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For Immediate Release: March 13, 2014

AFLC Seeks Full Court Review in Ninth Circuit of Panel Ruling that Upheld Ban on American Flag Shirts at California High School

San Francisco, California (March 13, 2014)—Late yesterday, the American Freedom Law Center (AFLC), a nonprofit Judeo-Christian law firm, filed a petition for *en banc* (full court) review with the Ninth Circuit, seeking review of a prior ruling by a three-judge panel which upheld a school district's ban on the wearing of American flag shirts on a California high school campus during a school-sanctioned *Cinco de Mayo* (May 5th) celebration.

In its decision, the Ninth Circuit panel ruled that the school officials' concerns of racial violence by "Mexican" students celebrating *Cinco de Mayo* against the "Caucasian" students for wearing American flag shirts on campus outweighed the students' First Amendment rights. Specifically, the court held:

"[T]he specific events of May 5, 2010, and the pattern of which those events were a part made it reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real. We hold that school officials . . . did not act unconstitutionally, under either the First Amendment or Article I, § 2(a) of the California Constitution, in asking students to turn their shirts inside out, remove them, or leave school for the day with an excused absence in order to prevent substantial disruption or violence at school."

The petition for full court review, which was drafted by AFLC Co-Founder and Senior Counsel Robert J. Muise, who also argued the case before the three-judge panel in San Francisco [[audio of argument available here](#)], argues that the panel's decision "overlooked material points of fact and law" and impermissibly incorporates a "heckler's veto" into the First Amendment, contrary to established precedent.

Muise commented: "It is never appropriate to ban an American flag on a public high

school campus in America. Moreover, not only is the panel's decision wrong as a matter of Supreme Court precedent, the decision affirms a dangerous lesson by rewarding student resort to disruption rather than reason as the default means of resolving disputes. The school district's proper response should be to educate the audience rather than silence the speaker."

David Yerushalmi, AFLC Co-Founder and Senior Counsel, commented: "The panel reasoned that because the 'Mexican' students were *not* 'targeted for violence,' they were permitted to express their message. Yet, because school officials perceived that the same 'Mexican' students might react adversely to the pro-America students, the latter group's speech—wearing an American flag t-shirt for goodness sakes—should be silenced. This not only creates perverse incentives for student hecklers; it ultimately turns the First Amendment on its head."

As stated in AFLC's petition:

"[O]ur Constitution does not permit public school officials to deny Plaintiffs' form of expression—the peaceful, passive, and silent expression of a pro-America message through the wearing of a shirt depicting the American flag Moreover, one of the 'bedrock First Amendment principles' that the panel's decision disregards (and, indeed, fails to mention) is that government officials may not 'restrict speech based on listener reaction,' even if the listeners are minors on a public school campus. This is known in First Amendment parlance as a 'heckler's veto.'"

On May 5, 2010, school officials from Live Oak High School in the Morgan Hill Unified School District, California, prevented five students from wearing American flag shirts because the officials did not want to offend "Mexican" students on "their day." That day, some students at the school were celebrating the holiday known as Cinco de Mayo. School officials approved the Cinco de Mayo celebration, which was co-sponsored by M.E.Ch.A, a school-sanctioned student group. While school officials claimed that they were concerned about racial tension and potential threats of violence in light of an altercation that occurred between Mexican and American students on campus during a 2009 Cinco de Mayo celebration, the officials nonetheless approved the 2010 Mexican celebration, demonstrating that their fear of violence was nothing short of a pretext.

The students wearing the American flag shirts had been on campus for over 3 hours when

they were approached by an assistant principal and ordered to turn their shirts inside out. When the students refused to disrespect the American flag, the school official directed them to the principal's office where they were lectured on the importance of Cinco de Mayo and given the option of either removing their shirts or leaving school. The students refused to remove the shirts, so they left school and then filed this civil rights lawsuit.

The **American Freedom Law Center** (AFLC) is a national, nonprofit Judeo-Christian law firm that fights for faith and freedom through litigation, public policy initiatives, and related activities. The IRS recognizes AFLC as a section 501(c) (3) organization. AFLC does not charge for its services, and it is supported by contributions from individuals, corporations, and charitable foundations. Visit us at www.americanfreedomlawcenter.org.

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