Nos. 19-251 & 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION AND THOMAS MORE LAW CENTER, *Petitioners*,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amicus Curiae of Free Speech Coalition, Free Speech Def. & Ed. Fund, Cal. Constitutional Rights Fdn, Gun Owners Fdn, Gun Owners of America, Nat'l Ass'n for Gun Rights, Nat'l Fdn for Gun Rights, Leadership Inst., Young America's Fdn, Nat'l Right to Work Legal Def. Fdn, Nat'l Right to Work Com., One Nation Under God Fdn, U.S. Constitutional Rights Legal Def. Fund, Public Advocate, Clare Boothe Luce Center for Cons. Women, Western Journalism Center, Cons. Legal Def. & Ed. Fund, Downsize DC Fdn, DownsizeDC.org, The Senior Citizens League, and Restoring Liberty Action Com. in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Free Speech Coalition, Gun Owners of America, Inc., National Association for Gun Rights, National Right to Work Committee, Public Advocate of the United States, DownsizeDC.org, and The Senior Citizens League are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Free Speech Defense and Education Fund, Young America's Foundation, Gun Owners Foundation, California Constitutional Rights Foundation, Leadership Institute, National Foundation for Gun Rights, National Right to Work Legal Defense Foundation, One Nation Under God, U.S. Constitutional Rights Legal Defense Fund, Clare Boothe Luce Center for Conservative Women, Western Journalism Center, Conservative Legal Defense and Education Fund, and Downsize DC Foundation are nonprofit educational and legal aid organizations, exempt under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization.

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Several of

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[1] It is hereby certified that counsel for all parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

these *amici* have filed *amicus* briefs in this and other related cases, including:

- AFPF v. Harris, Nos. 15-55446 & 15-55911, Ninth Circuit, Brief *Amicus Curiae* in Support of Petition for Rehearing *En Banc* (January 21, 2016);
- Citizens United v. Schneiderman, No. 16-3310, Second Circuit, Brief *Amicus Curiae* in Support of Appellants and Reversal (January 13, 2017);
- AFPF v. Becerra, Nos. 16-55727 & 16-55786, Ninth Circuit, Brief *Amicus Curiae* in Support of Plaintiff-Appellee and Affirmance (January 27, 2017);
- Institute for Free Speech v. Becerra, No. 17-17403, Ninth Circuit, Brief *Amicus Curiae* in Support of Plaintiff-Appellant and Reversal (March 16, 2018);
- AFPF v. Becerra, Nos. 16-55727 & 16-55786, Ninth Circuit, Brief *Amicus Curiae* in Support of Petition for Rehearing *En Banc* (October 5, 2018); and
- AFPF v. Becerra, Nos. 19-251 & 19-255, U.S. Supreme Court, Brief *Amicus Curiae* in Support of Petitioners (September 25, 2019).

STATEMENT

California is one of approximately 40 states[2] that license and regulate how nonprofit organizations may communicate with state residents when raising funds for their programs.[3] Although these "State Charitable Solicitation Acts" ("CSAs") vary, most require tens of thousands of nonprofit organizations — and often the for-profit firms which help them raise funds — to register in advance, to report periodically, to pay fees to the state, and to comply with a myriad of burdensome requirements.[4]

Generally, registration requires filing an application supported by certain attachments, enclosures, certifications, and payment of registration fees.[5] Once filed, the documents usually become

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[2] *See* www.multistatefiling.org/n_appendix.htm.

[3] The Ninth Circuit broadly describes the role of the Attorney General under this statute to be "policing charitable fraud." *See* Americans for Prosperity Foundation v. Becerra, 903 F.3d 1000, 1004 (9th Cir. 2018) ("AFPF"). Under such a theory, the general affairs of every nonprofit mailing nationally would be accountable to the Attorneys General of every state into which its mail is directed, not just those jurisdictions where it is domiciled or maintains a physical presence.

[4] Requirements can be sourced in statutes, regulations, guides, or sometimes contained on the registration and reporting forms without any statutory or regulatory authorization.

[5] Some states require multiple signatures and notarized signatures on forms, which can require that these forms be physically sent around the country before filing.

subject to public review. Only after registration is the nonprofit allowed to communicate with that state's residents about issues and programs, and solicit contributions. Thereafter, registrants must continue to file annual reports and pay renewal fees. Some states require updates to be filed within 30 days after any change to the materials previously filed.[6] A state may punish noncompliance through substantial civil fines and injunctive relief including prohibition from continuing to mail to, and solicit funds from, residents of the state.[7]

Although larger nonprofits and fundraisers often develop the expertise in-house to comply with the multitude of states' requirements, many must use funds contributed for their programs to purchase compliance services. For organizations seeking to raise funds on a nationwide basis, the fees and costs of complying with these laws can run $10,000 or more annually. Even worse, these redundant disclosures of information impose an enormous compliance burden while doing the public no good — except for providing states with a rationale for collecting fees, and giving

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[6] Although there has been an effort to develop a "unified registration statement" to standardize registration and reporting, several states that have joined that effort have soon thereafter thwarted its purpose and made the process more complicated by imposing additional state-specific requirements. *See* The Unified Registration Statement (The Multi-State Filer Project).

[7] Penalties can range from $1,000 "per act or omission," to $10,000 for violations "with intent to deceive or defraud...." Cal. Gov. Code § 12591.1(a) and (c).

state officials a regulatory hook to exercise control over nonprofits.

CSAs impose a particular burden on new organizations seeking to do test mailings or to begin a direct mail fundraising program to determine whether there is sufficient support for their cause to raise funds in the mail. The threshold cost of many thousands of dollars, imposed on top of printing and postage, discourages new entrants from trying to enter and compete in the marketplace of ideas.

The burden placed on nonprofits by CSAs is just one aspect of state control over nonprofits. The California Attorney General publishes a 110-page Guide[8] setting out all the myriad of rules and regulations imposed on nonprofits. And California is just one of 50 states. By any standard, nonprofits operate in a highly regulated industry. Faced with thousands of rules, nonprofits can be expected to violate some statute, regulation, policy, or instruction with some frequency, allowing states to find technical violations by virtually every organization and thus empowering state officials to silence those organizations through fines, cease and desist demands, and in some cases civil and criminal prosecutions.

In states like California, state attorneys general enjoy broad law enforcement powers to administer these laws — and broad prosecutorial discretion. In practice, CSA enforcement can be selective and

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[8] California Department of Justice, Charitable Trusts Section, Attorney General's Guide for Charities (April 2020).

arbitrary, lending itself to political abuse, opening nonprofits disfavored by attorneys general to targeted enforcement, and subjecting them to large defense costs and civil penalties.

Although this Court has rendered a handful of decisions limiting the types of restrictions which governments can impose on charitable solicitations, it has not yet addressed a broad challenge to states' authority to impose this type of licensing scheme. Many nonprofits believe the entire state CSA scheme is unconstitutional. Nevertheless, nonprofits and fundraisers generally have abided by these administrative schemes as the path of least resistance, so that they may be allowed to pursue the activities for which they were organized rather than incur the enormous commitment of resources required to bring a constitutional challenge. Consider the obvious cost and burden associated with the current challenge to even a small portion of one of these statutes. Generally, regulators face resistance only when states add new and particularly crippling restrictions to the baseline compliance burden.

In addition to complying with the state CSA requirements, most tax exempt organizations file an annual information return with the IRS — IRS Form 990. Schedule B to IRS Form 990 requires the nonprofit to identify the names and addresses of significant contributors and amounts of their contributions to the organization. Until recently, the list of contributors was required for all organizations that filed a Form 990. But on May 28, 2020, the IRS

issued a revised regulation,[9] and presently does not require a Schedule B list of contributors for organizations other than section 501(c)(3) organizations and section 527 political organizations.[10]

Schedule B's donor information is kept confidential by the IRS and nondisclosure is backed by severe civil and criminal penalties. *See* 26 U.S.C. §§ 6103 & 7213. Although exempt organizations must file the Form 990 and complete Schedules B with the IRS, they may redact donor information in required disclosures to the public. *See* 26 U.S.C. § 6104(d)(3). Similarly, for decades, most CSAs have required tax-exempt organizations have been required by CSAs only to submit a Schedule B with donor names and addresses redacted, until California demanded more. However, based on a 2010 policy change, the California Attorney General started declaring registrations incomplete when a redacted Schedule B was submitted. The California Attorney General threatened noncomplying nonprofits, including Petitioners, with fines and suspension of charitable solicitation registration. The record below in the AFPF litigation demonstrates that there was no actual need for the unredacted forms.[11]

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[9] *See* 85 *Fed. Reg.* 31959 (May 28, 2020).

[10] The New Jersey Division of Consumer Affairs recently promulgated a regulation that requires that nonprofits provide Schedule B required information , even if the exempt organization is not a 501(c)(3) organization. 51 N.J.R. 637(a) (May 6, 2019).

[11] *See* AFPF Brief for Petitioner ("AFPF Pet. Br.") at 9, 13-14; Thomas More Brief for Petitioner ("Thomas More Pet. Br.") at 13, 15.

Yet California attorneys general refused to rescind the requirement, leading to the challenge below.

SUMMARY OF ARGUMENT

Our constitutional republic allows Americans who have strong feelings about public policy issues to become active participants in their own governance. Some choose to take leadership roles where they voluntarily disclose their identity, while others choose to avoid publicity making contributions to associations whose interests and goals match their own. This case involves a real threat by the California government to coerce the disclosure of the identity of large donors, putting them at risk retaliation from either the public or partisan office holders. Both mob and ruler are dangerous to dissenters, and the principle of anonymity protects Americans from both.

The demands by the Attorney General of California that every nonprofit charity seeking to mail educational material containing solicitations for funds into California must disclose to him the name, address, and contribution amount, of every large donor to that organization violates the anonymity princple, which protects those exercising their press and associational freedoms. The anonymity principle has a rich history in England, and an even richer history in America, where the people are sovereign. It should be honored and applied, not disregarded and overruled by government claims for the need of greater power over the people.

The court below applied this Court's election law precedents, which have no application here, in upholding the California Attorney General's demands for confidential donor information. Instead, this Court should apply its precedents relating to charitable solicitations, finding the Attorney General's actions to constitute impermissibly broad prophylactic controls of charitable solicitations and communications.

ARGUMENT

I. AMERICA'S STATUS AS A CONSTITUTIONALLY LIMITED REPUBLIC IS JEOPARDIZED BY STATE POLITICIANS EMPOWERED TO COMPEL DISCLOSURE OF THEIR IDEOLOGICAL OPPONENTS.

A. The First Amendment's Protections Were Designed to Preserve America as a Constitutional Republic.

The First Amendment protects five enumerated rights which history had taught the Framers that governments were prone to violate:

> Congress shall make no law respecting an establishment of **religion**, or prohibiting the free exercise thereof; or abridging the freedom of **speech**, or of the **press**; or the right of the people peaceably to **assemble**, and to **petition** the Government for a redress of grievances. [U.S. Constitution, Amendment I (emphasis added).]

Petitioners and these *amici* believe that the disclosures demanded by Respondent jeopardize the rights of Americans operating collectively in civil society through nonprofit organizations. Respondent alleges that not only has it never done anything wrong in handling donor information,[12] but also no harm could ever be suffered by a nonprofit or a donor due to its forced disclosure.[13] The California Attorney General would prefer this Court to operate based on some form of judicial presumption that governmental powers are never abused, that Attorneys General engage in nothing but evenhanded administration of the law, that politicians elected or appointed to high office cease to act as politicians, and that state office holders would never use their position to advance their own political agendas, reward their friends, or punish their enemies. Yet, adopting such an assumption would require this Court to disregard both history and current reality.

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[12] Respondent's false representations to the courts below as to the degree to which the identity of donors was compromised (*see* AFPF Brief of Petitioner at 9) might well trigger the principle "falsus in uno, falsus in omnibus." Indeed, that doctrine was declared to be "the law of the Ninth Circuit" in Enying Li v. Holder, 738 F.3d 1160, 1165 (9th Cir. 2013), but apparently was not applied here.

[13] *See* Combined Brief in Opposition (Nov. 25, 2019) at 22 n.6. With respect to public disclosure, California argues, any "concern that hostility and retaliation" could chill fundraising even "in times of deep public polarization" were baseless because "major-donor information is collected for use only by the Attorney General," ignoring completely the risk posed by inadvertent disclosure or disclosure to the Attorney General himself.

All five enumerated First Amendment rights protect the ability of Americans to participate in their own governance, without fear of reprisal. Although not all asserted by Petitioners, these *amici* believe that this case implicates each of the enumerated First Amendment rights to varying degrees. First, many of the nonprofit organizations required to identify their largest donors are religious in nature, and disclosure may impair their finding and thereby jeopardize the free exercise of their religion.[14] Second, speech and press rights are obviously implicated, and particularly press because nonprofits publish their sentiments in direct mail sent to their current members and supporters, or potential members and supporters, in California. Third, the very act of recruiting members and supporters and coordinating their public policy activities are acts of assembly — albeit not in person. Lastly, nonprofits often conduct programs to petition government, either through direct contact with office holders or through grassroots lobbying.

Some of these *amici* have solicited funds in California, while others have not, but join here to defend the constitutional principles involved nonetheless. Indeed, the state law involved here is generally triggered by nonprofits, not only when they seek to raise money in California, but also more

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[14] The "free exercise" clause is also violated when the state intrudes into the realm of "religion," which Madison defined as "the duty we owe to our Creator and the manner of discharging it [that] can be directed only by reason and conviction, not force and violence." J. Madison, *Memorial and Remonstrance Against Religious Assessments*, (1785).

broadly even to nonprofits which hold "property for charitable purposes." Cal. Gov. Code § 12581. AFPF describes the statute as applying to charities which "operate or fundraise" in California. AFPF Pet. Br. at 5. Thus, California seeks to require a nonprofit to file an unredacted Schedule B with the Attorney General in certain circumstances even if that organization is not soliciting contributions in California.

The Framers enumerated these five First Amendment rights to protect Americans in the exercise of certain rights that the signers of the Declaration of Independence declared to be unalienable because they were bestowed upon man by the Creator. The Attorney General of California's rule, now a California law, limits and chills the exercise of these rights and participation in the political process by empowering that State to compel its critics to identify their key funding sources, and thereafter to target those critics. This state law constitutes a frontal assault on the precious right of anonymity which is ancillary to most First Amendment freedoms, making this a case of great import.

B. Voluntary Associations Are Essential to the Protection of Constitutional Liberties.

During his travels in the early days of our Republic, Alexis de Tocqueville studied the role served by voluntary associations. One student of de Tocqueville summarized his observations in this way:

> Alexis de Tocqueville's notion of political and civic association is a recurrent theme in his work *Democracy in America*. There he argues that associations are a necessary correlational feature of democratization that should be promoted.... This is because they correct the natural defects of democracy in that they ... **protect against the systemic risk of tyranny of the majority** [and] **channel the energy of democracy**." [G. Foster, "Tocquevillian Associations and Democracy: A Critique," Aporia, vol. 25, no. 1-2015 (emphasis added).]

Those benefits to the nation of voluntary associations were doubtless true in the 1830s and certainly remain true nearly two centuries later. Today, Americans join associations for all manner of purposes. And, while many voluntary associations are informal, unorganized, and transient, those voluntary associations that have enduring existence and meaningful funding now generally operate as nonprofit organizations — which either will be protected, or left at risk to the tender mercies of state Attorneys General, by this Court's decision. It is critical to the financial health of nonprofits that their donors not be put at risk of public disclosure. And additionally donors believe, quite reasonably, that making a contribution could land them on a "hit list" maintained by those with real political power, and thus it is likely that many of whom will choose to withdraw from the public arena and take their money with them if they have not done so already. Without the funding provided by those donors who California requires to be

disclosed on IRS Form 990 Schedules B, many nonprofit organizations would cease to exist. In turn, without meaningful dissent on public policy issues, those in power will have free reign to pursue their own agendas without being subjected to pressures from organized groups of citizens, and thus increasingly without the consent of the governed.

C. Americans Fear Their Government Is Restricting Their Rights.

The California policy change which required charities to file a schedule containing their largest contributors occurred in 2010, when the California Registry of Charitable Trusts ("Registry") administered by the Attorney General of California began to send deficiency letters to those nonprofits registering to conduct charitable solicitations in California. Although many nonprofits complied, in December 2014, AFPF filed its challenge to the Attorney General's demand as unconstitutional on its face and as applied. *See* AFPF Pet. Br. at 5, 7, 13.

A Gallup poll taken in December 2013, just before suit was filed, revealed that 72 percent of Americans believe Big Government is the biggest threat to the country. By way of comparison, only 21 percent feared Big Business, and 5 percent feared Big Labor. The fear of government was bipartisan — not just a reaction to the political party in control of the White House. Then, during the presidency of Barack Obama, to be sure, the vast majority of Republicans feared Big Government (92 percent) — but even then, more than half (56 percent) of Democrats and more than two-

thirds (71 percent) of Independents also feared Big Government.[15]

The view held by many donors is that, by contributing to a nonprofit organization which is disfavored by the "ruling class," they will paint a target on their backs. That is not an outlier position — it is common, observed wisdom. While this litigation was pending in the Ninth Circuit, *USA Today* reported that a Harris Poll revealed that 92 percent of Americans "think their rights are under siege... Americans are most concerned that their freedom of speech (48%), right to bear arms (47%) and right to equal justice (41%) are at risk."[16]

The concerns of Americans in our "cancel culture" are widespread, and those concerns are certainly shared by the donor class, as discussed in a recent *USA Today* op-ed.

> Millions of Americans today are afraid to express their opinions on matters of public importance. A summer poll by the Cato Institute found that 62% of Americans were afraid to reveal their opinions; nearly one-third (32%) of employed Americans feared that they would lose their job or miss out on career opportunities if their views became known.

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[15] *See* J. Jones, "Record High in U.S. Say Big Government Greatest Threat," *Gallup* (Dec. 18, 2013).

[16] J. Bote, "92% of Americans think their basic rights are being threatened, new poll shows," *USA Today* (Dec. 16, 2019).

> Out of fear of harassment or social banishment, many donors to certain causes prefer to make their gifts anonymously. Unfortunately, some politicians today want to require charities to turn over their donor lists to the state....
>
> Politicians may be seeking donor information...to create informal enemy lists.... [J.C. Braceras, "Freedom of association is under attack. Will the Supreme Court protect it?" *USA Today* (Jan. 25, 2021).]

D. Americans Believe that Some State Attorneys General Are Acting as Hyper-Partisan Activists.

While Respondent wants this Court to believe that state attorneys general do not allow politics to affect their actions, there is little reason for the public or donors to adopt that view. NBC News reported last November that state attorneys general filed 148 multistate lawsuits against the Trump Administration — nearly double those against the Obama and Bush Administrations. The article explained: "[i]t's routine for attorneys general to sue the federal government, but experts say the sharp rise signifies the growing partisan and legal divide with Washington." Only six lawsuits involved a Republican attorney general. "California's Democratic attorney general, Xavier Becerra, has been part of the most multistate lawsuits...." E. Ortiz, "State attorneys general have sued Trump's administration 138 times – nearly double that of Obama and Bush," *NBC News* (Nov. 16, 2020).

When the Center for Medical Progress conducted an undercover investigation into Planned Parenthood, capturing discussions about the illegal sale of aborted baby parts, then-California Attorney General Kamala Harris expressed no interest in that activity, but rather arranged for the arrest of the investigative reporters. *See* S. Greenhut, "Planned Parenthood's California Counsel," *City Journal*, (Sept. 11, 2015). AG Harris apparently arranged for a raid on the home of the reporter — David Daleiden. "California's prosecutors charged Daleiden and an associate with 15 felonies for filming Planned Parenthood staff without their permission — the only known instance of undercover journalists being criminally prosecuted in California history." L. Wilkinson, "Kamala Harris's troubling record as California's attorney general," *The Spectator* (Aug. 14, 2020).

Other than California, the one state most aggressively supporting the push for unredacted Schedules B has been New York. In August 2020, "New York Attorney General Letitia James announced ... she has filed a lawsuit to dissolve the National Rifle Association." J.T. Fetch, "NRA strikes back against New York attorney general, claims lawsuit was political attack," WRGB (Aug. 6, 2020).

Historians have never verified the quotation attributed to Thomas Jefferson, that "[w]hen government fears the people, there is liberty. When the people fear the government, there is tyranny." There is nonetheless a great deal of history accurately reflected in that saying. These *amici* view this case as a vitally important opportunity for this Court — as a

guardian of the constitutional rights of the people — to constrain the arbitrary power of state governments, and to protect the constitutional rights of the people and the foundational principle of anonymity.

II. FORCED DISCLOSURE VIOLATES THE TIME-HONORED RULE OF ANONYMITY WHICH PROTECTS THE SOVEREIGNTY OF THE PEOPLE.

As discussed in Section I, *supra*, all five First Amendment freedoms are implicated by California's requirement that no nonprofit may solicit funds in California without registration, reporting, and disclosure of its largest donors. Although the statute does not use the terminology of "licensure," that is exactly what registration requires. Prior to publishing its sentiments to Californians — typically through distribution of written materials through the mail — and seeking contributions, a nonprofit must register with the State. To register, it must disclose its donors. *See* AFPF Pet. Br. at 5-6. Thus, that statutory scheme includes multiple violations of the Freedom of the Press protected rights — Anonymity, no Licensure, and no Prior Restraint. The Anonymity principle is also embodied in the Right of Assembly/Association.

A. The Founders Understood the Historical Battle to Protect Anonymity that California Has Disregarded.

In McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), Justice Thomas, concurring in the judgment, found the anonymity principle reflected in

"the historical evidence ... that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'" *Id*. at 361 (Thomas, J., concurring). The anonymity principle had been developed in England well before America's founding.

A strict licensing ordinance was issued in 1637 by the Star Chamber, the terms of which "provided an elaborate scheme of licensing designed to prevent the appearance of unlicensed books," including the requirement that "**all books were to bear the names of the printer and the author**." Sources of Our Liberties at 242 (Perry, ed., Amer. Bar. Found.: N.Y.U. Press 1972) (emphasis added).

In 1643, the poet John Milton challenged this English system of licensing, "attack[ing] government censorship in a well-reasoned treatise entitled *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England*[17] ..., which he did not bother to register," as required by the existing licensing laws. W. Davis, Eastern & Western History, Thought & Culture 1600-1815 at 25-26 (Univ. Press of America: 1993). Milton's eloquent support of the freedom of the press remains unsurpassed:

> [T]hough all the windes of doctrin were let loose to play upon the earth, so Truth be in the

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[17] *See* J. Milton, Areopagitica (Liberty Fund: 1999).

> field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing.... What a collusion is this, whenas we are exhorted by the wise man to use diligence, *to seek for wisdom as for hidd'n treasures* early and late, that another order shall enjoyn us to know nothing but by statute. [Areopagitica at 45-46.]

Fifty years after Milton published his *Areopagitica* treatise, the English Parliament allowed a successor licensing act to expire, freeing the press. *See Sources of our Liberties* at 243. Seventy-five years after that, Sir William Blackstone could write with confidence that "[t]he liberty of the press is indeed essential to the nature of a free state." IV W. Blackstone, Commentaries on the Laws of England ("Blackstone's Commentaries") at 151 (U. of Chicago Press facsimile edition: 1769). Blackstone explained that the liberty of the press "consists" of two governing principles. First, the civil government may "lay[] no *previous* restraints upon publications" (emphasis original); and second, "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public." *Id*. Otherwise, Blackstone concluded:

> To subject the press to the restrictive power of a licenser, as was formerly done ... is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in

> learning, religion, and government." [*Id*. at 152.]

Blackstone asserted that the liberty of the press was established in England in 1694. Blackstone's Commentaries at 152, n.2. Prior to that time, no person could lawfully publish anything without having first secured a license to do so from the crown. As Blackstone explained it:

> The art of printing, soon after it's [sic] introduction, was looked upon ... as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated ... by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. [*Id*.]

Disregarding these historical principles, the court of appeals below concluded that no nonprofit may send solicitations through the mail to California without first obtaining a license, because it claimed that such forced disclosure of donors was a helpful tool in preventing fraud. *See* AFPF v. Becerra at 1011. This finding cuts the very heart out of the freedom of the press. As Blackstone noted, the press guarantee was deliberately designed to limit the government to punishing an individual's committing "fraud" **after** it has been perpetrated, not **before** by imposing prior restraints upon **all** publishers, legitimate and

illegitimate alike. The court of appeals simply ignored this venerable rule, joining ranks with the Star Chamber by ruling that it is perfectly legitimate for California to take "reasonable" steps to "deter" fraud by requiring disclosure. *Id*.

B. The American Principle of Anonymity Is Predicated on the Sovereignty of the People.

The American principle of anonymity was built upon the hard-earned rights of Englishmen, but developed on a foundation quite different from the system that existed in England. Where sovereignty is vested in a monarch, the government can be expected to assert the power and right to know everything that happens in the society which could undermine the government. Of particular interest to monarchs is the identity of those subjects who would dare to criticize their government. In Talley v. California, 362 U.S. 60 (1960), Justice Black recounted the manner in which the English system suppressed dissent by forcing dissenters to reveal their identities:

> The obnoxious **press licensing law** of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature **critical of the government**. The old **seditious libel cases** in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers.... Before the

> Revolutionary War colonial patriots frequently had to **conceal their authorship** or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. [*Id.* at 64-65 (emphasis added).]

Freed from the English monarch, sovereignty in the United States has always been vested in the People. The right to govern is not divinely conferred; rather, "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." (Declaration of Independence.) Government officials serve — they do not rule. Government officials do not embody the government — they only are loaned the reins of government for a season.

In a constitutional republic, anonymity protects the people's full participation in the people's business, because the people are the principals and the government officials are their agents and representatives. Anonymity has a rich heritage from the founding era onward, as revealed by a short excerpt of that history, as told by Justice Stevens:

> That [anonymity] tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms. [McIntyre at 343 n.6.]

The American principle of anonymity, restricting what government officials can force us to reveal about our activities to them or to others, is constitutionally grounded in First Amendment freedoms of press and association. Its application ranges from pamphlets to television ads, from grassroots lobbying to memberships in voluntary societies, from public policy litigation to direct mail and online communications including solicitation of contributions.

C. This Court's Press Decisions Have Guaranteed the Anonymous Entry and Participation in the Marketplace of Ideas without a License.

Although the challenged disclosure of large donors is just a part of the state law requiring registration, the entire scheme of state charitable solicitation laws is repugnant to the freedom of the press as it has been applied by this Court. Indeed, a brief review of the right to anonymity shows how it protects a sovereign people from the tyranny of both the government and of the mob.

1. No Required License.

In 1938, this Court held "invalid on its face" a city ordinance prohibiting a person from distributing any written "literature of any kind ... without first obtaining written permission from the City Manager of the City of Griffin [Georgia]." Lovell v. Griffin, 303 U.S. 444, 447, 451 (1938). Refusing to consider the purported interests of the city to maintain "public order," or "littering," the Court found that the very

"character" of the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451.

Sixty-four years later, in Watchtower v. Village of Stratton, 536 U.S. 150 (2002), the Court struck down another municipal ordinance requiring one to obtain a permit before engaging in door-to-door advocacy and to display a permit with the person's name upon demand. Justice Stevens explained:

> [i]t is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. [*Id*. at 166.]

In short, by its no-licensing rule, the freedom of press prohibits the government from requiring a person to identify himself to government before entering the marketplace of ideas — either in person, by mail, by phone, or via the Internet — because every freeman has the right of self-censorship, free from the heavy hand of a government-imposed licensing system.

2. No Compelled Disclosure of Identity.

In Talley v. California, the Court declared unconstitutional a Los Angeles City ordinance requiring those who disseminate hand-bills to state, on their face, the identity of those who printed, wrote,

compiled, manufactured, and distributed them. Justice Black explained the Court's concern:

> There can be no doubt that such an **identification requirement** would tend to restrict freedom to distribute information and thereby freedom of expression....
>
> **Anonymous** pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either **anonymously** or not at all.... Even the Federalist Papers ... were published under **fictitious names**. It is plain that **anonymity** has sometimes been assumed for the most constructive purposes. [*Id*. at 64-65 (emphasis added).]

Thirty-five years later, in McIntyre v. Ohio Elections Commission, the Court struck down an Ohio election statute which prohibited distribution of political campaign literature not containing the name and address of the person or campaign official issuing the literature. Justice Stevens explained:

> [T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an **author's decision to remain anonymous**, like other decisions concerning omissions or additions to the content of a

> publication, is ... protected by the First Amendment. [*Id*. at 342 (emphasis added).]

The McIntyre rule protects the sovereignty of the individual against forced disclosure of his identity even if the purpose of the disclosure requirement is to make the market participant accountable to one other than a government official. Just as these venerable precedents protect the speaker's anonymity, they should be applied here to protect the anonymity of those persons who fund the speaker.

D. The Freedom to Assemble and Associate to Advocate Anonymously.

Justice Harlan's opinion in NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449 (1958), provides an eloquent explanation of how principles of anonymity are also grounded in freedom of association, and how they apply irrespective of the particular tactic chosen by government to restrict dissent. In addressing an effort by the Attorney General of Alabama to force disclosure of the membership list of the NAACP of Alabama, Justice Harlan wrote that "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters...." *Id*. at 460. He continued, "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective ... restraint on freedom of association...." *Id*. at 462.

Justice Harlan likewise recognized that "abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id*. at 461. An "unconstitutional intimidation of the free exercise of the right to advocate" can manifest itself with "a congressional committee investigating lobbying and of an Act regulating lobbying.... The governmental action challenged may appear to be totally unrelated to protected liberties [such as] [s]tatutes imposing taxes." *Id*. at 461. He drew upon a powerful and painful historical lesson when he found "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs [to be] of the same order" as a "'requirement that adherents of particular religious faiths or political parties wear identifying arm-bands.'" *Id*. at 462. By the power of this illustration, Justice Harlan teaches us that principles of anonymity are not second-order concerns that can be disregarded or suppressed, but instead are standards indispensable to both the protection of individual liberty and the preservation of our republic.

E. Compelled Disclosure Leads to Abuses.

Federal law sometimes requires forced disclosures of the identity of political actors to the government or third parties, triggering principles of anonymity. For example, section 203(b)(1) of the Labor Management Reporting and Disclosure Act requires the filing of reports with the Secretary of Labor by:

> Every person who pursuant to any agreement or arrangement with an employer **undertakes**

> **activities** where an object thereof is, directly or indirectly ... (1) to **persuade employees** to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing. [29 U.S.C. § 433(b) (emphasis added).]

Additionally, civil litigation also can lead to discovery demands requiring evaluation of anonymity principles. One important case illustrating those principles involved both statutory disclosures and discovery in a civil case.

In May 1973, the AFL-CIO, eleven other national and international labor unions, and some of their affiliates sued the *amicus* National Right to Work Legal Defense and Education Foundation, Inc. (hereinafter "NRWLDEF") for, *inter alia*, failing to report to the Secretary of Labor under section 203(b)(1). NRWLDEF operated as an independent legal aid organization that had a long history of successfully fighting against compulsory unionism. *See* International Union, UAW v. National Right to Work Legal Defense and Education Foundation, Inc., 590 F.2d 1139 (D.C. Cir. 1978), *further proceedings*, 584 F. Supp. 1219 (D.D.C. 1984), *aff'd*, 781 F.2d 928 (D.C. Cir. 1986).

In the ensuing litigation, the plaintiff unions sought to obtain NRWLDEF's contributor list, resulting in a discovery battle over the unions' demand for the names and addresses of all employers and businesses that contributed to NRWLDEF during a

certain period. NRWLDEF "refused to disclose the identities of any contributors, asserting constitutional privileges against disclosure and contending that disclosure would result in reprisals against contributors." *Id.* at 1145.

The district court ordered NRWLDEF, *inter alia*, to identify "the thirty-seven donors who contributed between $500 and $5,000 in 1971," as well as certain 1972 donors of smaller amounts, and "to disclose the names and addresses of the fifty largest contributors to the Foundation in 1972 and 1973 who were not identified in [NRWLDEF's] own records as employers or businesses." NRWLDEF refused, and the district court, entering adverse findings as Rule 37 sanctions, found that the Foundation had violated the second proviso to 29 U.S.C. § 411(a)(4) (1976). *Id.*, at 1145-46.

On appeal, the D.C. Circuit held that NRWLDEF had "asserted a substantial claim of constitutional privilege," citing Justice Harlan in NAACP v. Alabama, 357 U.S. at 462 ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute ... a restraint on freedom of association...."). "Without doubt, the association itself may assert the right of its members and contributors to withhold their connection with the association." International Union v. NRWLDEF, 590 F.2d at 1152.

III. THE CALIFORNIA REQUIREMENT COLLIDES WITH THE SUPREME COURT'S FIRST AMENDMENT PRECEDENTS GOVERNING CHARITABLE SOLICITATIONS.

The lower court's decision relied on its prior analysis in Center for Competitive Politics v. Harris, 784 F.3d 1307 (9th Cir. 2015) ("CCP"). *See* AFPF at 1009. However, the CCP decision was flawed because it failed to rely on this Court's decisions on regulations and restrictions imposed on charitable solicitation, which is the essential issue of this case. *See* CCP at 1312 (relying on Citizens United v. FEC, 558 U.S. 310 (2010) and Buckley v. Valeo, 424 U.S. 1 (1976)).

In a series of four cases, this Court has addressed the constitutionality of government actions affecting charitable solicitations under the First Amendment.[18] Those cases recognized that charitable solicitation is protected by the First Amendment, that broad prophylactic rules are suspect under the First Amendment, and that states may take action against charitable solicitations when they are actually fraudulent. The Ninth Circuit below utterly failed to consider this directly relevant line of cases, dealing with the specific matter involved: government control of charitable solicitations.

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[18] Village of Schaumburg v. Citizens for a Better Envt., 444 U.S. 620 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988); and Madigan v. Telemarketing Associates, 538 U.S. 600 (2003).

On the first three of those occasions between 1980 and 1988, the Court found that various legislative efforts — all purportedly designed to prevent fraud — were unconstitutional. Known as "the Village of Schaumburg trilogy," these cases addressed an unrelated issue of state efforts to limit the cost of fundraising, but they also established that broad "prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation" unconstitutionally abridge the freedom of speech (Madigan at 612). These cases left only "a corridor open for fraud actions ... trained on representations made in individual cases...." *Id.* at 617; *see* Village of Schaumburg at 628-32; Munson at 959-64; and Riley at 787-88.

Not surprisingly, of the four governmental actions on charitable solicitation, only the fourth one survived constitutional scrutiny — Madigan. There, the Court allowed the Illinois Attorney General to bring a common law fraud action against a specific "for-profit fundraising corporation[] ... for fraudulent charitable solicitations," based upon "intentionally misleading statements designed to deceive the listener" as to the "percentage of charitable donations [they] retain for themselves." Madigan at 605-06. But, the Court pointedly emphasized, the "bare failure to disclose that information directly to potential donors does not suffice to establish fraud." *Id.* at 606.

Distinguishing the three previous charitable solicitation cases in which the Court had "invalidated state or local laws," the Court in Madigan explained that those laws "categorically restrained solicitation by

charities or professional fundraisers if a high percentage of the funds raised would be used to cover administrative or fundraising costs." *Id.* at 610. In contrast, the Court continued:

> unlike *Schaumburg, Munson*, and *Riley*, [this case] involves **no prophylactic** provision proscribing any charitable solicitation if fundraising costs exceeded a prescribed limit. Instead, the Attorney General sought to enforce the State's generally applicable antifraud laws against Telemarketers for "specific instances of deliberate deception." [*Id.* at 610 (emphasis added).]

Unlike the Attorney General of Illinois in Madigan, the Attorney General of California here has chosen to exercise his "broad powers" to require production of donor information on the IRS Schedule B, expanding the prophylactic reach of the California Trustees and Fundraisers for Charitable Purposes Act — purportedly "solely to prevent charitable fraud." AFPF at 1004. Although "the First Amendment does not shield fraud" (Madigan at 612), it does shield charitable solicitors from "'**unduly burdensome**' prophylactic rule[s] [that are] unnecessary to achieve the State's goal of preventing donors from being misled." *Id.* at 619-20.

To confine government reach to specific enforcement actions in appropriate cases, the Madigan Court summarized its opinions in Schaumburg, Munson, and Riley as having taken "care to leave a **corridor** open for fraud actions to guard the public

against false or misleading charitable solicitations." Madigan at 617 (emphasis added). To that end, the Madigan Court spelled out a narrow constitutional passageway, allowing for "a properly tailored fraud action [in which] the State bears the full burden of proof," including proof that the solicitor "made a false representation of a material fact knowing that the **representation was false**" and that the representation was "made ... with the **intent to mislead**...." *Id.* at 620 (emphasis added).

Requiring an unredacted Schedule B as a condition for permitting charitable solicitation falls far short of this constitutional mark. A charitable organization's desire to protect the identity of its donors does not suggest an intent to deceive. And the Attorney General's wholesale disclosure requirement of the confidential donor information is a superhighway, not a narrow pathway, to reach the state's purported goal of preventing fraud.[19]

The Ninth Circuit hoped to open up Madigan's constitutional passageway by agreeing with the claim that the state's CSA is designed not just for "'making

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[19] When the Attorney General does get specific, recounting a few incidents when donor information in Schedule B has increased his "'investigative efficiency'" (AFPF at 1009-10), it appears that he did **not** need **all** Schedule B donor information of **all** registering solicitors, but rather "[e]ven in the five investigations where a Schedule B was used, the Attorney General's investigators could not recall whether they had consulted unredacted Schedule Bs on file before initiating the investigation ... [a]nd when investigators relied on Schedule B, the same information could have been obtained from other sources." AFPF Pet. Brief at 33.

it easier to police for ... fraud,'" but also "to 'tell [the AG] whether or not there was an illegal activity occurring.'" AFPF at 1010-11. This claim appears to be an attempt to reopen passageways foreclosed by the Schaumburg trilogy, because there is a lack of any evidence that the mandated disclosure of the donors' names and addresses has anything to do with fraud or any other specified offense.

Indeed, other than the specific interest in "fraud prevention," the Ninth Circuit identified only superficial generalities, such as that Schedule B "'information is necessary to determine whether a charity is actually engaged in a charitable purpose, or is instead violating California law by engaging in self-dealing, improper loans, or other unfair business practices.'"[20] *See id.* at 1009. Not only is "improper" not an equivalent of "illegal," but it also embraces various synonyms from "inappropriate" to "unsuitable" to "indecent" to "unbecoming." Equipped with such a fistful of vague adjectives, the California Attorney General is well-armed to shut the state's door to any nonprofit he deems to be undeserving.

If, as the Madigan Court has ruled, the First Amendment allows for only a narrow passageway to vindicate the state's interest in "preventing fraud," *a fortiori*, the pathway to Schedule B donor information

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[20] California's justification for its demand for Schedule B information is devoid of any connection to donor identity and Schedule B as any purported self-dealing and loans are evident from other parts of the Form 990, where loans and expenditures are publicly reported.

must likewise be "narrowly tailored to the State's interest in preventing" abuses. Riley at 789. Not only is the demand for donor information **not** "narrowly tailored," it is not tailored at all, sweeping up a multitude of donor names to be used at the Attorney General's arbitrary discretion, causing a chilling of donor participation and creating a real risk of public disclosure as well.

CONCLUSION

These *amici* urge the Court to reverse the Ninth Circuit's judgment and remand with instructions to enter a permanent injunction against enforcement of the Attorney General's policy and regulations requiring unredacted Schedules B to be filed with the State.

Respectfully submitted,

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