No. 23-5173

In the United States Court of Appeals
for the District of Columbia Circuit

AMERICA FIRST LEGAL FOUNDATION,
Plaintiff-Appellant,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
Defendants-Appellees,

On Appeal from the United States District Court for
the District of Columbia

Brief *Amicus Curiae* of Citizens United in Support of Plaintiff-Appellant and Reversal

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amicus*

Except for the following, all parties, intervenors, and *amici curiae* appearing before the district court below and this Court are listed in the Briefs for the parties: *amicus curiae* Citizens United.

Ruling under Review

References to the ruling at issue appear in the Plaintiff-Appellant's Brief.

Related Cases

Counsel adopt and incorporate by reference parties' statements with respect to related cases.

CORPORATE DISCLOSURE STATEMENT

The *amicus curiae* herein, Citizens United, through its undersigned counsel, submit this Corporate Disclosure Statement pursuant to Rules 26.1(b) and 29(c) of the Federal Rules of Appellate Procedure, and Rule 26.1 of the Rules of the United States Court of Appeals for the District of Columbia Circuit.

This *amicus curiae* is a non-stock, not-for-profit corporation, which has no parent company, and no person or entity owns it or any part of it.

This *amicus curiae* is represented herein by Jeremiah L. Morgan, counsel of record, and William J. Olson, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, VA 22180-5615; and Michael Boos of Citizens United, 1006 Pennsylvania Avenue, S.E., Washington, DC 20003.

/s/ Jeremiah L. Morgan
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GLOSSARY OF ABBREVIATIONS

"EO"	Executive Order
"FOIA"	The Freedom of Information Act

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Citizens United is a nonstock, not-for-profit organization, exempt from federal income taxation under section 501(c)(4) of the Internal Revenue Code. Citizens United seeks to inform and educate the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society. In furtherance of those ends, Citizens United produces and distributes information through various outlets, including producing documentary films on matters of public importance. Citizens United regularly seeks access to the public records of federal government agencies, entities, and offices, in order to disseminate its findings to the public.

When Executive Order 14019 was issued, Citizens United became concerned that the various strategic plans submitted to the White House in response could improperly politicize the departments and agencies and could include conduct which is prohibited by the Hatch Act. *See* 5 U.S.C. §§ 7321, *et seq*. To gather additional information, Citizens United sent FOIA requests to

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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 the *amicus curiae*, its members or its counsel contributed money that was intended to fund preparing or submitting this brief.

several federal offices, including the Department of Interior, seeking records demonstrating whether those agencies considered the limitations of the Hatch Act in the context of Executive Order 14019. On August 17, 2022, Citizens United filed a complaint in U.S. District Court for the District of Columbia against the Department of the Interior for failure to respond to Citizens United's FOIA request. *See Citizens United v. Dep't of Interior*, No. 22-cv-2443 (D.C. Dist.), Rec. #1. During the course of that litigation, Interior produced some records to Citizens United, but withheld other records including Interior's "Interim Strategic Plan for the Implementation of Executive Order 14019, Access to Voting," claiming exemption 5 under the FOIA. That case has been held in abeyance pending a resolution of the present appeal.

ARGUMENT

I. AGENCY PLANS SUBMITTED IN RESPONSE TO SECTION 3 OF EXECUTIVE ORDER 14019 ARE NOT PROTECTED BY THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE.

The district court ruled that the defendant agencies properly withheld their strategic plans, submitted in response to Section 3(b) of Executive Order 14019, as exempt from public disclosure under the presidential communications privilege, concluding that: "Defendants have … met their burden of establishing

that foreseeable harm to the interests protected by the **presidential communications privilege** would ensue if the strategic plans were disclosed, as required to withhold the documents pursuant to Exemption 5." *Am. First Legal Found. v. Dep't of Agriculture*, 2023 U.S. Dist. LEXIS 122994 (D.D.C. 2023) ("*AFLF*") at *33 (emphasis added). Section 3(b) provides:

> Within 200 days of the date of this order, the head of each agency shall submit to the Assistant to the President for Domestic Policy a **strategic plan** outlining the ways identified under this review that the **agency can promote** voter registration and voter participation. [Emphasis added.]

The district court reasoned that "the strategic plans were solicited by President Biden through EO 14019 and received by his immediate White House advisors **for use in briefing and advising** him on voting rights issues." *AFLF* at *18 (emphasis added). Citing the declaration of the White House Special Counsel, the district court stated that "Ambassador Rice's staff members **compiled** information **from** the strategic plans, and senior White House advisors **relied on** the information to brief the President on agency actions and proposals and **to advise** the President on further executive decision-making regarding voting matters." *Id*. at *19 (emphasis added). However, these assertions

provide an inadequate basis for applying that privilege to the strategic reports themselves.

While Presidents are routinely briefed and advised on many matters, that does not automatically demonstrate that any documents used in such briefing fall under the presidential communications privilege. If it did, any record submitted to the White House would be immunized from agency disclosure under the Freedom of Information Act. Additionally, even the raw data contained in those reports would automatically be deemed protected presidential communications merely because they were sent to a presidential advisor and were included in briefings or formed the basis for a proposal presented to the President — a result that could easily lead to abuse. If an agency wanted a record exempt from disclosure under FOIA, it would just send it to the White House. Virtually any record could be argued to constitute information that could be used for presidential policy and decision-making.

The district court gave an unnatural reading to Section 3(a) of Executive Order 14019, which directed the head of each agency to "evaluate ways in which the agency can, as **appropriate and consistent with applicable law**, promote voter registration and voter participation." (Emphasis added.) The most

reasonable reading of this directive is that the agencies are to compile a catalog of actions that are **currently available** to them to implement. Since the report was to be based on the express condition that the actions are "consistent with applicable law," the Executive Order made clear it was not requesting proposals for legislative or administrative changes. Neither does Section 3 ask for recommendations,[2] proposals, advice, or suggestions for future actions.

The Special Counsel's declaration which stated that "White House advisors relied on the strategic plans in formulating advice to the President and creating briefing materials for him" (Sauber Declaration, ¶ 12) advances the government's argument not one bit. Neither does the assertion that these strategic plans were provided the White House as "comprehensive information … in order to inform policy recommendations to the President…." *Id*. at ¶ 15. Under that reasoning, every document in every agency on a given topic could be considered part of the "comprehensive information" reviewed by White House staff, before making "policy recommendations" to the President and therefore exempted under the presidential communications privilege. This simply cannot

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[2] Plaintiff-Appellant's Brief describes in more detail the use of "recommendations" elsewhere in Executive Order 14019, demonstrating that President Biden knew how to request a recommendation when he wanted to.

be what the privilege protects. If it were, this judicially created "privilege" would swallow the whole of the Freedom of Information Act and any hope for government transparency with it.

Indeed, it should be remembered that the presidential communications privilege is not textually part of the Freedom of Information Act. Its scope cannot be determined from an analysis of Congressional language, but rather only from a relatively small number of judicial opinions, mostly in the D.C. Circuit. This privilege was created by the judiciary through case law to protect the President's Article II powers, as such it is an evolving notion which requires the judiciary in each instance, including this case, to closely examine whether the documents sought to be shielded are justified by the policy behind this judicially crafted doctrine. *See Judicial Watch v. DOJ*, 365 F.3d 1108, 1117 (D.C. Cir. 2004) (rejecting a bright-line rule for applying the presidential communications privilege).

The remainder of this brief demonstrates that the documents being withheld do not fall under the interests which the presidential communications privilege seeks to protect. The reports requested do not involve the President's Article II responsibilities, but rather implicate the constitutional power over

elections granted to the states and also to Congress. Additionally, the reports at issue in this litigation were requested only weeks after President Biden took office following an exceedingly close and contested election. They relate, not to any governmental power of the President, but rather to one of the non-constitutional roles of the President — to serve as head of his political party.

II. PRESIDENT BIDEN'S EXECUTIVE ORDER 14019 IS UNRELATED TO THE PRESIDENT'S ARTICLE II POWERS.

Executive Order 14019 begins with a general, atextual assertion of Presidential authority: "By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows…." Thereafter, the Executive Order's only other constitutional reference: "The Constitution … protect[s] the right to vote." Section 1. These assertions of constitutional authority are misleading at best. With respect to the election of the President, the Supreme Court has made clear that: "[t]he individual citizen has **no federal constitutional right to vote** for electors for the President of the United States…." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added). The Executive Order's Purpose section also asserts: "The right to vote is the foundation of American democracy." EO 14019, Section 1. President Biden's view apparently was not shared by the Framers of our

Constitution, because they left it out of the original constitutional text. To be sure, if a state legislature chooses to select electors by popular vote, that vote must be administered **by the states** consistent with the Constitution. Grounding this particular Presidential executive order in a constitutional "right to vote" is high sounding, but vastly overstated, as to voting for President.

With respect to elections for Senators and Representatives, the matters addressed in the Executive Order for changing the manner of conducting elections are vested by the Constitution initially to the states, and secondarily to Congress: "The **Times, Places and Manner** of holding Elections for Senators and Representatives, shall be **prescribed in each State** by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Article I, Section 4 (emphasis added). The same is true for presidential elections: "Each State shall appoint, in such Manner **as the Legislature thereof** may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress…. The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes…." Article II, Section 1 (emphasis added). The Executive Order

implicitly criticizes decisions made by the states to minimize voter fraud, such as "voter identification laws" and imposing "limited opportunities to vote by mail" (EO 14019, Section 1), but these are decisions reserved to the states with a role for Congress. In no instance are they subject to change by Presidential policy making.

The argument that there is no constitutional predicate for the Executive Order has been asserted not just by private parties but also by many states. On August 3, 2022, 15 state Secretaries of State sent a letter to President Biden describing Executive Order 14019 as an unconstitutional encroachment on the powers of states:

> As the supreme law of the land, the Constitution clearly says the state legislatures *shall* (emphasis added) prescribe the way elections are run, and that if any adjustments need to be made, such adjustments are the province of Congress, not the Executive branch….[3]

The letter also asserts: "Executive Order 14019 calls for federal agencies to develop plans that duplicate voter registration efforts conducted at the state level and ignores codified procedures and programs in our state constitutions and

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[3] Letter from 15 state Secretaries of State to President Joe Biden (Aug. 3, 2022).

laws." It concludes: "As the chief election officials for our respective states, we ask you to rescind Executive Order 14019." *Id.*

If the subject matter of the Executive Order — the "Times, Places and Manner" of congressional elections — is beyond the scope of the President's Article II powers, the presidential communications privilege cannot apply, as it is designed so that the President may "effectively and faithfully carry out his Article II duties and 'to protect the effectiveness of the executive decision-making process.'" *Judicial Watch* at 1115 (citations omitted).

Indeed, "this is not a case involving 'a **quintessential and nondelegable** Presidential power' — such as appointment and removal of Executive Branch officials — where separation of powers concerns are at their highest." *Ctr. for Effective Gov't v. Dep't of State*, 7 F. Supp. 3d 16, 25 (D.D.C. 2013) (emphasis added). Here, not only were the strategic plans not within the quintessential powers of the President (the Elections and the Electors clauses), they do not involve nondelegable powers, to the extent the agencies can undertake action to help voting access "consistent with applicable law." This is similar to the finding in *Ctr. for Effective Gov't* rejecting the government's assertion of the presidential communications privilege where "the development and enactment of

foreign development policy can be and is 'exercised or performed without the President's direct involvement.'" *Id*.

Thus, because the district court failed to determine whether the topic of the EO and the strategic plans were within the President's natural authority, it failed to weigh a key factor in determining whether the presidential communications privilege applies.

III. EXECUTIVE ORDER 14019 IS A SLIPPERY SLOPE THAT COULD BE CONSTRUED BY FEDERAL WORKERS AS AN ATTEMPT TO PROMOTE THE INTERESTS OF THE PRESIDENT'S POLITICAL PARTY.

The applicability of the presidential communications privilege is a legal question, but one that must be viewed in the context of the inherently political subject matter addressed in Executive Order 14019. Even from the limited information that has been learned about the Executive Order, it can be understood by federal workers and others as a taxpayer-funded partisan effort to increase voter registration and voting by constituencies who historically have supported the President's Party.

After President Biden issued the Executive Order, the Justice Department held a "listening session" with community organizer groups on voting issues:

> The group included dozens of people, **all of them from left-leaning groups**. There were 10 from the American Civil Liberties Union, five from the Campaign Legal Center, three from Demos, three from the Southern Poverty Law Center, five from the Leadership Conference on Civil Rights, two from Black Lives Matter, and many others. The list would not reassure anyone hoping that the Justice Department is working in a scrupulously nonpartisan way. But of course, we don't really know what the department is doing because the administration is keeping it a secret.[4]

Although the Order speaks of "voter access" and "voter participation," the surrounding facts suggest it is designed to increase the voter turnout in voting blocks who have historically supported the President's party — at taxpayer expense. If so, that illegitimate purpose may well explain why the White House has resisted disclosure with such force. What it is doing, it certainly wants to cloak with secrecy.

The thinly veiled justification for shifting voter registration efforts from political committees and private entities to the United States Government is the notion that states routinely engage in "voter suppression" against minorities. Any reform designed to ensure that only those eligible to vote are registering to vote and voting — including photo identification, purging voting lists of those who have moved or died, checking on citizenship — is decried as "voter

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[4] B. York, "Joe Biden's secret voter plan," *Washington Examiner* (Sept. 12, 2022) (emphasis added).

suppression." That topic cannot be addressed here fully, but it has repeatedly been debunked. *See, e.g.,* J. Riley, "Data Disprove the 'Voter Suppression' Myth," *Wall Street Journal* (May 7, 2019); I. Shapiro, "The Voter Suppression Lie," CATO Institute (Apr. 22, 2021); F. Lucas, The Myth of Voter Suppression: The Left's Assault on Clean Elections (Bombardier Books: 2022).

Suspicions about the partisan motive behind Executive Order 14019 have garnered strong public interest. Prior to the 2022 mid-term elections, the Foundation for Government Accountability succinctly summed up the concerns as follows: "The American people deserve to know if the Biden administration's unprecedented action is fair and non-partisan, or if it is designed to help one political party over the other…. Midterms are approaching, and the DOJ's failure to disclose information raises troubling issues. They need to reveal these public documents to keep our elections fair."[5]

On June 13, 2023, the Conservative Action Project, a coalition of leaders from conservative groups across the nation, called on Congress to immediately defund Executive Order 14019 in its Fiscal Year 2024 budget. "The origin of

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[5] "DOJ Continues to Redact, Suppress Crucial Documents Involving Voter Registration Projects," Foundation for Government Accountability (Sept. 11, 2022).

the Executive Order to use the vast resources of the federal government for voter registration and voter education and turnout was *not* Congress; rather, the idea for the Executive Order originated with Demos, a leftwing organization, and was subsequently embraced by numerous leftist groups," the group wrote.[6]

> [F]ederal agencies appear to be utilizing federal resources for political campaign activities. Congress should stop the funding of the illegal use of taxpayer dollars for political campaign activities, including but not limited to the White House's distribution of federal grants to unknown nongovernmental organizations (NGOs) approved solely by the partisan political operatives in the Biden White House. The use of federal tax dollars to fund political activities by federal agencies and grants to undisclosed, partisan leftist organizations engaged in political campaign activities is unconstitutional, illegal, and must be stopped. [*Id*.]

Rep. Ralph Norman (R-SC) and eight other Members of the U.S. House of Representatives wrote to Attorney General Merrick Garland making a similar point[7]:

> The executive order is unconstitutional. States are supposed to be in charge of election laws.... The administration has not been telling the American people what they are doing.... The order will cause violations of the Hatch Act that says federal employees can't get

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[6] "Congress Should Defund the Unconstitutional Biden Executive Order 14019 That Uses Federal Agencies and Tax Dollars for Political Campaign Activities," ConservativeActionProject.com (June 13, 2023).

[7] Letter from Rep. Ralph Norman to Attorney General Merrick Garland (Oct. 18, 2022).

> involved in the voting process. It's also a form of ballot harvesting on the backs of taxpayers.[8]

On May 10, 2023, 12 United States Senators, led by Sen. Bill Hagerty (R-TN), wrote a letter to Biden demanding transparency into the likely partisan nature of the "secret voter plan":

> [T]he job of federal agencies is to perform their defined missions in a nonpartisan way, not use their taxpayer funds for clandestine voter mobilization and election-turnout operations. This is especially true if such federally funded efforts involve partnering with nongovernmental organizations with unclear and potentially partisan motives and tactics.[9]

The Senators also attacked Executive Order 14019 as a violation of the Anti-Deficiency Act, which prohibits federal agencies from taking actions when funds for the purpose have not been appropriated by Congress:

> [I]t seems doubtful that Congress approved all federal agencies to use appropriated funds for the purpose of voter mobilization. The Antideficiency Act (31 U.S.C. § 1341(a)(1)(A)) prohibits "making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law." [*Id.*]

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[8] F. Lucas, "Biden's Secretive Election Order Plans Shielded From Congress but Showcased by Political Allies," *Daily Signal* (May 9, 2023).

[9] Letter from Sen. Bill Hagerty to President Joe Biden (May 10, 2023).

The district court stated that the presidential communications privilege is "'inextricably rooted in the separation of powers under the Constitution' because it 'relates to the effective discharge of a President's powers.'" *AFLF* at *18 (quoting *Judicial Watch* at 1110). However, Executive Order 14019 involves issues of elections and voter rights, issues which the Constitution makes the prerogatives of the states and Congress. *See, e.g.*, Constitution, Art. I, Sec. 4; Art. II, Sec. 1, cl. 2. At bottom, the strategic plans of federal agencies in implementing Executive Order 14019 have effect well outside the scope of presidential powers; consequently, claims of the presidential communications privilege should be closely scrutinized.

These reports are presumptively political. It would be a grave mistake for this Court to accept at face value that the "strategic plans" being generated by federal agencies were written in pursuit of a bona fide governmental purpose. If they were, there would be no need for the cloak of secrecy. If these "strategic plans" are part of a playbook for advancing a Democrat Party's electoral agenda, then the Biden Administration would have every reason to remain opaque by ordering the Department of Justice to resist the disclosure with all the vigor it can muster.

IV. THE NEED FOR GOVERNMENTAL TRANSPARENCY OUTWEIGHS THE ADMINISTRATION'S EFFORT TO CONCEAL ITS POLITICIZATION OF GOVERNMENT.

As discussed *supra*, the government seeks to expand the presidential communications privilege beyond where it has ever before been applied to cover purely informational reports, to cover agency reports relating to issues on which the President has no meaningful constitutional role, and where there is every indication the agenda appears to be political, not governmental.

Any consideration of whether to expand the presidential communications privilege requires refocusing on the reasons that the Freedom of Information Act was signed into law by President Lyndon B. Johnson in 1966. The selection of July 4 for the bill signing was not an accident. It was designed to demonstrate a return to Founding Principles. The Founders were united in their determination that a republican government must be accountable to the people, and that this accountability could only be achieved if the people are knowledgeable as to the inner workings of their government. For example, James Madison wrote:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who

> mean to be their own Governors, must arm themselves with the power which knowledge gives.[10]

John Adams similarly made clear that it was not general knowledge that protected liberty — but specific knowledge of what the government was doing: "[L]iberty cannot be preserved without a general knowledge among the people, who have a right … and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and **conduct of their rulers**."[11]

If the Executive Order is generating strategic reports to implement a partisan electoral agenda, how can this be addressed unless the voters are allowed to know? "In a society which takes seriously the principle that government rests upon the consent of the governed … [i]t is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves." *Edwards v. National Audubon Soc.*, 556 F.2d 113, 115 (2d Cir.

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[10] Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 The Writings of James Madison at 103 (G. Hunt, ed.) (G.P. Putnam's Sons: 1910).

[11] John Adams, A Dissertation on the Canon and Feudal Law, No. 3. *Boston Gazette* (Sept. 30, 1765) (emphasis added).

1977). "FOIA is often explained as a means for citizens to know what the Government is up to. This phrase should not be dismissed as a convenient formalism. It defines **a structural necessity in a real democracy**." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added) (internal quotation omitted).

Attorney General Merrick Garland once stated:

> At the Justice Department, and across government, our success depends upon the trust of the people we serve. That trust must be earned every day…. For more than fifty years, the Freedom of Information Act has been a vital tool for advancing the principles of open government and democratic accountability that are at the heart of who we are as public servants. [DOJ, "Attorney General Merrick B. Garland Issues New FOIA Guidelines to Favor Disclosure and Transparency" (Mar. 15, 2022).]

However, in practice, the Biden Administration has been among the least transparent presidencies in history.

When President Biden took office, his press secretary famously promised that he would: "bring transparency and truth back."[12] President Biden has failed to deliver, and few still believe he has tried. A Pew Research Center poll found

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[12] E. Relman, "Biden's White House press secretary Jen Psaki promises to bring 'transparency and truth' back to the briefing room," Business Insider (Jan. 20, 2021).

that 55 percent of Americans believe that his administration has been anything but transparent.[13]

The government's position in this case is that it has the right to deny to the American people information about "the conduct of their rulers" on the misuse of government resources to advance a partisan, political agenda. That position should not be accepted by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

/s/ Jeremiah L. Morgan

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December 11, 2023

[13] Pew Research Center, "Biden's Job Rating Slumps as Public's View of Economy Turns More Negative" (July 13, 2022).

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Citizens United in Support of Plaintiff-Appellant and Reversal complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 4,101 words, excluding the parts of the brief exempted by Rule 32(f).

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 21.0.0.194 in 14-point CG Times.

/s/ Jeremiah L. Morgan

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Jeremiah L. Morgan
Attorney for *Amicus Curiae*

Dated: December 11, 2023

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Citizens United in Support of Plaintiff-Appellant and Reversal, was made, this 11th day of December 2023, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ Jeremiah L. Morgan

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Jeremiah L. Morgan
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