No. 14-1168

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLYTENOW, INC.,

Petitioner,

v.

Administrator, FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR HEARING EN BANC

On Petition for Review of an Order of
the Federal Aviation Administration

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GLOSSARY

FAA	Federal Aviation Administration
JA	Joint Appendix, Document # 1530250 filed 01/05/2015
MacPherson-Winton Interpretation	Letter from FAA to Rebecca B. MacPherson and Gregory Winton responding to request for legal interpretation
PA	Petitioner's Addendum to Opening Brief, Document # 1530251 filed 01/05/2015
POB	Petitioner's Opening Brief, Document # 1530249 filed 01/05/2015
REP	Petitioner's Reply Brief, Document # 1546445 filed 04/08/2015
RESP	Brief for the Respondent, Document # 1541908 filed 03/11/2015

INTRODUCTION AND RULE 35(B)(1) STATEMENT

This case involves a challenge to a letter of interpretation ("MacPherson–Winton Interpretation") issued by the Federal Aviation Administration ("FAA") that prohibits private pilots from sharing expenses with their passengers because those pilots used the Internet to communicate. Although pilots have been communicating with passengers in order to share flight operating expenses since the beginning of general aviation, and with the express approval of the FAA for over 60 years, the FAA has now deemed such communications unlawful. In doing so, the FAA has issued a regulatory interpretation that violates the common law, this Court's precedent, and the First Amendment to the U.S. Constitution. The panel decision under review conflicts with Supreme Court and Circuit precedents and raises issues of exceptional importance. Flytenow's petition for en banc hearing should be granted for three reasons.

First, the panel's refusal to consider the argument that the common law definition of "common carrier" conflicts with the FAA's definition was based on factual inaccuracies and conflicts with Circuit precedent. Specifically, the panel held that this argument was waived because it was raised for the first time in Petitioner Flytenow, Inc.'s ("Flytenow") reply brief. *Flytenow, Inc. v. FAA*, 808 F.3d 882, 892–93 (D.C. Cir. 2015). In fact, the argument was not only raised in Flytenow's opening brief, but Flytenow also replied directly to this issue *after* the FAA raised it in their answering brief. Circuit precedent expressly permits appellants to respond to contentions made in an answering brief in their reply brief. *See United States v. Van Smith*, 530 F.3d 967, 973 (D.C. Cir. 2008); *see also Envtl. Def. Fund v. E.P.A*, 210

F.3d 396, 401 n.8 (D.C. Cir. 2000). The panel erred in not reaching a dispositive issue that strongly favors Flytenow on the merits.

Second, the panel did not resolve the question of what level of deference is due given that the MacPherson–Winton Interpretation involved a mixed-interpretation scenario where interpretation of statutory, common law, and regulatory definitions was material to the outcome but the agency predominantly interpreted common law terms. This is a question of exceptional importance. Moreover, in this case, application of *Auer* deference is exceedingly inappropriate based on current Supreme Court and Circuit precedent. *See Gonzales v. Oregon*, 546 U.S. 243, 245–46 (2006); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2159 (2012); *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199 (2015).

Third, the panel's decision regarding the First Amendment violations at issue in this case directly contravenes the Supreme Court's holding in *Reed v. Town of Gilbert* for content based restrictions on speech. 135 S.Ct. 2218 (2015). In that case, the Supreme Court held that "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2231. Applying strict scrutiny, the Court struck down a town's sign code that "single[d] out signs bearing a particular message: the time and location of a specific event." *Id.* In this case, the FAA has imposed content based speech restrictions on the communications of Flytenow and its member pilots by singling out web postings that bear a particular message; viz., the time and location of a pilot's specific travel plans. *Reed* was decided prior to oral argument in this case, and Flytenow supplemented the record with the case pursuant to Fed. R. App. P. 28(j). The panel

erred by not applying strict scrutiny to the actions of the FAA as a content based restriction on speech pursuant to *Reed*.

ISSUES PRESENTED

(1) Whether the panel erred by not considering the common law definition of "common carriage," which contravenes the FAA's definition of "common carriage" as applied to expense-sharing services.

(2) Whether the panel erred by giving *Auer* deference, i.e. deference due an agency's interpretation of its regulations, when the agency predominantly interpreted common law terms.

(3) Whether the panel erred when it held that the FAA could permissibly prohibit pilot communications regarding discriminately-available expense-sharing services on the Internet, thus contravening *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, Flytenow, Inc., operates a website for the exclusive use of FAA-certified pilots and their passengers to communicate in order to share the operating expenses of a pre-planned flight. Flytenow acts as a communications facilitator to match pilots with flight enthusiasts and then allow a pilot to defray operating expenses of the flight with passengers pursuant to FAA regulations. 14 C.F.R § 61.113(c) ("[A] pilot may accept compensation in the form of a pro rata share of operating expenses for a flight from his or her passengers" ("Expense-Sharing Rule")); JA.058.

For decades, the FAA has recognized the right of pilots and passengers to share the operating expenses of flights. *See* 29 Fed. Reg. 4717, 4718 (April 2, 1964); 62 Fed. Reg. 16220, 16263 (April 4, 1997). Pilots and passengers have been able to

connect with one another for purposes of identifying flights using a wide variety of platforms. For example, one such customary practice involves pilots posting their planned flights on local airport bulletin boards, or in other community spaces, so that a passerby who has an interest in the destination of the flight can contact the pilot, request to join the flight, and share the costs pursuant to the Expense-Sharing Rule.

Today, the power of collaborative consumption—systems of organized sharing through digital technologies—continues to transform the way we live and communicate. Communication is no longer limited to physical bulletin boards, but rather, has extended to the Internet, and by virtue, to social media and websites.

Flytenow has effectively created an online bulletin board to facilitate the genuine sharing of expenses between pilots and passengers who have a demonstrated common purpose in a flight. Flytenow launched its Internet-based platform in January 2014. Shortly thereafter, several pilot-members indicated that the FAA insisted participation on Flytenow was illegal. As one pilot-member noted, FAA enforcement officials "let me know in no uncertain terms that they consider this [the Flytenow website] [to be] holding out for illegal charter. They will be/are going after these operations." PA.007.

Therefore, in February 2014, Flytenow requested a formal Letter of Interpretation from the Office of the Chief Counsel of the FAA regarding Flytenow's communications platform and the Expense-Sharing Rule. JA.047–50. On August 14, 2014, the FAA rendered its final agency order to Flytenow concluding that pilots communicating on the website must obtain a commercial license even though no commercial profit is possible under the expense-sharing arrangement, thus

extinguishing the traditional right of a pilot to defray operating expenses. JA.061–62.

Flytenow timely filed a petition for review in this Court challenging the FAA's Interpretation. On December 18, 2015, a panel of this Court denied the petition for review.

ARGUMENT

I. THE PANEL'S REFUSAL TO CONSIDER THE COMMON LAW DEFINITION OF "COMMON CARRIAGE" CONTRAVENES CIRCUIT COURT PRECEDENT.

Since the outset of this litigation, Flytenow has contended that the FAA's definition of "common carriage" contravenes both this Court's definition of that term as well as the common law. However, the panel did not consider this crucial argument because it concluded that Flytenow raised the argument for the first time in its reply brief. *Flytenow*, 808 F.3d at 892–93. Flytenow not only raised the issue of the common law definition of common carriage in its opening brief, but Flytenow also replied to this issue in direct response to arguments made by the FAA in the agency's Answering Brief. As a result, in line with longstanding Circuit precedent, the panel should have considered this argument, which strongly supports Flytenow's request to have the FAA's letter of interpretation set aside. Because the panel did not properly consider this argument, the Court should grant the petition for en banc review.

An entire section of Flytenow's opening brief discussed how the FAA's interpretation of common carriage was owed no deference because common carriage is defined in the common law, and the FAA's interpretation departs from that

definition. Courts do not generally entertain arguments omitted from an appellant's opening brief and raised initially in the reply brief. *See McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986); *see also Corson & Gruman Co. v. N.L.R.B.*, 899 F.2d 47, 50 (D.C. Cir. 1990). But, of course, that principle does not apply if the argument was, in fact, raised in the opening brief, as was the case here. POB.16 ("Since the FAA has interpreted *only common law terms* here, and because the FAA has *radically departed* from previous interpretations *and precedent*, the *MacPherson–Winton* Interpretation is entitled to no deference by this Court.") (emphasis added); POB.30 ("Here, the key terms that the FAA had to interpret and apply to Flytenow's facts [including "common carriage"] are, by the FAA's own admission, all *common law* terms") (emphasis added). POB.35 ("'[C]ommon carriage' as opposed to private carriage…[is a] purely *common law* term[]") (emphasis added). Although Flytenow's opening brief discussed the common law definition of common carrier in the context of deference, Flytenow expressly asserted that the FAA's definition of that term "radically departed" from common law precedent. POB.16. And in any event, the question of deference is inextricably intertwined with the argument that the FAA's definition of common carriage is at odds with the common law definition. As a result, the argument was simply not forfeited.

If there was any question about whether Flytenow properly raised its argument regarding the common law definition of common carriage, it was foreclosed by the FAA's answering brief, which expressly contended that the agency's definition of common carrier is in line with the common law definition of that term. "To be sure,

an appellant may use his reply brief to respond to a contention made by the appellee." *Van Smith*, 530 F.3d at 973; *see also Envtl. Def. Fund*, 210 F.3d at 401 n.8 (appellant's argument was properly raised in the reply brief when appellees' raised the issue in their answering brief).

In its answering brief, the FAA expressly argues that its definition of common carrier comports with, and does not contravene, the common law definition of that term. Specifically, the FAA argues, "The 'holding out' element of common carriage is not separately codified, but it has been consistently articulated by the FAA *and endorsed by this Court* in applying the 'common carrier' concept." Resp.30. The FAA goes on to argue that "[t]his Court has already interpreted the term 'common carrier' in the governing FAA statute, explaining that it is a 'well-known term that comes to us from the *common law*…'" Resp.35 (*citing CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 415 (D.C. Cir. 2011)) (emphasis added). As a result, to the extent the door was not already ajar regarding the common law definition of common carriage in Flytenow's opening brief, the FAA blew it wide open in its answering brief. Because the FAA contended in their answering brief that their definition of common carrier does not contravene the common law definition of common carrier, Flytenow was entitled, indeed, should be expected, to respond to that contention in Flytenow's reply brief. The panel, therefore erred in not reaching this dispositive issue.

As a final matter, the reasons this Circuit has articulated for precluding arguments raised in a reply brief simply do not apply in this case. "Considering an argument advanced for the first time in a reply brief, then, is not only unfair to an

appellee, but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *McBride*, 800 F.2d at 1211 (internal citations omitted). But reaching the issue of whether the common law definition of common carrier conflicts with the FAA's definition does neither of those things. The FAA has obviously not been prejudiced because the common law definition of common carrier was raised in the opening brief. Moreover, the FAA itself used that definition to support its own arguments in their answering brief. Therefore, not only did the FAA have an opportunity to respond to this argument, but they did respond, by discussing it in their answering brief.

Additionally, ignoring the common law definition of common carrier in this case, as the panel did, has itself resulted in an improvident and ill-advised opinion, not the other way around. In this case, the common law definition of common carrier is clearly at odds with the FAA's definition. *See* POB.16, POB29–30, POB.35; Rep. 3–9. The panel's decision, therefore, sanctions agency contravention of governing legal authority; or, in other words, regulatory lawlessness. If the panel's decision is allowed to stand, it signals to regulatory agencies that they are free to ignore common law precedent in fashioning their own rules. It will also be the first time in history that expense-sharing services, which by definition cannot result in a commercial profit, will be considered commercial enterprise under the common law definition of common carrier. Addressing a fundamental and central issue in this case that involves a conflict between this Circuit's precedent and the FAA's rules, therefore, is not improvident nor ill-advised; ignoring it is.

II. EN BANC REVIEW IS NECESSARY TO RESOLVE THE ISSUE OF WHAT DEFERENCE IS DUE WHEN THE AGENCY PREDOMINANTLY INTERPRETS COMMON LAW TERMS MIXED WITH INTERPRETATION OF STATUTE AND ITS REGULATIONS.

In this case, the panel applied "the familiar *Auer v. Robbins* framework" to what it characterized as "the FAA's interpretation of its own regulations." *Flytenow*, 808 F.3d at 889. "[E]ven without such deference," the panel held, "we have no difficulty upholding the FAA's interpretation of *its regulations* in this case." *Id.* at 890 (emphasis added). The panel, thus, included the MacPherson–Winton Interpretation under the rubric of agency "interpretation of its regulations." But the panel also characterized the MacPherson–Winton Interpretation as an interpretation that relies on a "statute [49 U.S.C. § 40102(a)]," *Id.* at 885, 886, 889, 892, on FAA's "regulations [14 C.F.R. §§ 1.1, 61.113]," *Id.* at 885, 886, 889, on FAA Advisory Circular 120–12A, *Id.* at 886, 887, and on common law, *Id.* at 886, 892, 893. The FAA's interpretation, thus, was a mixed interpretation of a statute, its own regulations, common law terms such as "holding out" and "common carriage," and its Advisory Circular 120–12A, and *each* of those four component interpretations were essential to reaching the result. In a mixed-interpretation scenario such as this, there is no clear guidance on what deference is due; no court has construed such a mixed interpretation as an interpretation of the agency's regulations and given it *Auer* deference. In light of the Supreme Court's unanimous skepticism as to the continued validity of *Auer*, this question has become exceptionally important. *See Perez*, 135 S.Ct. at 1208 n.4, 1210, 1212, 1214. Especially so when it is evident that the FAA's interpretation here relies heavily on common law rather than its

regulations, as Flytenow pointed out several times in its Opening Brief. *See* POB.16, POB.29, POB.30, POB.35.

Court decisions fail to provide guidance as to what deference is due in a mixed-interpretation scenario. When an agency relies on and interprets common law, this Circuit has held that no deference is due. *Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310, 1314–15 (D.C. Cir. 2012); *but see Edwards v. Califano*, 619 F.2d 865, 869 (10th Cir. 1980) ("not entitled to great deference"). If the agency relies on and interprets an advisory circular or "guideline," *Flytenow,* 808 F.3d at 886, such interpretations "are beyond the *Chevron* pale." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001); *see also Motor Vehicle Mfrs. Ass'n v. N.Y. State Dept. of Envtl. Conservation*, 17 F.3d 521, 534–35 (2d Cir. 1994) (refusing to apply *Chevron* deference to agency's interpretation of a statute put forth in an agency advisory circular).

Chevron deference applies to the agency's interpretation of an ambiguous statute, but if such interpretation is contained in an opinion letter, policy statements, agency manuals or a "guideline," *Flytenow,* 808 F.3d at 886, like FAA's Advisory Circular 120–12A, *Skidmore* deference applies. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *see also King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) (whether Congress has delegated to the agency the power to interpret the statute is a question the courts determine). Here, the FAA interpreted the term "common carrier" to include discriminately-available expense-sharing services in a marked departure from the common law definition which the agency said it relied upon and interpreted. *See also* 49 U.S.C. § 40102(a)(25) ("common carrier" not defined).

These cases and recent developments indicate that *Auer* deference or an "exceedingly deferential standard," *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 182 (D.C. Cir. 2001), is inappropriate in such circumstances. *See Gonzales*, 546 U.S. 243 (concluding: no *Auer* deference; no *Chevron* deference; interpretation unpersuasive under *Skidmore*; interpretation not upheld merely because the administration asserted an ancillary safety concern; interpretation constitutionally deficient); *Christopher*, 132 S.Ct. at 2159 (concluding *Auer* deference was inappropriate); *Perez*, *supra* (a unanimous Supreme Court doubting the continued validity of *Auer*). Because the MacPherson–Winton Interpretation predominantly interprets common law terms, the better rule would be to give no deference to it, i.e. the level of deference due an agency's interpretation of common law. Consequently, the question of what deference is due in a mixed-interpretation scenario is a "question of exceptional importance," Fed. R. App. P. 35(a)(2), that necessitates en banc review.

III. THE PANEL'S FIRST AMENDMENT HOLDING CONFLICTS WITH *REED V. TOWN OF GILBERT* AND CIRCUIT COURT OPINIONS.

The panel's opinion regarding the First Amendment violations at issue in this case directly conflicts with the Supreme Court's *Reed v. Town of Gilbert's* framework for content-based restrictions on speech. 135 S.Ct. 2218. The panel holds that "[the FAA] is using speech (postings on Flytenow.com) as evidence that pilots are offering service that exceeds the limits of their certifications." *Flytenow,* 808 F.3d at 894. But the Supreme Court has recently struck a different balance in *Reed*

v. Town of Gilbert, 135 S.Ct. 2218 (2015). In *Reed*, the Court held that the Town's look at the content of the speech in order to determine which level of speech restriction applies, and whether that speech is prohibited, are impermissible content based restrictions on speech. That analysis undoubtedly establishes that the FAA's speech restriction in this case is content-based. In *Reed*, as here, the "need to obtain" a Part 119 certificate "depends entirely on the communicative content of the message." *Working Am., Inc. v. City of Bloomington*, __ F.Supp.3d __, 2015 WL 6756089, at *5 (D. Minn., Nov. 4, 2015). After *Reed*, "an innocuous justification" such as safety "cannot transform a facially content-based law into one that is content neutral," *Reed*, 135 S.Ct. at 2228, and "at the first step, the government's justification or purpose in enacting the law is irrelevant." *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (citing *Reed*, 135 S.Ct. at 2228–29). *Reed* "effectively abolishes any distinction between content regulation and subject-matter regulation." *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015). Thus, regulations prohibiting activity-related speech are now content-based speech restrictions that are strictly scrutinized. *Id.* at 413 (Manion, J., concurring).

The panel cites *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388–89 (1973), to conclude that the advertising of illegal *activity* has never been protected speech. *Flytenow*, 808 F.3d at 894. But expense-sharing under 14 C.F.R. § 61.113(c) is not an illegal activity, and the panel holds that speech concerning a *legal activity* is permissibly prohibited. *Id.* This is also not a situation where speech is used to establish elements of a crime or to prove motive or intent. *See Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993) ("'Do you all feel

hyped to move on some white people? … There goes a white boy; go get him'"). As such, the FAA's speech restriction here falls squarely within the content based category under *Reed*, necessitating en banc review.[1]

Even if Flytenow-subscribing pilots' speech is considered commercial speech,[2] such speech "concern[ing] a lawful activity" that "is not misleading" is protected by the First Amendment. *Whitaker v. Thompson*, 353 F.3d 947, 952 (D.C. Cir. 2004); *see also Miller v. Stuart*, 117 F.3d 1376, 1382 (11th Cir. 1997) ("holding out" is "speech [that] warrants protection under the First Amendment"). Expense-sharing under 14 C.F.R. § 61.113(c) is a lawful activity, and nothing in the postings on Flytenow.com is misleading. Only licensed pilots, self-designating their certification level, and subject to background checks by Flytenow.com, can post on Flytenow.com. PA.023. Other less-restrictive alternatives to "further an important government interest," *Flytenow*, 808 F.3d at 894, are available, such as a prominent disclaimer on Flytenow.com, which is already part of the Flytenow.com Terms of

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[1] Flytenow brought *Reed* to the court's attention in a Rule 28(j) letter of supplemental authority because *Reed* was decided after briefing before the panel concluded. *See Norton*, *supra* (inviting parties to file *post-decision* supplemental memoranda discussing *Reed*).

[2] Whereas "commercial speech" is speech that does no more than "simply propose a commercial transaction," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976), to which the *Central Hudson* test applies, speech that "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services [is not treated as] a variety of purely commercial speech," *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980), and such speech does "not … retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988). Flytenow-subscribing pilots' speech is not commercial speech by these standards.

Service, PA.023, thus providing additional information and reminders to flight enthusiasts. Flytenow.com also provides a forum for pilots and enthusiasts to strike a dialog, and provides ample opportunities to enthusiasts to ask about the qualifications, licensure, and skill level of pilots before agreeing to share expenses with the pilot. PA.026. Thus, passengers on Flytenow.com obtain *more* information about pilot competence and safety than even commercial common carriers like American Airlines disclose on their booking websites.

The panel's decision in this case (Pillard, Wilkins, Ginsburg, JJ.) directly conflicts with the First Amendment analysis that another panel of this Court employed in *Edwards v. Dist. of Columbia*, 755 F.3d 996, 1000 (D.C. Cir. 2014) (Henderson, Brown, Wilkins, JJ.), that the Supreme Court employed in *Reed*, and sister circuits employ in post-*Reed* decisions. In this case, we have reached the "point" at which "a measure is no longer a regulation of a profession but a regulation of speech." *Lowe v. SEC*, 472 U.S. 181, 230 (1985) (White, J., concurring). By concluding that the holding out analysis turns not on whether the flight-sharing is discriminately available but on the segment of the public that the website reaches, the panel's opinion leads to the unintended consequence that the exact same speech concerning the exact same activity on any other website—such as Facebook.com—receives more protection than speech on Flytenow.com. Furthermore, private pilots, who are licensed by the FAA based on the fact that they can safely operate an aircraft as professionals exercising their professional judgment, enjoy First Amendment protections that approach a nadir. "[P]rofessional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Conant v. Walters*, 309 F.3d 629,

637 (9th Cir. 2002) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). The professional speech doctrine underlying the panel's opinion in this case inherently discriminates against speech based solely on its content and the identity of the speaker, which triggers strict scrutiny in every other context. *Reed*, 135 S.Ct. at 2227; *see also Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2665 (2011) (holding that any effort to restrict speech based on the speaker's "economic motive" is an identity-based restriction, also subject to strict scrutiny). It is inconsistent with Supreme Court precedent and creates an intra- and inter-circuit split in authority.

The need for clarification will only increase over time as the nation's economy becomes increasingly service-oriented, and communication-facilitating technology like Flytenow.com becomes increasingly pervasive. The dividing line between *speech* and *activity*, *Flytenow*, 808 F.3d at 894–95—already a "rough" one in Justice White's day, *Lowe*, 472 U.S. at 231 (quoting *Thomas v. Collins*, 323 U.S. 516, 544–48 (1945) (Jackson, J., concurring))—will only become more blurred. An en banc guidance on the standard of scrutiny applicable to burdens on professional speech, or speech of individuals who are licensed by the government, is essential not only to "maintain uniformity of the court's decisions," *compare Flytenow*, *supra*, *with Edwards v. Dist. of Columbia*, *supra*, but is also "a question of exceptional importance," Fed. R. App. P. 35(a)(1)–(2), thus necessitating en banc review in light of the Supreme Court's decision in *Reed*.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

Respectfully submitted,

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Pursuant to Fed. R. Civ. App. P. 35(b)(2), the undersigned certifies this brief is 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman Font.

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