Case No. B307056

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

COUNTY OF LOS ANGELES, *et al.*,
Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

GRACE COMMUNITY CHURCH OF THE VALLEY, *et al.*,
Real Parties in Interest.

APPLICATION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF ONE NATION UNDER GOD FOUNDATION, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN OPPOSITION TO LOS ANGELES COUNTY PETITION FOR WRIT OF MANDATE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus curiae One Nation Under God Foundation[1] ("ONUG") was founded in 2002, and is a nonprofit corporation organized and operating in Illinois. ONUG promotes pastor and voter education and registration at Christian churches and has filed 10 *amicus* briefs in other cases. Conservative Legal Defense and Education Fund ("CLDEF") was founded in 1982, and is a nonprofit corporation organized and operating in Virginia. CLDEF has filed 186 *amicus* briefs in federal and state courts — including trial courts, courts of appeal, and the U.S. Supreme Court.[2] Both organizations are exempt from federal income taxation under Internal Revenue Code section 501(c)(3) and are public charities. Both organizations have a particular interest in the defense of religious liberties.

ONUG and CLDEF only learned of the procedural schedule in this case on Friday, August 21, 2020, and began preparing this brief *amicus curiae*. Admittedly on short notice, *amici* requested consent from both the plaintiff and defendant. Counsel for Grace Community Church has consented to filing the brief, and counsel

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[1] ONUG's website is https://oneundergod.us/.

[2] CLDEF's website is www.cldef.org.

for *amici curiae* has not heard back from counsel for Los Angeles County as of filing.

These *amici* believe that this *amicus* brief will address a subject not fully developed in the argumentation being offered by the parties — the jurisdictional nature of the free exercise clause in the California Constitution — and focuses this brief on that issue.

This *amicus* brief is timely as it is being submitted within the time specified for Grace Community Church's response, and it is believed that no party will be prejudiced by its filing.

These *amici* request that the Court grant leave to file their *amicus* brief, which appears below.

BRIEF *AMICUS CURIAE* IN OPPOSITION TO LOS ANGELES COUNTY PETITION FOR WRIT OF MANDATE

STATEMENT OF FACTS

In its Complaint filed August 12, 2020, Grace Community Church asserts, *inter alia*, that Defendants' prohibition of in-person, indoor worship services constitutes a violation of Article I, section 4 of the California Constitution, which guarantees Plaintiffs' "[f]ree exercise and enjoyment of religion without discrimination or preference." *Grace Community Church v.*

Villanueva, No. 20BBCV00497, Complaint, First Claim for Relief, paras. 118-26.

In its Complaint, filed August 14, 2020, the County of Los Angeles asserts that it has authority to ban in-person, indoor worship services based on California Health and Safety Code, section 101040(a), which provides "The local health officer may take any preventive measure that may be necessary to protect and preserve the public health...." *County of Los Angeles v. Grace Community Church*, No. 20STCV30695, Complaint, para. 34. Los Angeles also relies on Title 17, California Code of Regulations, section 2501(a) which provides: "[T]he local health officer shall take whatever steps deemed necessary for the investigation and control of the disease...." Los Angeles Complaint, para. 36. Los Angeles also points out that it has not issued "a moratorium on religious service [as] Defendants can conduct religious services outdoors or virtually...." Los Angeles Complaint, para. 5.

Grace Community Church's First Claim for Relief based on Free Exercise argues that the right to engage in religious worship of the type chosen by Plaintiffs (*i.e.*, in-person indoor services) is a "fundamental right." Plaintiffs allege the types of substitutes for in-person, indoor services — outdoor or virtual religious services — are insufficient and constitute an intrusion into the church's authority. Accordingly, this court must apply "strict scrutiny."

Plaintiffs also allege that Los Angeles' mandate would fail "strict scrutiny" because it is not "narrowly tailored" and for other reasons. Grace Community Church Complaint, paras. 119-25.

ARGUMENT

I. This Court Should Not Apply any Interest Balancing Test, but Rather Examine the "Text, History, and Tradition" of the Free Exercise Protection.

Although these *amici* do not disagree with Grace Community Church that under California case law the interest balancing test termed "strict scrutiny" would apply[3] and that the prohibition could not survive strict scrutiny, these *amici* believe that the time has come for courts to reconsider the use of such tests. With respect to the Second Amendment, Justice Scalia accurately described these tests as "'judge-empowering'" interest balancing tests. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) ("*Heller I*").

> The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional

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[3] *See Carpenter v. San Francisco*, 93 F.3d 627 (9th Cir. 1996); *see also* Grace Community Church complaint, para. 120.

> guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.... Like the First, [the Second Amendment] is the very *product* of an **interest balancing by the people**.... [*Heller I* at 634-35 (emphasis added).]

As Justice Scalia indicates, interest balancing empowers judges to stray from the constitutional text, and is just as dangerous when applied to the First Amendment's Free Exercise guarantee as to the Second Amendment. Indeed, during oral argument in *Heller I*, Chief Justice Roberts described balancing tests as "baggage" that the First Amendment picked up along the way. *See District of Columbia v. Heller*, No. 07-290, Transcript of Oral Argument, p. 44, ll.17-23 (Mar. 18, 2008). It is time for the judiciary to shed the baggage of interest balancing tests and return to focusing on the text.

If interest balancing is to be jettisoned, what would replace it? Three years after *Heller I*, then-Judge Kavanaugh identified the proper method of constitutional analysis as a search for the "text, history, and tradition" of the constitutional provision. *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (2011) ("*Heller II*").

In sum, strict scrutiny is an atextual, judicially created test, finding no predicate in the state (or federal) constitution. Therefore, these *amici* urge the Court to seek out the scope of the protection afforded by the California Constitution's Free Exercise Clause based on an examination of the constitutional text, which requires focus on what the framers were publicly expressing through that constitutional provision, rather than focus on an artificial test which empowers modern judges to reach the decision they prefer.

II. Pastor John MacArthur and Grace Community Church's Theological View of the Limits on State Authority over the Church Is Identical to the Scope of the Free Exercise Clause.

For the first weeks of the shut-down orders issued by Los Angeles, the elders of Grace Community Church voluntarily chose to shut down in-person, indoor church services.[4] After the passage of many weeks, when Los Angeles kept the shut-down orders in place, these elders of Grace Community Church re-examined the issue and unanimously decided to begin in-person, indoor church services on July 23, 2020, stating:

> we cannot and will not acquiesce to a government-imposed moratorium on our weekly

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[4] *See* Grace Community Church, "Christ, not Caesar, Is Head of the Church: A Biblical Case for the Church's Duty to Remain Open (July 24, 2020; modified Aug. 19, 2020) at Addendum.

> congregational worship or other regular corporate gatherings. Compliance would be disobedience to our Lord's clear commands. [*Id.*]

The statement of the elders explained the limitations of state power based on Holy Writ:

> [W]hile civil government is invested with divine authority to rule the state, neither of those texts (nor any other) grants civic rulers jurisdiction over the church. God has established **three institutions** within human society: the family, the state, and the church. Each institution has a sphere of authority with **jurisdictional limits** that must be respected.... *God has not granted civic rulers authority over the doctrine, practice, or polity of the church*. The biblical framework **limits** the authority of each institution to its specific **jurisdiction**. [*Id.*; quoted in *Grace Community Church v. Newsom* Complaint, para. 114 (emphasis added).]

The elders' statement explains how *ultra vires* acts by one of these three institutions should be responded to by the other institutions:

> When any one of the three institutions exceeds the bounds of its jurisdiction **it is the duty of the other institutions to curtail that overreach**. Therefore, when any government official issues orders regulating worship (such as bans on singing, caps on attendance, or prohibitions against gatherings and services), he steps outside the legitimate bounds of his God-ordained authority as a civic official and arrogates to himself authority that God expressly

> grants only to the Lord Jesus Christ as sovereign over His Kingdom, which is the church. [*Id*. (emphasis added).]

In that statement, the elders made clear that they were presenting a Biblical analysis, not a constitutional analysis:

> [W]e are **not making a constitutional argument**.... The right we are appealing to was **not *created* by the Constitution**. It is one of those **unalienable rights granted solely by God**, who ordained human government and establishes both the extent and the **limitations of the state's authority** (Romans 13:1-7).... In other words, freedom of worship is a command of God, not a privilege granted by the state. [*Id*. (emphasis added).]

It should be noted that the adverse consequence of allowing the powers of these three institutions to be accumulated in the state, are quite similar to what James Madison warned us would be the consequences of unifying the powers of the three branches of government:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of **tyranny**. [Federalist No. 47, G. Carey & J. McClellan, <u>The Federalist</u> (Liberty Fund: 2001) at 249.]

And the Biblical duty of each institution to resist encroachments by the other institutions, is analogous to the duty of each branch

of government to resist encroachments from the other branches. *See generally* Federalist Papers, *supra*, Nos. 47-49.

Most importantly, an examination of the constitutional text and its historical context reveals that the Biblical principles articulated by the elders in their statement are exactly the protections that were built into the free exercise clause by its framers, as explained in the next section.

III. The Free Exercise of Religion Establishes a Jurisdictional Barrier.

A. "Religion" Defined.

Article I, Section 4 of the California Constitution is no less protective of free exercise rights protected by the First Amendment, which provides that "Congress shall make no law ... prohibiting the free exercise []of [religion]." "[A] search for the independent meaning of California Constitution, article I, section 4, entails a certain amount of frustration because California courts have typically construed the provision to afford the same protection for religious exercise as the federal Constitution before *Employment Div., Ore. Dept. of Human Res. v. Smith*.... Indeed, our more recent cases treat the state and federal free exercise clauses as interchangeable...." *Smith v. Fair Employment & Hous. Com.*, 12 Cal. 4th 1143, 1177 (Cal. Apr. 9, 1996).

In *Reynolds v. United States*, 98 U.S. 145 (1878), the Supreme Court traced the lineage of the First Amendment to the 1776 Virginia Declaration of Rights. *Id.* at 162-63. Because "'religion' is not defined in the Constitution," but is defined in the Virginia Declaration of Rights, the U.S. Supreme Court looked to that definition. *See id.* at 162-63. Section 16 of the Virginia Declaration of Rights defined religion to be "the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." *See* Constitution of Virginia, Section 16, reprinted in Sources of Our Liberties 312 (R. Perry & J. Cooper, eds., rev. ed., ABA Found.: 1978).

In the words of the *Reynolds* Court, "religion," as so defined, "was not within the cognizance of civil government." *Reynolds* at 163. The Court further acknowledged that this **jurisdictional principle** was explained in James Madison's Memorial and Remonstrance, a document that Madison penned in June 1785 and circulated among members of the Virginia Assembly in support of Jefferson's Bill for Establishing Religious Freedom. Quoting from Section 16 of the 1776 Virginia Declaration, Madison proclaimed:

> Because we hold it for a fundamental and undeniable truth, "that **Religion** or **the duty which we owe to our Creator and the manner of discharging it**,

> can be directed only by reason and conviction, not by force or violence." [citation omitted]. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds **cannot follow the dictates of other men.** [J. Madison, "Memorial and Remonstrance" To the Honorable the General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in 5 The Founders' Constitution, p. 82 (item # 43) (P. Kurland & R. Lerner, eds., U. of Chi.: 1987) (emphasis added).]

Four months later, the Virginia General Assembly enacted into law Thomas Jefferson's "Act for Establishing Religious Freedom," the preamble of which, the *Reynolds* Court wrote, affirmed this same **jurisdictional principle**. *See Reynolds* at 163. The Act's preamble read:

> Whereas Almighty God hath created the mind free; that **all attempts to influence it by temporal punishments or burthens, or by civil incapacitations**, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the **impious presumption of legislators and rulers**, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions

> and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time.... [Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 The Founders' Constitution at 84 (item # 44) (emphasis added).]

B. Free Exercise of "Religion."

The 1776 Virginia Declaration not only defined "religion," but also secured its "free exercise," that is, its exercise free from any and all claims of civil jurisdiction. And the choice could not have been more deliberate. As originally drafted by George Mason, Section 16 of that Virginia Declaration read, as follows:

> That as Religion, or the Duty which we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be governed only by Reason and Conviction, not by Force or Violence, and therefore that all Men should enjoy the fullest **Toleration** in the **Exercise of Religion**, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate **unless**, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals.... [Virginia Declaration of Rights, First Draft (May 20-26, 1776) (emphasis added).[5]]

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[5] *See* https://gunstonhall.org/learn/george-mason/virginia-declaration-of-rights/virginia-declaration-of-rights-first-draft/.

At the state constitutional convention, James Madison objected to the provision "'that all men should enjoy the fullest toleration in the exercise of religion'"[6]:

> Madison wanted to move beyond the tradition of religious toleration introduced by John Locke and the English Toleration Act of 1689.... So the twenty-five-year-old delegate from Orange County to Virginia's constitutional convention put forward these words: "All men are equally entitled to the free exercise of religion." [*Id.* at 31.]

"Madison's proposal that a right to 'free exercise of religion' should replace the phrase on religious toleration was approved." *Id*. Thus, Section 16 as adopted by the convention, read in pertinent part, "and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience," removing any and all reference to any and all exceptions for the peace, happiness, or safety of the larger society as determined by any civil magistrate.

Nine years later, in his 1785 Memorial and Remonstrance, Madison painstakingly explained the absolute principle upon which the free exercise of religion rests. The right "is unalienable

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[6] *See* Constitutional Debates on Freedom of Religion, p. 31 (J. Patrick & G. Long, eds., Greenwood Press: 1999).

... because what is here a right towards men, is a duty towards the Creator"[7]:

> It is the **duty** of every man to render **to the Creator** such homage and such only as he believes to be acceptable to him. This duty is **precedent, both in order of time and in degree of obligation, to the claims of Civil Society**. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that **Religion is wholly exempt from its cognizance**. [*Id.* (emphasis added.)]

C. Free Exercise Restricted and Then Revived.

For 170 years after the ratification of the Bill of Rights, Madison's jurisdictional principle went unchallenged.[8] In 1963, however, the U.S. Supreme Court departed from that tradition, reducing the free exercise guarantee as if it were a mere rule of religious toleration, limiting the jurisdictional principle to only

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[7] "Memorial and Remonstrance," 5 The Founders' Constitution at 82.

[8] *See* H. Titus, "The Free Exercise Clause: Past, Present and Future," 6 *Regent L. Rev.* 7, 10-15 (1995).

those cases involving "religious belief," and subjecting laws impacting "religious practices" to a balancing test to determine whether the law could be justified as protecting the health, safety, and welfare of the civil society.[9] That atextual experiment came to an end in 1990 when the Court refused to limit the free exercise guarantee to just religious belief and profession, stating:

> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: **assembling with others for a worship service**, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. [*Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added).[10]]

Having rejected tolerance as the governing principle of the free exercise guarantee, the *Smith* Court rejected the belief/practice dichotomy, returning the Court to the text's jurisdictional principle. While the state had no jurisdiction to regulate "religion," the free exercise guarantee did not "excuse ... compliance" with an "otherwise valid law prohibiting conduct that the State is free to regulate." *Smith* at 878-79.

Whether the state is free to regulate particular conduct is, then, determined by the original definition of "religion" in the free

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[9] *Id.* at 15-22. *See Sherbert v. Verner*, 374 U.S. 398 (1963).

[10] *See also* Titus, "The Free Exercise Clause" at 22-23.

exercise guarantee itself. This is the teaching of the original First Amendment text as illuminated by the express definition of "religion" of its Virginia forerunner. And this, in turn, is the lesson of the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

In *Hosanna-Tabor,* the Court rejected the EEOC's argument that the Americans with Disabilities Act's prohibition of employer retaliation against employees filing a grievance under the Act was immune from a free exercise challenge because it was a "neutral law of general applicability." *See id.* at 190. It did so on the ground that the internal governance of a church body, including the hiring and firing of ministers, is outside the jurisdiction of the federal government. Although the Court did not explicitly pose the issue as to whether such employment relations involve duties owed to the Creator, enforceable only "by reason and conviction, not by force or violence," the Court relied upon ecclesiastical history to establish that the free exercise guarantee grew out of a jurisdictional conflict between parishioners and the English monarchy over church self-government. *Id*. at 182-84. "[T]he Religion Clauses," Chief Justice Roberts wrote, "ensured that the new Federal Government — unlike the English Crown — would have no role in filling ecclesiastical offices" — citing in support none other

than James Madison, who the Chief Justice reminded was "'the leading architect of the religion clauses of the First Amendment.'" *Id.* at 184.

As its chief architect, it was Madison, along with Jefferson, who understood that the First Amendment erected a **jurisdictional barrier** between matters that belonged to **church government** and matters that belonged to **civil government** of the state, the latter having absolutely no jurisdiction over duties owed to the Creator which, by nature, are enforceable only "by reason and conviction."

As Robert Louis Wilken, William R. Kenan Professor Emeritus of the History of Christianity at the University of Virginia, has recently observed:

> **Religious freedom** rests on a simple truth: religious faith is an inward disposition of the mind and heart and for that reason **cannot be coerced by external force**. This truth was stated for the first time by Tertullian of Carthage, a Christian writer who lived in North Africa in the early third century. **Tertullian** said: "It is only just and a privilege inherent in human nature that every person should be able to worship according to his own convictions; the religious practice of one person.... It is not part of religion to coerce religious practice, for it is by **choice not coercion** that we should be led to religion." [Robert Louis Wilken, Liberty in the Things of God: The Christian Origins of Religious Freedom (Yale University Press: 2019) at 1 (emphasis added).]

It is the threshold jurisdictional limitation found in the free exercise provision on government power that Los Angeles has breached.

IV. *Employment Division v. Smith* Applied a Textual Analysis of the Free Exercise Clause to Identify the True Threshold Question: Does the Government have Jurisdiction over the Conduct?

In recent years, the case most often relied on by those who assert that the government may assert power over church services and worship through laws of general applicability is *Employment Division v. Smith*, 494 U.S. 872 (1990). However, such a use of that decision would be improper. The constitutional analysis in *Smith* begins with the principle that the "free exercise of religion means, first and foremost, the right to **believe and profess** whatever religious doctrine one desires." *Smith* at 877 (emphasis added). After listing illustrations of cases following that principle, the Court continued:

> But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: **assembling with others for a worship service**.... [*Id*. (emphasis added).]

The Court then points out that in the *Smith* case, the plaintiffs "seek to carry the meaning of 'prohibiting the free exercise [of religion]' **one large step further**." *Id.* at 878 (emphasis added). In that case, the issue was "whether the Free

Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use." *Id*. at 874. Then the Court stated the linchpin of its holding:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law **prohibiting conduct that the State is free to regulate**. [*Id.* at 878-79.]

The Court had just specified what conduct that the State is **not** free to regulate — identifying right after "the **right to believe and profess** whatever religious doctrine one desires" the very issue involved in this case — "**assembling with others for a worship service**." *Id*. at 877 (emphasis added).

Los Angeles County's position in this case no doubt will be that so long as the restriction is generally applicable and religiously neutral, and applying "rational basis"[11] review Los Angeles can lawfully prohibit in-person, indoor religious services.

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[11] No balancing test, such as rational basis, intermediate scrutiny, or strict scrutiny, should be employed by the Court as the Health Order restricting religious services is wholly outside the scope of the lawful power of government.

But if that were true, then Los Angeles County also could specify what residents "believe and profess" through a declaration that is generally applicable to everyone, and religiously neutral.

But the key point is that the Order prohibiting in-person, indoor services fails on the true threshold question — Los Angeles County is only free to **prohibit "conduct that the State is free to regulate.**" Assembling for a worship service is **not** in that category, as made clear by the history of religious liberty in America. It has always been the church's prerogative to choose the place and time of the meeting in accord with the command of God for the body of Christ to come together regularly in Christian fellowship. *See* Hebrews 10:26.

CONCLUSION

Since Los Angeles has intruded on a subject matter that belongs to the church, it matters not at all that the Order in question imposes a rule of general applicability. The Los Angeles Order to bar in-person indoor services violates the threshold jurisdictional barrier imposed as a barrier to the state's power by the free exercise of religion under the California Constitution, Article I, section 4, and cannot stand.

Respectfully Submitted,

BY:____/s/_____
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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California rules of Court, the foregoing Application for Leave to File and Brief *Amicus Curiae* of One Nation under God Foundation, and Conservative Legal Defense and Education Fund in Opposition to Los Angeles County Petition for Writ of Mandate contains words, not including the tables of contents and authorities, the caption page, signature blocks, or this certification page.

Dated: August 25, 2020

/s/ Jeremiah L. Morgan
Jeremiah L. Morgan