

No. 15-152

In the
Supreme Court of the United States

CENTER FOR COMPETITIVE POLITICS,
Petitioner,

v.

KAMALA D. HARRIS, ATTORNEY GENERAL OF
CALIFORNIA,
Respondent.

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

**BRIEF *AMICUS CURIAE* OF CENTER FOR
CONSTITUTIONAL JURISPRUDENCE IN
SUPPORT OF PETITIONER**

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

*Counsel for Amicus Curiae Center
for Constitutional Jurisprudence*

QUESTIONS PRESENTED

1. Whether the California Attorney General can compel the disclosure of the names and addresses of donors (members) of a nonprofit association engaged in political activity.
2. Whether the California Attorney General can compel the disclosure of federal tax documents that Congress mandated be kept confidential.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES..... iii
IDENTITY AND INTEREST OF AMICUS CURIAE 1
SUMMARY OF ARGUMENT2
REASONS FOR GRANTING REVIEW4
I. This Court Cannot Allow the Continued Retreat
by the Lower Federal Courts from the Principles
Announced in *NAACP v. Alabama*.....4
CONCLUSION11

TABLE OF AUTHORITIES

Cases

<i>Cause of Action v. Internal Revenue Service</i> , Case No. 1:13-cv-00920 (D.D.C. 2015) Memorandum Order	9
<i>Citizens United v. Federal Elections Commission</i> , 558 U.S. 310 (2010).....	1
<i>Hollingsworth v. Perry</i> , 133 S.Ct. 2652 (2013).....	1, 9
<i>In re Woodfill</i> , 58 Tex Sup. Ct. .J. 1525; -- S.W.3d --; 2015 WL 4498229 (2015).....	7
<i>John Doe #1 v. Reed</i> , 561 U.S. 186 (2010).....	1, 5
<i>NAACP v. Alabama, ex rel. Patterson</i> , 357 U.S. 449 (1958).....	3, 4, 11
<i>National Organization for Marriage v. United States</i> , 24 F. Supp. 3d 518 (E.D. Vir. 2014)	1, 8
<i>O’Keefe v. Chisholm</i> , 769 F.3d 936 (7th Cir. 2014).....	5
<i>State ex rel. Two Unnamed Petitioners v. Peterson</i> , 363 Wis. 2d 1 , 866 N.W.2d 165 (2015)	6, 7
<i>Woodfill v. Parker</i> , Harris County District Court No. 2014-44974	8

Other Authorities

Treasury Inspector General for Tax Administration, Inappropriate Criteria Were Used to Identify Tax-	
---	--

Exempt Applications for Review, Reference No. 2013-10-053, May14, 2013.....9

Caldego, Christopher, Sacramento Bee Capitol Alert, Kamala Harris to review group behind Planned Parenthood videos, July 24, 2015, available at <http://www.sacbee.com/news/politics-government/capitol-alert/article28666714.html#storylink=cpy>..... 10

Committee on Oversight and Government Reform, Lois Lerner’s Involvement in the IRS Targeting of Tax-Exempt Organizations, March 11, 2014.....9

Eastman, John C., Cheating Marriage: A Tragedy in Three Acts, 13 Ave Maria L. Rev. 281 (2015).....9

Letter from Congresswoman Jane Schakowsky <http://schakowsky.house.gov/press-releases/schakowsky-lofgren-nadler-and-clarke-send-letter-to-attorneys-general-asking-for-investigation-into-center-for-medical-progress/> ...10

www.adfmedia.org/files/WoodfillSubpoenaRequest.pdf.....8

Rules

Sup. Ct. R. 37.3(a)1

Sup. Ct. R. 37.6.....1

**IDENTITY AND
INTEREST OF AMICUS CURIAE**

Amicus, Center for Constitutional Jurisprudence,¹ is dedicated to upholding the principles of the American Founding, including the individual liberties of Free Speech and Association. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance addressing core issues Freedom of Speech and Association, including *John Doe #1 v. Reed*, 561 U.S. 186 (2010) and *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010). The Center has participated in cases where government power was abused in ways that would cause citizens significant concern about disclosing their identity and participation in organizations not favored by the party in power including *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) and *National Organization for Marriage v. United States*, 24 F. Supp. 3d 518 (E.D. Vir. 2014).

The Center's experience in litigation exposing abuse of executive power at the state and federal level and its extensive expertise in the political theory

¹ Pursuant to this Court's Rule 37.2(a), all parties were given notice amicus's intent to file at least 10 days prior to the filing of this brief and all parties have consented to the filing of this brief. Petitioner filed a blanket consent and the consent from respondent has been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

of the Constitution makes it particularly well qualified to elaborate up the vital importance of limiting State and Federal government authorities from actions that will chill speech and association. A democracy cannot survive if participants in the process must live in fear of reprisal.

SUMMARY OF ARGUMENT

The last several years have seen increasing abuse of government power in the pursuit of political gain. A local prosecutor in Wisconsin opposed to policies of the state's governor opened a secret investigation of groups supporting the governor. A prominent tool in the secret investigation were early morning SWAT-like raids on the homes of members of those groups.

In Texas, a mayor sought a court order compelling preachers to hand over the text of their Sunday sermons. The mayor was seeking to prevent a referendum from appearing on the ballot that would overturn recent city council decisions backed by the mayor.

At the federal level, the Internal Revenue Service "accidentally" disclosed confidential donor information of the National Organization for Marriage to group that posted the information on its website in the apparent hopes that its members and supporters would harass NOM's donors.

It also appears that the IRS intentionally delayed the nonprofit applications of organizations that might be seen as opposing the President's policies. Organizations supportive of the President saw no such delay in their applications. Even now, the Internal Revenue Service is delaying its compliance

with federal court orders to disclose information about whether the IRS disclosed tax return information to anyone in the Executive Office of the President.

This trend of apparent abuse of executive power is also evident in the office of the California Attorney General. Under then Attorney General (now Governor) Brown, attorneys in the Attorney General's office appeared to collude with plaintiffs' attorneys seeking to overturn a California constitutional provision defining marriage. More recently, Attorney General Harris as agreed to investigate a nonprofit organization at the behest of prominent Democrats in the House of Representatives. Of special note, Attorney General Harris promised to give special attention to documents filed by the nonprofit with the Attorney General's Registry of Charitable Trusts – the type of information that is at issue in this case.

The promise by Attorney General Harris to open such an investigation is a transparent attempt to chill the advocacy of the nonprofit and the association and speech rights of its donors. Organizations and their members and donors are right to fear the new demands by the California Attorney General that nonprofits disclose their members. That information provides little, if any, enforcement information about whether the organization is abusing the charitable solicitation laws. It does, however, provide the Attorney General with a tool to shut down political opponents.

Recent history demonstrates that this Court cannot allow lower federal courts to abandon the principles announced in the *NAACP v. Alabama, ex rel. Patterson*.

REASONS FOR GRANTING REVIEW

I. **This Court Cannot Allow the Continued Retreat by the Lower Federal Courts from the Principles Announced in *NAACP v. Alabama***

In *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449 (1958), this Court considered a discovery ruling by Alabama state courts that the NAACP turn over to the state the names and addresses of members living in Alabama. The Court acknowledged, “that that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *Id.*, at 460. Thus, any state action that curtailed such freedoms was subject to the “closest scrutiny.” *Id.*

The Court concluded that the membership disclosure order was an action that curtailed the freedom of association and speech. The Court was careful to point out that the state of Alabama had taken no action to restrict speech of NAACP members was not the deciding factor. As the Court noted, even an unintended chilling of speech “may inevitably follow from varied forms of governmental action.” *Id.*, at 461.

The lower court found this ruling to be completely irrelevant since the petitioner here raised a facial challenge to the Attorney General’s order to disclose the names and addresses of petitioner’s members/donors. Instead of analyzing this disclosure order under the case directly on point, the Ninth Circuit chose to look only to the election law cases like

Doe v. Reed.² Even in *Doe*, however, this Court looked beyond the briefs and pleadings of the parties to help define the state’s interest in disclosure. *Doe*, 561 U.S., at 197-98 (citing to briefs of amici to help define the state’s interest in the compelled disclosure). The Ninth Circuit should likewise have taken note of the current trend of abuse of executive power. A disclosure order in this climate “may inevitably” chill the speech of nonprofits and their members. Indeed, that may well be the entire point of the California Attorney General’s order. A close review of the abuse of executive power at every level of government is relevant to this inquiry.

The so-called “John Doe” investigation in Wisconsin demonstrates how abuse of power by a prosecutor can chill an organization’s speech and be used to terrify individuals associated with political organizations. The genesis for the investigation was an allegation of illegal coordination between the campaign for Governor Scott Walker during a recall election and nonprofit advocacy groups that supported the Governor’s policies on public employee collective bargaining.

As part of the “investigation,” prosecutors subpoenaed the Wisconsin Club for Growth seeking (like the California Attorney General in this case) a list of all the contributors to the organization. *O’Keefe v. Chisholm*, 769 F.3d 936, 938 (7th Cir. 2014). The head of the organization successfully sought an order

² In *Doe*, this Court appears to recognize compelled disclosures in the “electoral context” as a discrete subset of compelled disclosure cases, noting the states substantial interest in protecting the integrity of the electoral process. *Doe*, 561 U.S., at 196-97.

quashing the subpoena, but the damage was already done. Because of the investigation, the donations to the organization “dried up.” *Id.*, at 939. Donors apparently had no desire to have their identities disclosed to the “John Doe” prosecutor. There is no reason to believe that donors to nonprofit organizations in California will be any different – especially in light of the manner in which the California Attorney Generals have used their office to advance partisan political positions.

Other actions of the prosecutors in the John Doe investigation demonstrate the extreme lengths to which some individuals with executive power will go to advance their political agenda. During the course of the investigation, search warrants were issued for the homes of individuals connected with the nonprofit organizations that supported the Governor’s policies. As the Wisconsin Supreme Court noted, the warrants were executed before day-break in “armed, paramilitary-style raids in which bright floodlights were used to illuminate the targets’ homes.” *State ex rel. Two Unnamed Petitioners v. Peterson*, 363 Wis. 2d 1, 37, 866 N.W.2d 165, 183 (2015). The court described the breadth of the search warrants as “amazing”:

Millions of documents, both in digital and paper copy, were subpoenaed and/or seized. Deputies seized business papers, computer equipment, phones, and other devices, while their targets were restrained under police supervision and denied the ability to contact their attorneys. The special prosecutor obtained virtually every document possessed by the Unnamed Movants relating to

every aspect of their lives, both personal and professional, over a five-year span (from 2009 to 2013). Such documents were subpoenaed and/or seized without regard to content or relevance to the alleged violations of Ch. 11. As part of this dragnet, the special prosecutor also had seized wholly irrelevant information, such as retirement income statements, personal financial account information, personal letters, and family photos.

Id., 363 Wis., at 38; 866 N.W.2d, at 183. Petitioner in this case participated in the Wisconsin litigation and was thus well aware of the possible abuse of power by executive officials pursuing a political agenda.

Pastors in Houston saw a similar abuse of power when local elected officials attempted to use judicial processes to compel those pastors to produce copies of their sermons and to identify donors who helped pay for a petition drive. At issue was an ordinance sponsored by the Mayor of Houston and a referendum campaign to require a public vote on the measure. When the Mayor and City Council refused to put the referendum on the ballot, the referendum proponents filed suit seeking a court order requiring the city to allow city residents a vote. *In re Woodfill*, 58 Tex Sup. Ct. .J. 1525; -- S.W.3d --; 2015 WL 4498229, *1 (2015). During the course of the litigation, the Mayor served subpoenas on pastors who were not parties to the litigation seeking, among other things, copies of their sermons related to the ordinance and identities of donors who helped fund the referendum petition drive. *Woodfill v. Parker*, Harris County

District Court No. 2014-44974, Notice of Intention to Subpoena Pastor Steve Riggle to Produce Documents or Tangible Evidence.³ The demand for copies of sermons and the names of donors was not related to the issue of whether the proponents submitted the required number of signatures. The only purpose was to chill speech and association rights of those involved in the campaign.

More significant problems develop when government agencies use sensitive private information of citizens in an abusive manner. The Internal Revenue Service is a case in point. In recent years, the IRS has been found liable for releasing confidential portions of a nonprofit organization's tax return, accused of sharing confidential tax return information with individuals in the Executive Office of the President and erecting barriers to the formation of new nonprofits that would oppose the President's policies.

In *National Organization for Marriage v. United States*, *supra*, the Federal District Court found that the IRS "accidentally" released confidential donor information (the information demanded by the California Attorney General in this case) of the National Organization for Marriage to a political opponent of NOM. 24 F. Supp. 3d, at 524. That confidential donor information was later posted to a public website in the apparent hopes that opponents of NOM would harass the donors. *See id.*, at 521.

NOM is apparently not the only victim of unlawful releases of confidential information by the IRS. The organization Cause of Action is suing the IRS

³ Available at www.adfmedia.org/files/WoodfillSubpoenaRequest.pdf

under the Freedom of Information Act for access to emails between the IRS and the Executive Office of the President disclosing confidential tax return information of the President's political opponents. See *Cause of Action v. Internal Revenue Service*, Case No. 1:13-cv-00920 (D.D.C. 2015) Memorandum Order at 1.

The IRS is also accused of delaying approval of nonprofit organizations that might oppose the President's policies while swiftly approving nonprofits that support the President. Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Reference No. 2013-10-053, May 14, 2013; Committee on Oversight and Government Reform, *Lois Lerner's Involvement in the IRS Targeting of Tax-Exempt Organizations*, March 11, 2014 at 3.

The abuse of executive power is also a feature of the California Attorney General's office and organizations and their donors are right to fear the newly mandated disclosure of member/donor information to the Attorney General.

The California Attorney General's office appears to have colluded with the plaintiffs in the *Hollingsworth v. Perry* action challenging California's constitutional provision defining marriage. As documented in a recently published law review article, then Attorney General Jerry Brown made "material and unnecessary concessions" in the state's pleadings in order to assist the plaintiffs in their challenge. John C. Eastman, *Cheating Marriage: A Tragedy in Three Acts*, 13 Ave Maria L. Rev. 281, 287-90 (2015).

The current California Attorney General, and respondent in this action, has also shown a willingness to use her office to pursue partisan political goals. The nonprofit organization Center for Medical Progress has released a series of undercover videos that appear to show how Planned Parenthood is marketing parts of aborted babies to medical research companies. Four Democratic Congressional Representatives wrote to Attorney General Kamala Harris to request an investigation of the Center for Medical Progress.⁴ Attorney General Harris immediately responded that she would open an investigation to determine whether there were any violations of California law *by the organization that exposed Planned Parenthood's wrongdoing* rather than by Planned Parenthood itself.⁵

Of significance to this case, Attorney General Harris promised that she would “review any materials filed by the Center for Medical Progress with the Attorney General’s Registry of Charitable Trusts to determine whether the organization violated laws including, but not limited to, our registration and reporting requirements.” Caldego, *supra* note 5. Those are the type of documents that are at issue in this case. Donors to the Center for Medical Progress now know that their identities will be disclosed to the

⁴ A copy of the letter requesting the investigation can be found on the website of Congresswoman Jan Schakowsky at <http://schakowsky.house.gov/press-releases/schakowsky-lofgren-nadler-and-clarke-send-letter-to-attorneys-general-asking-for-investigation-into-center-for-medical-progress/>

⁵ Christopher Caldego, Sacramento Bee Capitol Alert, Kamala Harris to review group behind Planned Parenthood videos, July 24, 2015, available at <http://www.sacbee.com/news/politics-government/capitol-alert/article28666714.html#storylink=cpy>

California Attorney General as she attempts responds to partisan requests for an investigation.

Petitioners in this action are rightly concerned that the California Attorney General is demanding disclosure of their donor-members. The court below was far too quick to dismiss these concerns and abandon the principles set down by this Court in *NAACP v. Alabama, supra*.

CONCLUSION

The Court should grant the petition for writ of certiorari to ensure that the lower federal courts do not abandon the important principles of *NAACP v. Alabama, ex rel. Patterson*.

DATED: September, 2015.

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2866
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence