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

Brief Amicus Curiae of Free Speech Coalition, Free Speech Defense & Education Fund, Citizens United, Citizens United Fdn, The Presidential Coalition, Nat'l Right to Work Comm, Nat'l Right to Work Legal Defense Fdn, U.S. Constitutional Rights Legal Defense Fund, Eberle Associates, Inc., Gun Owners Fdn, Gun Owners of America, Conservative Legal Defense and Education Fund, Patriotic Veterans, California Constitutional Rights Fdn, Leadership Institute, Nat'l Assn. for Gun Rights, Nat'l Fdn. for Gun Rights, Downsize DC Fdn, DownsizeDC.org., Public Advocate, The Senior Citizen League, and Restoring Liberty Action Comm in Support of Petitioners

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F.A. Monti, "What Kind of Watchdog? The Role of the State Attorney General in Nonprofit Oversight," *Inside Philanthropy* (July 28, 2015) 26
J. Wick, "Newsletter: The state of California vs. Trump, again," *Los Angeles Times* (Aug. 14, 2019) 26

INTEREST OF THE *AMICI CURIAE*[1]

Free Speech Coalition, Citizens United, National Right to Work Committee, Gun Owners of America, Inc., Patriotic Veterans, National Association for Gun Rights, Public Advocate of the United States, The Senior Citizens League, and DownsizeDC.org, are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") §501(c)(4). Free Speech Defense and Education Fund, Citizens United Foundation, National Right to Work Legal Defense Foundation, U.S. Constitutional Rights Legal Defense Fund, Gun Owners Foundation, Conservative Legal Defense and Education Fund, California Constitutional Rights Foundation, The Leadership Institute, National Foundation for Gun Rights, and Downsize DC Foundation are nonprofit educational and legal aid organizations, exempt under IRC §501(c)(3). The Presidential Coalition, LLC is an IRC §527 organization. Eberle Associates, Inc. is a for-profit corporation. 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

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[1] It is hereby certified that counsel for all parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; 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.

related to the rights of citizens, and questions related to human and civil rights secured by law. Several of 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); and
- AFPF v. Becerra, Nos. 16-55727 & 16-55786, Ninth Circuit, Brief *Amicus Curiae* in Support of Petition for Rehearing *En Banc* (October 5, 2018).

STATEMENT

California, like about 40 other states and the District of Columbia,[2] imposes a prior restraint on some types of nonprofit organizations seeking to communicate with state residents in order to educate

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

and to raise funds for their programs.[3] These "State Charitable Solicitation Acts" ("CSAs") require nonprofit organizations — and often the for-profit firms which help them fundraise — to comply with myriad requirements imposed not just by statute and regulations, but sometimes by the instructions for the forms that must be filed, and even via practices informally adopted by different states.

These regulatory schemes generally first require registration with the state by filing an application supported by certain attachments, enclosures, certifications, and payment of registration fees.[4] Usually, once filed, the documents become public. Once registered, the nonprofit is allowed to inform that state's residents about issues and programs, and solicit contributions. Thereafter, registrants must continue to file additional reports and pay a renewal fee — generally on an annual basis, but many states also require amendments to be filed 30 days after any

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[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] Some states require multiple signatures and notarized signatures on forms, requiring that these forms be physically sent around the country to obtain the required signatures before filing.

change in the material previously filed.[5] Failure to do so may be punished by substantial civil fines and injunctive relief including prohibition from continuing to mail to, and solicit funds from, residents of the state.[6]

Although some nonprofits and fundraisers develop the expertise in-house to comply with the changing requirements imposed by the states, many firms across the country offer compliance services. For organizations seeking to raise funds on a nationwide basis, the fees and costs expended in complying with these laws can run $12,000 or more annually.[7] Even worse, these redundant disclosures of information impose an enormous compliance burden while doing the public no good, only providing the rationale for supplying a lucrative revenue stream for state governments, and a regulatory hook to control nonprofits.

State CSAs impose a particular burden on new organizations seeking to do test mailings or to begin a

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[5] Although there has been an effort to develop a "uniform registration statement" to standardize registration and reporting, states that have joined that effort make it more complicated by imposing additional state-specific requirements. *See* The Unified Registration Statement.

[6] 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).

[7] These costs reduce the amount of funds raised that can be spent for exempt function activities.

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 entering the marketplace of ideas. However, well-established and well-known charities can become comfortable with the burdens imposed on nonprofits, because they have the expertise and resources to comply no matter what the rules may be. Established charities may even favor more complex and expensive systems, as they impose a significant "barrier to entry" for new competing nonprofits.

In some states, such as California, state attorneys general that enjoy broad law enforcement powers administer these laws. CSA enforcement can be quite arbitrary, lending itself to political abuse, opening targeted nonprofits to large enforcement defense costs and civil penalties. The very complexity and the fluidity of these laws lend themselves to violations, allowing states to find technical violations whenever convenient, against whomever convenient. Defending against enforcement actions by states can be prohibitively expensive, and attorneys general are often motivated to generate negative publicity against certain nonprofits while gaining positive publicity for themselves.

Although this Court has rendered a handful of decisions which limit the types of burdens which governments can impose, including what is known as "the Village of Schaumburg trilogy," no broad challenge to the authority of states to impose this type

of licensing scheme has yet come to this Court. Many nonprofits believe the entire state CSA scheme of registration and reporting is unconstitutional. Nevertheless, nonprofits and fundraisers have abided with 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 cost of bringing a constitutional challenge. Generally, states face resistance only when new and particularly crippling restrictions are added to the baseline compliance burden. Here, resistance arose to the demand by California state officials for detailed information on these nonprofits' largest donors — the very lifeblood of each nonprofit organization,

Thus far, only two states enforce demands for nonprofits to file an unredacted Schedule B — California and New York.[8] Unsurprisingly, these are the two states with the most political and litigious state attorneys general in the country.

SUMMARY OF ARGUMENT

The Americans For Prosperity Foundation ("AFPF") and Thomas More Law Center petitions challenge the Ninth Circuit decision approving the California Attorney General's decision to compel those two organizations to disclose the names and addresses of their largest donors, and the dates and amounts of

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[8] The New York requirement led to a challenge brought by Citizens United. *See* Citizens United v. Schneiderman, 882 F.3d 374 (2d Cir. 2018).

their donations, as a precondition to charitable solicitation in the state. These challenges are based primarily on a violation of the freedom of association. These *amici* agree that a valid "as applied" challenge was presented, demonstrating herein how the Ninth Circuit misread and erroneously distinguished NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), while ignoring numerous district court findings of fact in the process. *See* Section I, *infra*.

However, these *amici* believe that States should not impose such disclosure requirements on any nonprofit organizations. Nor should courts evaluate such requirements through the use of any "interest balancing test," or any "standard of review" — whether it be "exacting scrutiny" or "strict scrutiny" — because three well-established legal principles obviate the need for any "as applied" showing.

First, Petitioner Thomas More correctly asserts that the only state interest that can justify disgorging highly sensitive donor information from a nonprofit is a concrete demonstration of fraud by a specific organization. Thomas More Pet. at 13-14, 27-19. Indeed, this Court evaluated and rejected the state's use of a broad prophylactic approach to rooting out fraud when it decided the Village of Schaumburg trilogy, followed by its decision in Madigan v. Telemarketing Associates, 538 U.S. 600 (2003). Faithful application of the Madigan decision bars the Attorney General's blanket prophylactic rule. *See* Section II, *infra*.

Second, these *amici* agree with Petitioner AFPF that Americans have the right to support causes anonymously under the constitutional principles recognized in Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002) and Talley v. California, 362 U.S. 60 (1960). Indeed, the doctrine of anonymity has ancient roots, and has been invoked regularly by this Court for 80 years, to protect the people from government overreach. *See* Section III, *infra*.

Lastly, these *amici* believe that the petitioners were not required to show that the confidential donor information being demanded will be at risk of public disclosure, because the historical principle of anonymity protects against disclosure to the state as vigorously as from disclosure to the public. Indeed, the need for this Court to faithfully apply the principle of anonymity has only increased with the politicization of law enforcement and the weaponization of the administrative state. *See* Section IV, *infra*.

ARGUMENT

I. THE CALIFORNIA REQUIREMENT CONSTITUTES AN IMPERMISSIBLE INTERFERENCE WITH FIRST AMENDMENT ASSOCIATIONAL RIGHTS.

The main argument of both petitions is the claim that forced disclosure of detailed information about petitioners' major donors violated the First Amendment freedom of "the people peaceably to assemble," expressed in this context as the freedom of

association, and the closely related freedom of speech. The question presented by AFPF specifically relied on NAACP v. Alabama and its progeny, and those authorities also were repeatedly relied on throughout the Thomas More petition.

NAACP v. Alabama involved a court order requiring the production of documents, including membership lists, on the grounds that the NAACP failed to comply with Alabama's requirement to register as a foreign corporation.[9] After discussing NAACP's speech, press, due process, and associational rights, this Court protected the NAACP from being compelled to provide those lists.

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly....
>
> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective ... restraint on freedom of association....
>
> Inviolability of privacy in group association may in many circumstances be indispensable

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[9] Arguably, a nonprofit such as NAACP would have less authority on which to refuse to comply with a court order based on a demonstrated violation of law than against a blanket disclosure requirement imposed on all nonprofits.

> to preservation of freedom of association, particularly where a group espouses dissident beliefs. [NAACP v. Alabama at 460-462.]

The court of appeals opinion below contains only one brief citation to NAACP v. Alabama and a footnote, designed to give the impression that the NAACP faced threats of "economic reprisal, loss of employment, [and] threat of physical coercion...." (AFPF at 1014 and 1014 n.5) unlike the situation faced by petitioners. The Ninth Circuit added what it thought to be a distinguishing parenthetical that "(between 100 and 150 members declined to renew their NAACP membership, citing disclosure concerns)" drawn from the later case of Bates v. City of Little Rock, 361 U.S. 516, 521 n.5 (1960). Actually, those statistics were admitted to be highly speculative (based on testimony prefaced by "I guess"), and in fact played no part in the NAACP v. Alabama decision.

The district court made numerous findings of fact much more serious than the failure to renew membership.[10] *See* AFPF v. Harris, 182 F. Supp. 3d 1049, 1055-56 (C.D. Cal. 2016). The district court below described a long line of "threats, protests, boycotts, reprisals, and harassment" directed at those "publically associated with AFP," concluding that even if the threats were not as violent as in NAACP, "this Court is not prepared to wait until an AFP opponent

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[10] The Ninth Circuit stated that it "'reviews the district court's findings of fact for clear error....'" (AFPF at 1007), but its opinion rewrites those facts to support its decision.

carries out one of the numerous death threats made against its members." *Id*. at 1056.

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

Between 1980 and 2003, this Court addressed four times the constitutionality of government actions affecting charitable solicitations under the First Amendment.[11] On three of those occasions, the Court found that those legislative efforts — all purportedly designed to prevent fraud — were unconstitutional. As Petitioner Thomas More points out, this Court "has long safeguarded nonprofit solicitations as speech." Thomas More Pet. at 18. Additionally, Thomas More states "broad prophylactic rules are inherently suspect under the First Amendment." *Id*. at 20. Not surprisingly, of the four constraints on charitable solicitation, only one survived constitutional scrutiny — Madigan v. Telemarketing Associates. In that case, the Court allowed the Illinois Attorney General to bring a common law fraud action against a "for-profit fundraising corporation[] ... for fraudulent charitable solicitations," based upon "intentionally misleading statements designed to deceive the listener" as to the

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[11] 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.

"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 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 616.

To guard against this government overreach, 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. 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 requirement of a wholesale disclosure of the confidential donor information is a superhighway, not a narrow pathway, to reach the state's purported goal of preventing fraud.[12]

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[12] 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 "even in those five investigations, the

The Ninth Circuit hoped to avoid this Madigan stricture against prior restraints by its agreement with the claim that the state's CSA is designed not just for "'making 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, at best, a make-weight for the 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.'" *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 adjectives, the California Attorney General is well-armed to shut the state's door to a nonprofit deemed 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 must likewise be "narrowly tailored to the State's

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investigators were able to obtain the pertinent Schedule B information from other sources." AFPF Pet. at 13.

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 discretion, creating a real risk of public disclosure as well.

III. THE CALIFORNIA REQUIREMENT IS IN DIRECT CONFLICT WITH THIS COURT'S PRESS AND SPEECH PRECEDENTS.

Before petitioners may engage in any solicitation activity in California, it must register with the Attorney General and, to continue such solicitation activities, it must annually renew its license, furnishing all requested documentation, including its IRS Form 990 Schedule B containing the names and addresses of large donors. By substituting the judgment of the Attorney General for that of the State's householders, the California CSA denies to petitioners the unfettered opportunity to "distribute" their literature and denies to Californians the unfettered opportunity to receive that literature, both in violation of the freedom of the press.

Not only does such a regulatory scheme violate "the First Amendment guarantee[] [of] the 'right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends,'" as AFPF has proclaimed, but it also violates "the right to support causes anonymously." AFPF Pet. at 17-18.

In support of its anonymity claim, AFPF cites two of this Court's decisions: Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton and Talley v. California.

A. Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton.

The parallels between AFPF's cause and that addressed in Watchtower are remarkable.

- In Watchtower, a Jehovah's Witness engaged in door-to-door canvassing, distributing handbills sharing his religious faith (Watchtower at 153); AFPF is engaged in mailing letters advancing free-market economic policies.

- Before taking his message to village residents, the Jehovah's Witness was required by the city ordinance to complete and file with the mayor a "Solicitor's Registration Form" and obtain a "Solicitation Permit" (*id.* at 155 and 115 n.2); before soliciting Californians, AFPF is required by the State attorney general to file annually its IRS Form 990 Schedule B, disclosing its major donors.

- The Stratton ordinance was designed to protect the village's residents from "'flim flam' con artists who prey on small town populations" and from "fraud" (*id.* at 158); the California CSA was designed to "prevent charitable fraud." AFPF at 1004.

Unhesitantly, eight of nine of the justices on this Court condemned the Village of Stratton because:

> [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. [Watchtower at 165-66 (emphasis added).]

The Court did not end there. Continuing, it advised:

> Even if the issuance of permits by the mayor's office is a **ministerial** task that is performed promptly and at no cost to the applicant, a law requiring a **permit** to engage in such speech constitutes a **dramatic departure** from our national **heritage** and constitutional **tradition**. [*Id.* at 166 (emphasis added).]

Lest we forget that heritage and tradition, this Court posed the question:

> Does a municipal ordinance that requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded **to anonymous** pamphleteering or discourse? [*Id.* at 160 (emphasis added).]

This was followed by the answer:

> On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the **freedom of the press**.... To require a censorship through license which makes impossible the *free and unhampered* distribution of pamphlets strikes at the heart of the constitutional guarantees. [*Id.* at 162 (emphasis added).]

B. Talley v. California.

About 60 years ago, this Court ruled unconstitutional a Los Angeles, California city ordinance that made it a crime for any "'person [to] distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of ... [t]he person who caused the [hand-bill] to be distributed.'" Talley v. California at 60-61. In support of this seminal ruling, Justice Black explained:

> Persecuted groups ... throughout history have been able to criticize oppressive practices and laws either **anonymously or not at all**. 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.** [*Id.* at 64 (emphasis added).]

Given this history of government abuse, Justice Black rejected the claims of the Talley Court dissenters that where "there is neither allegation nor proof that Talley ... would suffer 'economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility,'" there was no First Amendment violation. *Id.* at 69 (Clark, J., dissenting). It was enough, Justice Black observed, that "fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.* at 65.

C. The Historic and Enduring People's Right of Anonymity.

Talley was not the first time that this Court had addressed the anonymity issue and its role in the First Amendment's free marketplace of ideas. Twenty-two years before Talley, this Court decided Lovell v. Griffin, 303 U.S. 444 (1938), striking down a city ordinance requiring a license to "'distribute literature in the City of Griffin.'" Lovell at 451. Chief Justice Charles Evans Hughes, writing for a unanimous court, ruled the ordinance "invalid on its face": "Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to **license and censorship.**" *Id.* at 451 (emphasis added). The Chief Justice elaborated, recounting the history of the licensed press in England:

> The struggle for the freedom of the press was primarily directed against the **power of the licensor**. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." [*Id.* (emphasis added.)]

And in 1769 — 125 years after Milton read his Areopagitica[13] to the English Parliament — Sir William Blackstone published the fourth volume of his Commentaries, in which he penned these notable words:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted **right to lay what sentiments he pleases before the public:** to forbid this, is to destroy the freedom of the press...." [4 W. Blackstone, Commentaries on the Laws of England (Univ. Chi. facsimile ed. 1769) at 151-52 (bold added).]

In 1943, this Court decided Martin v. City of Struthers, 319 U.S. 141 (1943) involving another city ordinance, this one outlawing the door-to-door

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[13] *See* https://firstamendmentwatch.org/history-speaks-essay-john-milton-areopagitica-1644/.

distribution of hand bills, circulars, and the like. Challenged by a Jehovah's Witness as a violation of the freedom of the press, Justice Black wrote that "[t]he right of freedom of speech and press ... embraces the right to distribute literature [and] protects the right to receive it." *Id.* at 143.

On its face, this Court found the Struthers city ordinance to have "substitute[d] the judgment of the community for the judgment of [each] individual householder," thereby denying both distributors and householders of their respective opportunities, the opportunity of the Jehovah's Witness to speak, and that of the householders to listen. *Id.* at 144. But, the city contested that its door-to-door solicitation policy was not based on the content of the communication. Rather, it was designed to protect the city's residents from "annoyance, including intrusion upon the hours of rest, and ... the prevention of crime." *Id.* The Struthers Court replied: "While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." *Id.* at 145. And, as this Court later put the Struthers holding:

> while supporting the "freedom to distribute information to every citizen," acknowledged a limitation in terms of leaving "with the homeowner himself" the power to decide "whether distributors of literature may lawfully call at a home." [Rowan v. United

> States Post Office Department, 397 U.S. 728, 736 (1970).]

If it were otherwise, it would be within the power of government to censor the people, not the other way around.

Yet that is precisely what the California CSA does, and in so doing, unconstitutionally "intru[des] into the function of editors":

> The choice of material to go into a newspaper ... constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press[14].... [Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).]

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[14] "[Some] view the Press Clause as somehow conferring special and extraordinary privileges or status on the 'institutional press....' I perceive two fundamental difficulties with [such a] reading.... First ... the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege.... The second fundamental difficulty ... is one of definition. The very task of including some entities within the 'institutional press' while excluding others [is] reminiscent of the abhorred licensing system [that] the First Amendment was intended to ban. [In my view] the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." First National Bank of Boston v. Bellotti, 435 U.S. 765, 797-802 (1978) (Burger, C.J., concurring).

It is for the people to decide not only what to say, but also whether to say anything at all, including stating the names and addresses of the writer, the publisher, or the distributor. As Justice Thomas observed in McIntyre v. Ohio Elections Comm.:

> [W]hen viewed in light of the Framers' universal practice of publishing anonymous articles and pamphlets, [the historical record] indicates that the Framers shared the belief that such activity was firmly part of the freedom of the press. It is only an innovation of modern times that has permitted the regulation of anonymous speech. [*Id.*, 514 U.S. 334, 367 (1995) (Thomas, J., concurring).]

IV. THE COURT OF APPEALS DISREGARDED THE THREAT OF RETALIATION BY GOVERNMENT OFFICIALS.

To defeat California's disclosure demands, the Ninth Circuit required plaintiffs to prove the existence of "'a substantial threat of harassment.'" AFPF at 1012. The Ninth Circuit did acknowledge that such a threat could come from "either Government officials or private parties.'" *Id.*; *see also id.* at 1015. But the court never addressed that risk.[15]

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[15] In their opinion concurring in the denial of rehearing *en banc*, the three judges who served on the panel deciding the case acknowledged that they did not consider threats from government to the donors of the petitioners: "To determine the actual burden on First Amendment rights, we looked at two questions: (1) the likelihood that the plaintiffs' Schedule B contributors would face

Both petitions raised retaliation and harassment issues, not just by the public, but also by government officials. Thomas More's petition explains why the burden of proving the lack of any threat of retaliation by government should be on the government:

> It is presumed that citizens' beliefs and affiliations are generally no concern of the state. Overcoming this presumption should not be easy because **officials may use such information to penalize views they dislike**. And to say there is a *blanket* compelling interest in donor disclosure flips the First Amendment on its head, establishing a default rule of disclosure rather than one of confidentiality....
>
> [D]isclosure rules allow **officials** and persons who accidentally or maliciously gain access to donors' identities to expose and **penalize their views** — serious ills that freedom of association prevents.
>
> Because our society has never been more vehemently polarized, **fear of reprisal** threatens to dry up funds to the point that some viewpoints cannot survive. [Thomas More Pet. at 16, 18, 19 (citations omitted) (emphasis added).]

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threats, harassment or reprisals *if* their Schedule B information were made public and (2) the likelihood that the information would become public." AFPF v. Becerra, 919 F.3d 1177, 1191-92 (2019).

The AFPF Petition cited an ominous warning in a brief filed by *amicus* NAACP Legal Defense and Education Fund which the Ninth Circuit disregarded:

> By collecting and aggregating confidential information about an organization's donors or members, the government creates a loaded gun that a future administrat[ion] might decide to fire. [Cited in AFPF Pet. at 23.]

The NAACP brief describes exactly the type of future government retaliation that could not readily be proven, but which is perceived to present a very real risk to nonprofits and their largest donors. Moreover, political officeholders can contrive high-sounding reasons to gather intelligence on the giving patterns of their wealthy adversaries, and if the request for the largest donors is allowed, the scope of disclosure can be expected to grow.[16] As the threat of retaliation from government officials is inherently difficult to prove, with government law enforcement decision-making cloaked in secrecy and privilege, such claims are better addressed in a facial challenge than an as-applied challenge, but the Ninth Circuit rejected a facial challenge because of a prior precedent. AFPF at 1006.

The threat of state retaliation is real, and it is growing, as officeholders and advocacy organizations increasingly contend, particularly in California and

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[16] As one commentator notes, "there is no guarantee that such disclosure policies (whether codified or not) will not change in the future...." "Court Reaffirms CA Attorney General's Demand for Donor List," Seyfarth Shaw, LLP (Jan. 13, 2016).

New York — the only two states that currently enforce a requirement for an organization to file an unredacted Schedule B.

Former New York Attorney General Eric Schneiderman held what can only be called a radical view of governmental power over nonprofits, viewing them as little more than arms of the state — bestowed by government with tax-exempt status and some with public funding. This view leads to the belief that their boards of trustees are not really in charge of their organizations, but merely operate under the supervisory control of the State acting through the Attorney General.[17]

Former California Attorney General Kamala Harris, who implemented the new requirement, was elected a U.S. Senator, and now is campaigning for the Democratic Party nomination for President. California's current Attorney General Xavier Becerra — formerly a member of Congress — has revealed his partisan political agenda by filing over 50 lawsuits against the Trump Administration since his appointment and election.[18]

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[17] F.A. Monti, "What Kind of Watchdog? The Role of the State Attorney General in Nonprofit Oversight," *Inside Philanthropy* (July 28, 2015).

[18] *See* J. Wick, "Newsletter: The state of California vs. Trump, again," *Los Angeles Times* (Aug. 14, 2019) ("In May, California filed its 50th lawsuit against the Trump administration....").

State attorneys general are often some of the most politically ambitious office holders, and the Ninth Circuit below did not even pause to consider the possibility, and indeed likelihood, of the threat they can pose for donors to groups they oppose. Donors are concerned that their identities will be made public, but there is just as much concern that politically motivated individuals holding discretionary law enforcement power will use donor disclosures to target them for governmental retribution. This risk has been made even more real in this country's growing political divide, including invasions of privacy, threats, and actual instances of violence.[19] These are not hypotheticals, but real-life examples of how those entrusted with access to information can misuse that confidential information for harmful political purposes. At the very least, it explains why donors would reasonably fear the misuse of their contribution history.

CONCLUSION

For all these reasons, the Petitions for Certiorari should be granted, with directions to the parties to address also the following issue:

> Whether the California requirement that all nonprofit organizations disclose to the State

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[19] A congressional staffer was convicted for posting home addresses and telephone numbers for five senators of the opposing party during the Senate's consideration of a recent Supreme Court nomination. *See* J. Gerstein, "Ex-Hassan aide sentenced to 4 years for doxing senators," *Politico* (June 19, 2019).

the names and addresses of their largest donors as a precondition to the soliciting of funds violates this Court's precedents barring use of broad prophylactic measures to prevent charitable solicitation fraud and the First Amendment anonymity principle.

Respectfully submitted,

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