No. 20-55874

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMILY ROE, *ex. rel.* United States of America and
The State of California
Plaintiff-Appellant,

v.

STANFORD HEALTH CARE, F.K.A. STANFORD HOSPITALS AND CLINICS; FREDERICK DIRBAS, DR.; STANFORD HEALTHCARE BILLING DEPARTMENT; THE BOARD OF DIRECTORS OF THE STANFORD HEALTH CARE; THE BOARD OF DIRECTORS OF THE LUCILE SALTER PACKARD CHILDREN'S HOSPITAL AT STANFORD; THE LELAND JUNIOR UNIVERSITY; THE BOARD OF TRUSTEES OF STANFORD UNIVERSITY; DEBRA ZUMWALT; STANFORD HEALTH CARE ADVANTAGE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Civil Case No. CV-17-08726-DSF (AFM)
The Honorable Dale S. Fischer, Judge

AMICUS CURIAE BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND SUPPORTING APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

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Pursuant to Federal Rule of Appellate Procedure 29, Taxpayers Against Fraud Education Fund ("TAFEF") submits this brief in support of plaintiff-appellant, EMILY ROE, and reversal. At the time of filing, plaintiff-appellant had consented to the filing of this brief and TAFEF had not received a response from defendants-appellees.[1]

INTEREST OF *AMICUS CURIAE*

TAFEF is a non-profit public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to educate the public and the legal community about the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and provided testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae*. TAFEF is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

SUMMARY OF ARGUMENT

This brief makes three points.

[1] No party's counsel authored this brief in whole or in part. No person other than *amicus* and its counsel contributed any money intended to fund preparing or submitting this brief.

First, the district court's interpretation of the public disclosure bar is inconsistent with the intent of Congress to encourage *qui tam* suits to be filed and move forward unless they are truly parasitic. From the 1986 amendments to the FCA forward, Congress has consistently amended the Act to encourage whistleblowers to step forward with allegations of fraud. A broad application of the public disclosure bar does not serve that purpose.

Second, the district court erroneously concluded that the relator's allegations had been publicly disclosed because the Medicare claims data that she analyzed was obtained via a Freedom of Information Act (FOIA) request, citing *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401 (2011). This a reading of *Schindler* fails to consider what information was actually disclosed in the FOIA responses. The pertinent statutory inquiry is whether the relator's "allegations or transactions" were publicly disclosed. Those allegations and transactions are disclosed if the complaint "repeat[s] what the public already knows," and what the public "already knows" must include both the misrepresented state of facts and the true state of facts. Unless both may be derived from the Medicare data there is no public disclosure. If there is no public disclosure, the inquiry stops there.

Third, even if there had been a public disclosure, the district court's narrow interpretation of the "original source" exception runs contrary to the intent of the 1986, 2009, and 2010 amendments to the FCA. Through these amendments

Congress intended to encourage additional *qui tam* suits to be filed and move forward by legislatively overruling decisions holding that only relators with inside knowledge of a fraud scheme were able to pursue cases under the Act. Nothing in the FCA suggests such a reading of the original source exception, and some of the largest recoveries for the United States have resulted from cases initiated by outsiders whose expertise and ability to understand a fraud scheme were essential to making the case. Even if Medicare data alone were to be considered a public disclosure, a relator with particular knowledge may materially add to that information. For the addition to be material it must "add value to what the government already knows."

ARGUMENT

I. The Text and Legislative History of the FCA Encourage a Narrow Construction of the Public Disclosure Bar and a Broad Construction of the Original Source Exception.

The FCA has become the "premier tool for recovering money lost to fraud against the Government," responsible for recovering almost $45 billion wrongfully taken from the federal Treasury, with over $2 billion recovered each year since 2010 under the *qui tam* provisions. *See* Sen. Chuck Grassley, Prepared Statement at the False Claims Act hearing, Feb. 27, 2008, *available at* https://www.grassley.senate.gov/news/news-releases/prepared-statement-senator-chuck-grassley-false-claims-act-hearing; *see* U.S. Dep't of Justice, Fraud Statistics

(2020), https://www.justice.gov/opa/press-release/file/1233201/download. The Act has been used to redress and deter fraud in programs as diverse as military procurement, crop subsidies, disaster relief, government-backed loan programs, and healthcare. *See* S. Rep. No. 110-507, at 7 (2008). Since its inception the FCA has been consistently amended to expand the type and range of *qui tam* actions that may be brought and allowed to proceed. S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266; *United States ex rel. Green v. Northrop,* 59 F.3d 953, 963 (9th Cir. 1995).

The public disclosure bar seeks to prevent so-called "parasitic" suits by a relator whose fraud allegations have already been publicly disclosed in certain ways and do not contribute new information to the Government's fraud prevention efforts. The bar, however, carves out an exception that allows certain relators to proceed even when their allegations of fraud have been publicly disclosed. An overview of the amendments to the FCA's public disclosure bar and original source exception demonstrates these points.

The FCA was enacted in 1863 to enlist private individuals to assist the Government in ferreting out fraud by authorizing those individuals to file suit in the name of the Government and to reward successful relators with a share of the recovery. S. Rep. No. 99-345 (1986), at 10-11. During World War II, however, the statute was amended to address a perceived problem with parasitic relators who

merely copied publicly available information and then filed suit to collect a reward. *Id*. Congress amended the FCA to preclude such parasitic suits and barred *qui tam* lawsuits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609. 7. Known as the "government knowledge bar," this provision ultimately had the consequence of nullifying the FCA as a viable tool to combat fraud perpetrated against the Government. See S. Rep. No. 110-507 (2008), at 3 (noting that the government knowledge bar "significantly limited the number of FCA cases that were filed" and that "[b]y the 1980s, the FCA was no longer a viable tool for combating fraud against the Government"). *See also Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("In the years that followed the 1943 amendment [of the FCA], the volume and efficacy of *qui tam* litigation dwindled"); *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 297 (3d Cir. 2016) (observing that the government knowledge bar "did not just eradicate the parasitic lawsuits; it eliminated most FCA lawsuits" because of courts' strict interpretation that the provision "barr[ed] FCA actions even when the government knew of the fraud only because the relator had reported it"); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 680 (D.C.

Cir. 1997) (noting that enactment of the government knowledge bar "killed the goose that laid the golden egg and eliminated the financial incentive to expose frauds against the government").

In 1986, after extensive study and hearings, Congress determined that the FCA should be amended to address, *inter alia*, courts' interpretations of the statute's provisions and to reinvigorate the FCA after decades of dormancy. Recognizing a "severe" problem of fraud on the Government, Congress determined that "only a coordinated effort of both the Government and the citizenry" could solve the problem. S. Rep. No. 99-345, at 2 (1986). The amendments were designed to "encourage any individual knowing of Government fraud to bring that information forward." *Id.* Congress stated that "[t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits." S. Rep. No. 99-345 at 23-24. Among the changes, Congress repealed the government knowledge bar and adopted the public disclosure bar. The new provision stated that a *qui tam* relator could not proceed with a lawsuit alleging fraud that had been publicly disclosed in specific ways, including in "government reports." However, the provision permitted some relators to proceed even if their allegations had been publicly disclosed: The "original source" exception permitted a relator to proceed if she met certain requirements, including that the relator's information "materially added" to the

allegations that had been disclosed. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157.

The public disclosure bar sought "to strike a *balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler*, 563 U.S. 401, 413 (2011) (quotation marks omitted) (emphasis in original). See S. Rep. No. 110-507, at 5, 22 (seeking "to ensure that any individual *qui tam* relator who came forward with legitimate information that started the Government looking into an area it would otherwise not have looked, could proceed with an FCA case" and explaining that the creation of the public disclosure bar and the original source exception "was intended to only bar truly 'parasitic' lawsuits, such as those brought by individuals who did nothing more than copy a criminal indictment filed by the Government").

Unfortunately, despite the 1986 Amendments, courts still interpreted the bar and the original source exception in a manner that led to the dismissal of meritorious FCA suits. As Senator Charles Grassley and Representative Howard Berman (the sponsors of the 1986 Amendments) noted, the public disclosure bar had "been converted by several circuit courts into a powerful sword by which defendants [were] able to defeat worthy relators and their claims" and threatened to undermine the purpose of the 1986 Amendments, which was to encourage more private FCA suits. 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL

495861, at *E1546. Of particular concern were cases holding that FCA suits "are barred if the relator obtains some, or even all, of the information necessary to prove fraud from publicly available documents." *Id*. at *E1547. In the Amendment's authors' view, a relator "who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a *qui tam* action." *Id*. The legal landscape involving the original source exception also raised congressional concern. At the time, courts had interpreted the provision to "require[] the relator to be an eyewitness to the fraudulent conduct as it occurs." *Id*. The legislators explained that they had intended that "a relator's knowledge of the fraud is 'direct and independent' if it results from his or her own efforts." *Id*. In 2010, Congress amended the statute's public disclosure bar as part of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The amendments "radically changed" the statute to "lower the bar for relators." *Moore*, 812 F.3d at 298-99. The amendments narrowed the types of disclosures that triggered the bar and expanded the scope of the original source exception. In particular, instead of requiring an original source to have "direct and independent knowledge," which (as noted *supra*) some courts had read as requiring firsthand factual knowledge, the current version eliminates the term "direct" and merely requires a relator to have

"independent" knowledge that "materially adds to" the public disclosures. 31 U.S.C. § 3730(e)(4)(B).

II. Data Produced in Response to a FOIA Request Does Not Automatically Publicly Disclose the Allegations and Transactions Underlying the Fraud.

The lower court's dismissal of the relator's complaint should be reversed because Medicare data alone does not constitute a public disclosure of "substantially the same allegations or transactions alleged." 31 U.S.C. §§ 3730(e)(4)(A). In granting the defendants' motion to dismiss the relator's second amended complaint, the court below asserted that "[i]nformation produced by the government in response to a FOIA request is a public disclosure [citation omitted], and information from prior lawsuits is obviously a public disclosure." E.R. at 12-13. The court below did not explain whether anything in the FOIA response was more than mere claims data or how it constituted the same allegations or evidence of fraud that is alleged in the relator's complaint. This Court ought not assume that the data offered anything more revealing than the frequency and nature of patient encounters and related diagnostic codes and billing amounts. This data standing alone says nothing about fraud.

Relying on information in the public domain does not necessarily trigger the public disclosure bar. The bar is only triggered when the "allegations or transactions" alleged by the relator have already been publicly disclosed. This is

why courts routinely allow relators to proceed when they use information from Medicare databases to discover relationships between database elements and patterns of activity that allow the fraud to be detected. *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs*., 2019 Dist. LEXIS 125352 (C.D. Cal. July 16, 2019) (overturned on other grounds) (relator who relied partly on government claims data was allowed to proceed with claims); *United States ex rel. Girling v. Specialist Doctors' Grp., LLC*, 2020 U.S. Dist. LEXIS 229018 (M.D. Fla. Dec. 7, 2020) (relator's use of public domain Medicare databases did not bar FCA claims). The proper inquiry is "whether the information conveyed [in the public disclosure] could have formed the basis for a governmental decision on prosecution, or could at least have alerted law enforcement authorities to the likelihood of wrongdoing." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 653-54 (D.C. Cir. 1994).

> Some courts have described this inquiry as follows:
>
> > [I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.

Id. "In terms of th[is] mathematical illustration, when X by itself is in the public domain, and its presence is essential but not sufficient to suggest fraud, the public fisc only suffers when the whistle-blower's suit is banned." *Id*.

The court below did not explain whether the FOIA response contained more than mere claims data or how it constituted the same allegations of fraud alleged in the relator's complaint or transactions from which the fraud the relator alleged could be inferred. Claims data standing alone says nothing about fraud. Something more is required to discern fraud from the data. Here, that something more is the discerning eye of another surgeon and certified coder who has been specifically trained and can interpret the claims data and show the fraud. That training and expertise is the hallmark of a material addition to the bare data.

"Facts showing fraud may be publicly disclosed either in the form of direct allegations of fraud or through disclosure of transactions that give rise to an inference of fraud." *Silbersher v. Allergan Inc.*, 2020 U.S. Dist. LEXIS 233570, at *53 (N.D. Cal. Dec. 11, 2020) (citing *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 571 (9th Cir. 2016)). Courts have held that when ascertaining whether allegations and transactions have been disclosed, "allegation" means a direct claim of fraud and "transaction" means the facts from which the existence of fraud may be inferred. *Mateski*, 816 F.3d at 570-71; (citing *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F3d 228, 235-36 (3d Cir. 2013); and *Springfield Terminal,* 14 F.3d at 653-54). The "direct claim of fraud" must include both the misrepresentation and the true state of affairs. *United States ex rel. Found. Aiding the Elderly v. Horizon West.* 265 F.3d 1011, 1015 (9th Cir. 2001).

Thus "the material elements of the allegedly fraudulent transaction are disclosed in the public domain." *Silbersher*, 2020 U.S. Dist. LEXIS 233570, at *53-54 (quoting *United States ex rel. Found. Aiding the Elderly*, 265 F.3d 1011, 1014 (9th Cir. 2001)) (internal quotations omitted). The raw Medicare data obtained here did not do this.

III. The FCA Contemplates Suits by Outsider Whistleblowers

Congress did not limit *qui tam* suits to corporate insiders. A *qui tam* suit may be filed by any "person." It is no surprise that Congress has never limited the class of potential relators to insiders. See S. Rep. No. 99-345, at 1 (FCA amendments are designed to "encourage any individual knowing of Government fraud to bring that information forward"). Moreover, in 2010, when Congress amended the public disclosure provision in several respects, Congress removed the requirement that a relator have "direct knowledge" to establish that he or she is an original source. (Sec. I, *supra*).

The 2010 amendments were in keeping with the intent of the 1986 amendments through which Congress sought to encourage a broad reading of the statute. The authors of the 1986 FCA amendments explained that a relator "who *uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents*, should be allowed to file a *qui tam* action." 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999). As Senator Grassley and

Congressman Berman explained, this is necessary because "[i]f, absent the relator's ability to understand a fraudulent scheme, the fraud would go undetected, then we should reward relators who with their talent and energy come forward…" *Ibid.* "This is especially true where a relator must piece together facts exposing a fraud from separate documents." *Ibid.* The simple reason is that education, training, experience, and talent constitute "knowledge" that is "independent" of publicly disclosed transactions, and which "materially adds" to those disclosures by showing that facially innocuous information actually signals fraud.

There is a reason that Congress wanted these actions filed by knowledgeable outsiders as well as inside tipsters – outsiders can be as or even more effective in analyzing the available information to uncover a fraud scheme. There are many examples of outsider relators who have been allowed to proceed when they relied on publicly disclosed information. *See e.g. United States ex rel. Girling v. Specialist Doctors' Grp., LLC*, No. 8:17-cv-2647, 2020 U.S. Dist. LEXIS 229018 (M.D. Fla. Dec. 7, 2020) (relator who relied on information from a Centers for Medicare and Medicaid database allowed to proceed with FCA claims). To give just a few additional examples:

- Like the relator here, Lt. Colonel James DeVage discovered fraud by comparing records of his bills with his own experience as a patient. Having worked 16 years as an IRS examiner, he was highly skilled at

examining complex records and spotting inconsistencies. His careful examination that began with just his own chart let to a $325 million recovery for the Government. David Voreacos, "*HealthSouth to Settle Medicare Fraud Charges – Whistleblower Stands to Collect $8 Million*", (Bloomberg News, Jan 26, 2005) accessed via https://www.chron.com/business/article/HealthSouth-to-settle-Medicare-fraud-charges-1505588.php , last visited May 24, 2021. U.S Dep't of Justice, "*Healthsouth to Pay United States $324 Million to Resolve Medicare Fraud Allegations*," (Dec. 30, 2004) [Press Release] https://www.justice.gov/archive/opa/pr/2004/December/04_civ_807.htm, last visited May 24, 2021.

- Richard West, a wheelchair-bound veteran had his home health services cut off when New Jersey's Medicaid program determined he had used up his annual benefits. After going through fifteen months of his home health agency's billing and comparing it with his personal diary, he ultimately filed a *qui tam* case which led to a $150 million recovery. *Feds: Company Agrees to Pay $150 Million Over Medicaid Fraud Charges*, (CNN.com, September 12, 2011), http://edition.cnn.com/2011/US/09/12/medicaid.fraud/index.html, last visited May 24, 2021.

- Four outsiders, partners in a small infusion therapy company (Ven-A-Care) discovered kickback schemes run by major pharmaceutical companies and recovered $2.986 billion for the United States. When Ven-A-Care began receiving Medicare payments in the hundreds of dollars for drugs they had paid just thirty dollars for, it first returned the checks to Medicare, thinking Medicare must have made a mistake. When Medicare sent the payments back to the company the partners began studying how drug companies used discounts to create a "spread" between a drug's actual price and the publicly known "sticker price." *United States ex rel. Ven-a-Care of the Fla, Keys, Inc. v. Actavis Mid Atlantic* LLC, 659 F.Supp.2d 262 (D. Mass. 2009).
- Stephen Shea, a telecommunications consultant investigated the billing practices of wireless carriers and determined, entirely as an outsider, that they had overcharged the Government. The case he filed led to a $93 million recovery for the United States. *United States ex rel. Shea v. Verizon Comms., Inc.*, 844 F.Supp.2d 78, 80 (D.D.C. 2012).
- An outsider data analyst and cardiac nurse teamed up to identify a widespread scheme involving the unnecessary implantation of cardiac devices in thousands of patients, leading to a recovery of $250 million. *See* U.S. Dep't of Justice, *Nearly 500 Hospitals Pay United States More*

Than $250 Million to Resolve False Claims Act Allegations Related to Implantation of Cardiac Devices (Oct. 30, 2015), https://www.justice.gov/opa/pr/nearly-500-hospitals-pay-united-states-more-250-million-resolve-false-claims-act-allegations.

These outsiders used their expertise and experience to review data and other available documentation, conduct analyses, and complete thorough investigations. They uncovered and reported fraud against the Government that would otherwise go undetected. This is exactly the result that Congress intended. *See* 145 Cong. Rec. E1546-01 (daily ed. July 14, 1999), 1999 WL 495861, at *E1547.

Moreover, allowing outsider whistleblowers serves the Act's purposes of encouraging whistleblowers to step forward and provide valuable information for the government. Outsider whistleblowers do not face some of the same barriers that insider relators often face, including employment retaliation, harassment, termination, and attempts to sabotage future employment. Outsider relators also do not have to fear accusations that they were somehow complicit in the fraud scheme. *See e.g.,* The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Com. on the Judiciary, 110th Cong. 167-85 (2008) (statement of Tina M. Gonter, Relator), *available at*, https://www.judiciary.senate.gov/download/testimony-oftina-mgonter-pdf. *See*

also, e.g., Alexander Dyck, et al., Who Blows the Whistle on Corporate Fraud?, 65 J.Fin. 2213, 2240-45 (2010); Yuval Feldman & Orly Lobel, The Incentive Matrix: The Comparative Benefits of Rewards, Liabilities, Duties, Protections for Reporting Illegality, 88 Tex.L.Rev. 1151 (2010); James Moorman, The Whistleblower Experience: The High Cost of Integrity, 42 False Claims Act and *Qui Tam* Quarterly Review 73 (2006). Further, a relator viewing a full set of data from an outsider perspective may actually have a fuller perspective on the scheme than an insider who worked in, for example, the billing department, but may not know what is occurring in the operating room. This is especially true if she has specialized knowledge and expertise that would allow her to more effectively analyze the public data.

Where the relator has alleged fraud in the provision of medical services, billing, and coding, the relator may bring a sophisticated understanding that is independent of any allegations or transactions that may have been publicly disclosed. Having the training and expertise that gives a heightened ability to recognize fraud in publicly disclosed information can materially add to the bare information itself.

Congress did not intend to exclude outsiders and the FCA's authors unequivocally call for the involvement of knowledgeable outsiders to bring their experience to bear in bringing fraud to light. It is thus difficult to justify the

crabbed anti-textual reading of the FCA that the defendant urges. As stated *infra*, the history of the public disclosure bar and the original source exception is a history of Congress repeatedly rejecting judicial restrictions that would close the door to more relators.

Although this Court has not yet determined how the new "original source" language should be interpreted, nothing in the text of 31 U.S.C. §3730(e)(4)(B) suggests that only insider knowledge of the defendant's fraud itself will qualify a relator as an original source. Consistent with Congress' manifest intent to lower the bar for relators, any knowledge that will "add value to what the government already knew" is sufficient. *United States ex rel. Hastings v. Wells Fargo Bank, NA, Inc.*, 656 F. App'x 328, 331-332 (9th Cir. 2016).

When correcting the "original source" language, Congress did not require *evidence* "that is independent of and materially adds to the publicly disclosed allegations or transactions." Congress required knowledge. 31 U.S.C. §3730(e)(4)(B). Having training and expertise that gives one the ability to recognize fraud in publicly disclosed information is plainly something that materially adds to the bare information itself. The bare information – in this case claims data – said nothing about fraud. Rather, for the claims data to take any meaningful form, someone trained in coding or who otherwise understood how to

analyze the data was required to scrutinize the data and develop a theory of fraud. That relator has materially added to the bare data.

CONCLUSION

For the foregoing reasons, the order granting defendants' motion to dismiss the Second Amended Complaint should be reversed.

Respectfully submitted,

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Dated: May 24, 2021

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Cir. R. 32-1(a) because it contains 4,109 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(f). This brief also 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

Dated: May 24, 2021

/s/ Mark Kleiman

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 20-55874

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