicts with the approach of other circuits and will endanger a vast array of harmless speech in countless occupations. Finally, as explained in Section III, the panel's drastic ruling is unnecessary, because holding that SB 1172 is subject to heightened scrutiny will not deprive the government of the power to pass appropriately tailored laws to protect the health and safety of minors—and, indeed, it will not even necessarily prevent the government from successfully defending the constitutionality of SB 1172. It simply means that the government will bear the burden of justifying SB 1172 under the standards set by the U.S. Supreme Court for laws that impose content-based burdens on speech.

I. Under *Holder v. Humanitarian Law Project*, California's Prohibition on Talk Therapy Intended to Change a Minor's Sexual Orientation Is a Content-Based Restriction on Speech.

The core question in this case is straightforward: Is a restriction on face-to-face advice and counseling a restriction on free speech subject to heightened scrutiny, or is it simply a restriction on conduct requiring much more deferential review? Under binding precedent from the U.S. Supreme Court, the answer to that question is clear: Advice delivered entirely through the spoken word is speech, not

"conduct." Rehearing is necessary because the panel's opinion irreconcilably conflicts with that binding precedent.

The controlling case is *Holder v. Humanitarian Law Project*, in which the U.S. Supreme Court considered the constitutionality of a federal law that forbade speech in the form of individualized legal and technical advice to designated foreign terrorists. 130 S. Ct. 2705, 2712-14 (2010). The plaintiffs in that case included two U.S. citizens and six domestic organizations that wished, among other things, to provide "train[ing] [to] members of [the Kurdistan Workers' Party (PKK)] on how to use humanitarian and international law to peacefully resolve disputes" and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* at 2713–14, 2716. They wanted, in other words, to give individualized advice solely through the spoken word.

They were prevented from doing so, however, because speech in the form of advice was illegal. Under federal law, the plaintiffs were prohibited from providing terrorist groups with "material support or resources." *Id.* at 2715. That term was defined to include both "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance," defined as "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* The plaintiffs challenged that prohibition as a violation of the First Amendment. *Id.* at 2722–30.

The government defended the law by arguing that the material-support prohibition was aimed at conduct—specifically the conduct of providing "material support" to terrorist groups—and therefore only incidentally burdened the plaintiffs' expression. *Id.* at 2723.[2] But the U.S. Supreme Court emphatically and *unanimously* rejected that argument, holding that that the material-support prohibition was a content-based regulation of speech subject to heightened scrutiny.[3] *Id.*

Most importantly, and in sharp conflict with the panel's opinion, the Supreme Court did not base its ruling on some metaphysical distinction between "speech" and "conduct." Instead, the Court took a commonsense approach to determining whether the First Amendment was implicated, concluding that the material-support prohibition was a content-based restriction on speech because the plaintiffs were allowed to communicate some things to designated terrorist groups but not other things:

---

[2] In contrast with the panel's opinion in this case, the government in *Holder* did not argue that this fact eliminated *all* First Amendment scrutiny. Instead, the government argued only that the material-support statute was subject to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). *Holder*, 130 S. Ct. at 2723.

[3] Although only six justices joined the majority opinion in *Holder*, all nine justices agreed that, as applied to the plaintiffs in that case, the material-support prohibition was a restriction on speech, not conduct. *See id.* at 2723–24; *id.* at 2734 (Breyer, J., dissenting).

> [The material-support prohibition] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist organizations], and whether they may do so under [the law] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Id. at 2723–24 (citations omitted).

The Court also rejected the notion that the material-support prohibition could escape strict scrutiny because it "*generally* function[ed] as a regulation of conduct." *Id.* at 2724. As the Court observed, even when a law "may be described as directed at conduct," strict scrutiny is still appropriate when, "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.*

This analysis is directly applicable to the claims in this case. Plaintiffs wish to talk with their minor clients, and "whether they may do so . . . depends on what they say." *Id.* at 2723–24. If Plaintiffs communicate "acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development," Cal Bus. & Prof. Code § 865(b)(2), their speech is permitted. If, on the other hand, Plaintiffs communicate advice regarding ways to "change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex," *id.* § 865(b)(1), their speech is prohibited. Further, just as in *Holder*, although SB

1172 may generally function as a ban on conduct, the "conduct" triggering application of the statute to Plaintiffs consists entirely of speech.

Despite these clear parallels, and the fact that *Holder* was discussed both in the district court opinion granting Plaintiffs' motion for preliminary injunction, *Welch v. Brown*, 907 F. Supp. 2d 1102, 1113 (E.D. Cal. 2012), and in the Plaintiffs' brief before this Court, *see, e.g.*, Br. of Appellees, *Welch v. Brown*, No. 13-15023, at 15–16,[4] the panel failed to even cite *Holder*, let alone distinguish its holding.[5] Instead, the panel held simply that "psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word." Slip op. at 19. But that is precisely the sort of labeling game that the Supreme Court rejected in *Holder*.

---

[4] Plaintiffs-Appellees' answer brief filed before the panel is available at http://cdn.ca9.uscourts.gov/datastore/general/2013/02/20/13-15023_answering_brief.pdf.

[5] *Amicus* First Amendment Scholars also failed to cite or attempt to distinguish *Holder* in their brief submitted to the panel in the related case *Pickup v. Brown*. *See* Brief *Amicus Curiae* of First Amendment Scholars in Support of Defendants-Appellees Supporting Affirmance, *Pickup v. Brown*, No. 12-17681, available at http://cdn.ca9.uscourts.gov/datastore/general/2013/02/08/12-17681%20Amicus%20Brief%20by%20First%20Amendment%20Scholars.pdf. Indeed, despite the fact that the U.S. Supreme Court has become significantly more protective of First Amendment rights in the last 15 years, the Scholars' brief does not cite any Supreme Court cases decided after 1997. Instead, they rely heavily on *United States v. O'Brien*, 391 U.S. 367 (1968), the very case that *Holder* held was inapplicable to laws, like SB 1172, that are triggered by speech.

The panel's error is illustrated most vividly by its equation of talk therapy with the prescribing of drugs:

> [W]here we conclude that SB 1172 lands[] is the regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech. Most, if not all, medical treatment requires speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment. When a drug is banned, for example, a doctor who treats patients with that drug does not have a First Amendment right to speak the words necessary to provide or administer the banned drug.

Slip op. at 23 (citation omitted).

This comparison is inapt because a prohibition on prescribing a drug is aimed solely at the non-communicative effect of the speech: namely, the creation of a legal entitlement to access a controlled substance. The speech at issue in this case is different. Advice is not a drug—to the extent talk therapy works at all, it works by advising, encouraging, or persuading listeners to change their thought or behavior patterns. Thus, the sole object of the government's regulation is to prevent the *communicative* impact that talk therapy about a specific subject has on its listeners.[6] And, as this Circuit has recognized, when the government regulates

[6] *See, e.g.*, Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1346 (2005) (footnotes omitted):

> When the government restricts professionals from speaking to their clients, it's restricting speech, not conduct. And it's restricting the speech precisely because of the message that the speech communicates, or because of the

speech to address "concerns [that] all stem from the direct communicative impact of [the regulated] speech," such a regulation is properly viewed as a content-based restriction subject to strict scrutiny. *Lind v. Grimmer*, 30 F.3d 1115, 1118 (9th Cir. 1994).[7]

Instead of applying *Holder*, however, the panel opinion relies heavily on an earlier decision of this Circuit, *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*"), which upheld against a First Amendment challenge a licensing scheme for people engaged in psychoanalysis. Of course, to the extent *NAAP* conflicts with the U.S. Supreme Court's ruling in *Holder*, it is superseded by that ruling. But applying *Holder* does not even require overruling *NAAP*. As the panel correctly observed, this Circuit was "equivocal about whether, and to what extent, the

---

> harms that may flow from this message. The restriction is not a "legitimate regulation of professional practice with only incidental impact on speech"; the impact on the speech is the purpose of the restriction, not just an incidental matter.

[7] This distinction, between laws aimed at the communicative impact of speech and laws aimed at its noncommunicative impact, also serves to distinguish the Supreme Court's statement in *Giboney v. Empire Storage & Ice Co.*, upon which the panel relied, that it has "never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 336 U.S. 490, 502 (1949). The law at issue in *Giboney* was concerned with the noncommunicative impact of speech, namely, the formation of illegal restraints of trade.

licensing scheme in *NAAP* implicated any free speech concerns." Slip op. at 17. Nor, as the panel noted, did this Circuit decide in *NAAP*, "how *much* protection . . . communication [that occurs during psychoanalysis] should receive nor . . . whether the level of protection might vary depending on the function of the communication." *Id.* Accordingly, *NAAP* certainly did not command the panel's sweeping conclusion that the correct level of First Amendment protection for talk therapy is "none." Similarly, nothing in *NAAP* required the panel to disregard *Holder*'s core lesson that laws that are *triggered* by speech must be reviewed as *restrictions* on speech.[8]

II. The Panel's Holding That Talk Therapy Is Conduct, Rather Than Speech, Endangers a Vast Array of Speech in Countless Occupations.

Rehearing is also necessary because the panel's opinion conflicts with the approach taken by other circuits and applies rational-basis review to what,

[8] The contrast between this case and *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), presents a troubling picture of First Amendment rights in the Ninth Circuit. In *Conant*, the federal government threatened to strip California doctors of their licenses to prescribe controlled substances if the doctors specifically advised patients to use marijuana for medical purposes, a use that Congress has categorically rejected. This Court concluded that the federal government's viewpoint-specific restrictions on politically popular medical advice were subject to strict scrutiny. *Id.* at 637–38. In this case, however, the panel concluded that viewpoint-specific restrictions on politically unpopular psychotherapeutic advice receive zero First Amendment scrutiny. The outcomes in these two cases are difficult to reconcile as a matter of constitutional principle and appear to turn on the political popularity in California of the speech restrictions at issue, a distinction that is anathema to the First Amendment. Instead, both laws should be viewed as content-based restrictions on speech subject to strict scrutiny.

anywhere else in the country, would be protected speech. If talk therapy is a form of conduct, the regulation of which raises no First Amendment concerns whatsoever, then all one-on-one advice could be redefined as "conduct" outside the scope of the First Amendment.

Examples from the Institute for Justice's own litigation demonstrate the potential breadth of the panel's ruling. Consider the case of Steve Cooksey, a North Carolina resident living with Type II diabetes who has been able to control his diabetes and lose 78 pounds by maintaining a diet low in carbohydrates but high in fat. *Cooksey v. Futrell*, 721 F.3d 226, 229–30 (4th Cir. 2013). Inspired by his lifestyle change and wishing to help others with similar problems, Mr. Cooksey started a website called "Diabetes Warrior" to talk about his weight loss and diet, distribute meal plans, provide advice to readers, and advertise his fee-based diabetes-support and life-coaching services. *Id.* at 230. His website stated he was not a licensed medical professional and did not have any formal credentials. *Id.*

In January 2012, shortly after attending a nutritional seminar in which he expressed disagreement with dietary advice given by the director of diabetic services from a nearby hospital, Mr. Cooksey received a call from the Executive Director of the State Board of Dietetics/Nutrition, informing him that he and his website were "under investigation" and that the State Board had the statutory authority to seek an injunction to prevent the unlicensed practice of dietetics. *Id.* at

230–31. He then received a red-pen review of his website, indicating on a line-by-line basis what he was and was not allowed to say about diet. *Id*. at 231–32. The district court dismissed Mr. Cooksey's complaint on the ground that the law was a professional regulation and therefore did not implicate the protection of the First Amendment. *See Cooksey v. Futrell*, No. 3:12cv336, 2012 U.S. Dist. LEXIS 144397, at *8 (W.D.N.C. Oct. 5, 2012).

The United States Court of Appeals for the Fourth Circuit reversed, concluding that Mr. Cooksey's First Amendment claims could go forward because the chilling of his individualized advice was the chilling of speech protected by the First Amendment. 721 F.3d at 237 ("[W]e have no trouble deciding that Cooksey's *speech* was sufficiently chilled by the actions of the State Board to show a First Amendment injury-in-fact." (emphasis added)). But this determination conflicts with the panel opinion in this case. Under the panel's reasoning, Mr. Cooksey should not have been entitled to the protection of the First Amendment. Instead, the government would have been able to prevail—as it did in the trial court—simply by labeling Mr. Cooksey's advice about what adults should buy at the grocery store as the "conduct" of "nutritional assessing and counseling," and therefore outside the scope of the First Amendment.

Mr. Cooksey's situation is not unique. In another Institute for Justice case, the Kentucky Board of Examiners of Psychology recently sent a cease-and-desist

letter to syndicated newspaper columnist John Rosemond, ordering him to cease providing parenting advice in response to reader-submitted questions, because such advice constitutes a "psychological service" offered to the public. Complaint & Ex. A, *Rosemond v. Conway*, No. 3:13-cv-00042-GFVT (E.D. Ky. filed July 16, 2013), *available at* http://www.ij.org/images/pdf_folder/first_amendment/ky_psych/ky-psych-complaint.pdf. Mr. Rosemond's specific advice was simply that the parents of an underachieving 17-year-old get tough with their son and suspend his privileges until he started performing better in school. That sort of parenting advice is ubiquitous in America (as anyone with children can attest). But under the theory adopted by the panel, that speech would be entitled to no constitutional protection.

Indeed, if, as the panel held, the government can denude Plaintiffs' speech of First Amendment protection simply by labeling it the "conduct" of "therapy," then there are no limits to what can be cast out from the scope of the First Amendment, because almost all speech can be characterized, in some sense, as conduct. University professors engage in the conduct of "instructing." Political consultants engage in the conduct of "strategizing." Stand-up comedians engage in the conduct of "inducing amusement." Nobody, however, could conclude that such a sweeping and dangerous result is consistent with the Supreme Court's precedent.

III. Holding That SB 1172 Regulates Speech Will Not Deprive the Government of the Ability to Prevent or Punish Demonstrable Harm to Minors.

Beyond conflicting with controlling Supreme Court precedent and endangering a vast array of harmless speech, the panel's opinion requires rehearing because its sweeping conclusion that talk therapy falls entirely outside the First Amendment's protection is far broader than necessary to achieve the government's laudable interest in protecting minors from emotional harm.

First, there are many applications of the law that do not implicate the First Amendment at all because they are not triggered by speech. One point on which the panel was entirely correct is that the *Pickup* Plaintiffs were wrong in their assertion at oral argument that "aversive" types of so-called "sexual orientation change efforts," involving, for example, the administration of nauseating drugs or electroshock therapy, are entitled to heightened First Amendment scrutiny. *See* Slip op. at 24. Not only are the administration of drugs and the application of electroshock therapy conduct, they are not even expressive conduct as the Supreme Court has defined it. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012) (noting that the First Amendment's protection extends only to "conduct [that] 'convey[s] a particularized message' and is likely to be understood in the surrounding circumstances." (quoting *Spence v. Washington*, 418 U.S. 405, 409–11 (1974)).

Second, with regard to talk therapy, California has other regulatory options that impose a smaller burden on speech. California could, for example, publish information explaining its position that speech like Plaintiffs' is both useless and harmful. Moreover, to the extent that a licensed medical provider's advice breaches an applicable standard of care and causes actual harm, that provider may be liable for malpractice. Contrary to the panel's ruling, slip op. at 22, the existence of this sort of liability has never been understood to remove other First Amendment protection from speech in licensed occupations. For example, while it is obviously the case that lawyers may be sanctioned for negligent advice that causes actual harm, this did not prevent the Supreme Court in *Legal Services Corp. v. Velasquez* from invalidating a federal restriction on the rendering of certain legal advice. 531 U.S. 533, 548–49 (2001). That is in keeping with the distinction that the Supreme Court has always drawn between laws that impose liability on speakers for specific harms caused to specific individuals and laws that impose broad prophylactic restrictions on entire categories of speech. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (holding that the availability of damages in civil "cases [involving] defamation, fraud, or some other legally cognizable harm associated with a false statement" does not suggest that government may preemptively outlaw all false statements on a particular subject).

Finally, concluding that the First Amendment applies to Plaintiffs' speech is not the end of the constitutional analysis; it is just the beginning. Even under strict scrutiny, restrictions on speech may be upheld if the government is able to demonstrate that the law is narrowly tailored to serve a compelling government interest. This is a high bar, but it is not insurmountable, as is demonstrated by *Holder* itself, in which the Supreme Court ultimately upheld the federal prohibition on providing legal advice to terrorist groups. 130 S. Ct. at 2730.

It may well be the case that efforts to change a minor's sexual orientation are so uniformly harmful that California has no alternative but to prohibit these efforts entirely. [9] But that conclusion must be backed by evidence—evidence that is missing from the panel's opinion, which pointed only to "anecdotal reports of harm." Slip op. at 13–14. The First Amendment requires that the government "present more than anecdote and supposition," *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000), and the panel's refusal to demand more than anecdote in this case will, if left uncorrected, have serious consequences for the speech rights of countless Americans nationwide.

[9] The government will have to explain, however, why it has chosen to allow *unlicensed* counselors to engage in sexual orientation change efforts with minors, and why it allows licensed mental health providers to refer minors to unlicensed counselors for the specific purpose of participating in sexual orientation change efforts. *See* slip op. at 12.

CONCLUSION

This case unquestionably presents hard facts and, to many, unsympathetic plaintiffs. But the repercussions of the panel's opinion will sweep far broader than the narrow confines of the underlying debate over so-called "reparative" therapy. Countless Americans earn their living by speaking, and under the panel's ruling that speech is entitled to virtually no constitutional protection. That result cannot be squared with binding precedent from the U.S. Supreme Court. Accordingly, for the reasons stated above, this Court should grant Plaintiffs-Appellees' petition for rehearing or rehearing en banc.

Dated: September 20, 2013

Respectfully submitted,
/s/ Paul M. Sherman

INSTITUTE FOR JUSTICE
Paul M. Sherman*
Robert J. McNamara
Dana Berliner
Jeff Rowes
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

Counsel for *Amicus Curiae*
Institute for Justice
**Counsel of Record*

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 29(c)(7) and Rules 32(a)(5) & (7) that the attached brief was prepared using a proportionally spaced, 14-point typeface and contains 4,194 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated: September 20, 2013

/s/ Paul M. Sherman
Paul M. Sherman
Counsel for *Amicus Curiae*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 20, 2013, I caused this Brief of *Amicus Curiae* Institute for Justice In Support of Plaintiffs-Appellees' Petition for Rehearing or Rehearing En Banc to be filed electronically with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Paul M. Sherman
Paul M. Sherman
Counsel for *Amicus Curiae*