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 A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Until the decision below, it had been uniformly understood that governments inflict First Amendment injuries when they compel the disclosure of nonprofit associations' membership or donor lists, and that such invasions must be justified under exacting constitutional scrutiny.

The Attorney General downplays the Ninth Circuit's substantial departure from these principles. She claims that no court has ever found compelled donor disclosure to constitute a First Amendment harm, but fails to address contrary authority presented in the Petition. She adopts the Ninth Circuit's reasoning and reduces the seminal victories of the civil rights era to their facts. And she claims that her dragnet disclosure requirement satisfies exacting scrutiny while simultaneously abandoning the hypothetical constituting her only attempt to demonstrate tailoring.

Respondent relies almost exclusively upon misinterpreted campaign finance precedent, and claims that the mere invocation of a governmental interest is sufficient to require charities to disclose their donors to the government. This dangerous principle affords any official a blank check to intrude upon First Amendment liberties, provided only that he or she conjure a state interest that is not "wholly without rationality."

The Attorney General's brief confirms Petitioner's arguments. She has provided no bar to this Court's

review, nor suggested that this case is an inappropriate vehicle for consideration of the questions presented. Certiorari should accordingly be granted to address the Ninth Circuit's decision to effectively eliminate the First Amendment's protection of private association.

I. THE NINTH CIRCUIT IMPROPERLY HELD THAT COMPELLED DISCLOSURE IMPOSES NO FIRST AMENDMENT INJURY.

The Ninth Circuit and the Attorney General both contend that "state scrutiny" of donor lists does not implicate the First Amendment right "to pursue [one's] lawful private interests privately and to associate freely with others in so doing." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958); Opp. at 13. The Attorney General goes further, stating that "[t]here is no support in this Court's jurisprudence for petitioner's contention that every compelled disclosure causes First Amendment injury."[1] Opp. at 13. But many of the civil rights era's seminal cases acknowledge as much, including *Talley v. California*, 362 U.S. 60 (1960)—a case the Attorney General never discusses—and *NAACP* itself. Pet. at 12-18; Br. of *Amicus Curiae* Institute for Justice at 11 ("this Court has never suggested that the protection afforded to

[1] Of course, this case does not concern "every compelled disclosure." The questions presented apply only to the specific disclosure of a charity's donors as a precondition to speaking with a state's residents.

private association was limited to the NAACP"). Like the court below, her brief insists that these cases have no modern relevance. Opp. at 13-15.

Instead, the Attorney General relies almost exclusively upon the campaign-finance ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976).[2] Opp. at 13, App. at 20a. But that case does not support her argument. First, it relied upon and extended the *NAACP* line of cases. *Buckley*, 424 U.S. at 65-66. Second, the Court explicitly limited donor disclosure to cases where the government could demonstrate "a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64, 79-81 (citations and quotation marks omitted). Because that ruling was a facial one, and did not rely upon a specific record of demonstrated harm, it can only be read as supporting the view that compelled disclosure is itself a constitutional injury. *Id*. at 64 ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure *imposes*. . . .") (emphasis supplied). The Attorney General's reliance upon a single out-of-context use of the word "can" cannot trump *Buckley*'s holding. Opp. at 13 (quoting *Buckley*, 424 U.S. at 64) ("'compelled disclosure, in

[2] As the Attorney General admits, no civil-rights-era precedent stands for the proposition that plaintiffs must demonstrate additional harm besides compelled disclosure itself. Opp. at 14 ("While the need to demonstrate actual harm was first articulated by this Court in *Buckley*. . .").

itself, *can* seriously infringe on privacy of association and belief guaranteed by the First Amendment'") (emphasis supplied by Respondent); Pet. at 16-17.[3]

The Ninth Circuit believed that governments may compel the disclosure of donor information unless a party can show a reasonable probability of specific threats, harassments, or reprisals. But that as-applied standard is only relevant to specific groups subject to a disclosure regime that has *already* passed constitutional muster. Pet. at 16-17. That is, only when a specific disclosure regime has been proven constitutional would groups have to demonstrate some further harm, such as threats, harassments, or reprisals. *E.g.*, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *see* Pet. at 17; Br. of the Cato Institute *et al*. at 6-8. This view is also consistent with *Talley*, wherein this Court facially struck a compelled disclosure statute despite there being no evidence in the record that disclosure would cause threats, harassments, or reprisals against that

[3] The Attorney General provides little authority beyond *Buckley*, but does take issue with some of the cases cited by Petitioner. Her objection, however—including that certain cases "involv[e] regulation of solicitation" as opposed to the regulation of campaigns for public office—is curious where the policy at issue involves the regulation of charitable solicitations and not electioneering speech. Op. at 16; *compare Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) *with McConnell v. FEC*, 540 U.S. 93 (2003).

petitioner. 362 U.S. at 69 (Clark, J., dissenting); Pet. at 17-18.

If compelled disclosure of donor information imposes no First Amendment injury, it is difficult to imagine effective checks on government officials wishing to pry into private associations. Thankfully, that is not the law. *See, e.g.*, *Gibson v. Florida Legislative Investigative Comm.*, 372 U.S. 539, 556 (1963) ("of course, all legitimate organizations are the beneficiaries of these [First Amendment associational] protections."). Certiorari should be granted to review the Ninth Circuit's decision, which essentially invalidates a swath of important civil rights victories and eviscerates the First Amendment's protection of private association.

II. THE NINTH CIRCUIT APPLIED EXACTING SCRUTINY IN NAME ONLY.

Exacting scrutiny requires tailoring. Here, there was none, only the bald assertion of a state interest.

Before the district court, Respondent prevailed despite failing to even identify the mechanism by which compelled donor disclosure would serve any law enforcement interest. Pet. at 8, Opp. at 2-4. Before the court of appeals, Respondent provided a single, unconvincing scenario whereby unredacted Schedule B information might help combat fraud. Pet. at 9 (explaining how other information on Form 990 would give Respondent information permitting her to assess whether case-by-case subpoenas were

appropriate); *In re Primus*, 436 U.S. 412, 434 n.27 (1978).

Yet, here, Respondent has dropped even that fig leaf. She makes no attempt to defend the thin tailoring analysis attempted by the Ninth Circuit, Pet. at 21-22, and we are left with no explanation of how the Attorney General's comprehensive disclosure regime—which operates pursuant to no statute, regulation, or rule[4]—serves her law enforcement interests.[5] She simply says that it does, and that is that.

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[4] Respondent states that "[a]lthough petitioner characterizes the Schedule B requirement as new. . .state regulations have consistently required charitable organizations to submit a complete copy of the federal form and all schedules." Opp. at 4. But while California regulations state that "the Internal Revenue Service Form 990" must be filed with Respondent, many states have similar statutes and do not require *unredacted* versions of that form. App. 49a; Br. of *Amici* States at 7; *e.g.*, GA. CODE ANN. § 43-17-5(b)(4) ("a copy of the Form 990. . .which the organization filed for the previous taxable year"); HAW. REV. STAT. § 467B-6.5(a) ("the annual report shall be a copy of that Form 990 or 990-EZ"); KAN. STAT. § 17-1763(b)(15) ("a copy of the federal income tax return"); KY. REV. STAT. ANN. § 367.657(1) (2015) (". . .a copy of its most recent federal Form 990. . ."). Moreover, as *amici* below amply demonstrated, the practice of requesting donor lists began at some point in 2010. Br. of *Amicus Curiae* Charles Watkins at 8-9, *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015) (No. 14-15978), Dkt. No. 11.

[5] Petitioner reiterates that it "has no objection to the Attorney General conducting compliance audits, or subpoenaing certain donor information as part of an investigation if a charity's annual filing demonstrates a particularized suspicion of wrongdoing." Pet. at 26-27, n.7.

To support her view, the Attorney General again cites to a number of campaign finance cases. Opp. at 19. But those cases stand for the opposite proposition. They all require—at a minimum—"a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United v. FEC*, 558 U.S. 310, 366-367 (2010) (citation omitted, quotation marks removed). They do so by assessing the fit between that informational interest in knowing who funds campaigns for office and the specifics of the compelled disclosure regime. That causal connection is precisely what is missing here.[6] *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("All that matters is that the First Amendment cannot be encroached upon for naught.").

Undaunted, Respondent contends that her comprehensive demand "is precisely the type of law enforcement tool that this Court has repeatedly approved as a permissible means of serving significant governmental interests in protecting the public from fraud and illegality." Opp. at 10. For this proposition, the Attorney General proffers two citations. One is a student note discussing campaign finance disclosure requirements. The second is *Riley*, 487

[6] For this reason, as Petitioner has already noted, Respondent's observation that Schedule B is provided to the Internal Revenue Service ("IRS"), Opp. at 4, is irrelevant. In that context, there is a need for donor information that may survive exacting scrutiny. Pet. at 5, n.2. There is no such relationship here.

U.S. at 800, where this Court suggested that, rather than force professional fundraisers to make disclosures at the point-of-contact with potential donors, "as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers"—not charitable groups—"to file." That case does not demonstrate this Court's "repeated approval" for anything, much less a dragnet[7] demand for *all* significant donors to *all* charities wishing to engage in protected solicitations. *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656, 1664-1665 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest.").

The Attorney General also contends that she need not justify her disclosure program because she will keep donor information confidential. Opp. at 12. Of course, this promise of confidentiality is merely a statement of policy.[8] That policy could change as

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[7] Respondent objects to Petitioner's characterization of her disclosure mandate as a "dragnet." Opp. at 10. The Attorney General seeks private donor information from all charities operating in California without the judicial oversight that would exist if she instead issued administrative subpoenas. It is a dragnet.

[8] California law requires "reports filed with the Attorney General" to "be open to public inspection" unless their "content is not exclusively for charitable purposes." Cal. Gov't Code § 12590. But why does the Attorney General demand donor information here if not for "charitable purposes"?

the result of a future election. *Doe v. Reed*, 561 U.S. 186, 209-210 (2010) (Alito, J., concurring) (observing that different Washington secretaries of state held different policies on the disclosure of petition signatures pursuant to Public Records Act requests). Nor can the Attorney General guarantee that there will be no inadvertent release of donor information, either accidentally or otherwise. *See* Br. of Center for Constitutional Jurisprudence at 8 (discussing inadvertent IRS release of *amicus curiae* National Organization for Marriage's donor list).[9] Under Ninth Circuit law, once donor information becomes public, contributor privacy is irrevocably violated. *ProtectMarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 835 (9th Cir. 2014) (after donor information was revealed publicly, it was so "vast[ly] disseminat[ed]" to third parties that the court could "no longer provide Appellants with effective relief").

The Attorney General, then, has failed to demonstrate any need for donor information as a precondition to engaging in charitable solicitations. This is

[9] The Attorney General has stated that she does not consider herself bound by the IRS's safeguards against the accidental release of sensitive information, including criminal penalties for IRS employees who release donor information. Br. of Defendant-Appellee at 41, *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015) (No. 14-15978), Dkt. No. 17-1 (averring that California's collection of unredacted Schedule B information is not "subject to the Federal confidentiality rules") (citations and quotations omitted). California law provides no similar protections.

unsurprising, as only California and New York demand this information.[10] The remaining "[f]orty-eight states have virtually identical governmental interests. . .yet they do not require the sweeping disclosure of donor information demanded by" Respondent. Br. of the States of Arizona, Michigan, and South Carolina ("States") at 3. Respondent concedes this point, admitting that "[d]ifferent States have different regulatory schemes and oversight functions, and some do not register charities at all." Opp. at 16, n.12. Yet the Attorney General fails to demonstrate how California's condition is so dissimilar that she must compile a database of the private giving habits of an untold number of Americans.[11]

The decision below permits any governmental agency to demand membership or donor information upon the talismanic invocation of a law enforcement interest. The Attorney General's arguments to the contrary, this form of scrutiny is in no way exacting.

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[10] As *amici* States note, although Florida briefly asserted the right to compel an unredacted Schedule B from nonprofit organizations, its legislature promptly overruled that interpretation. Br. of States at 7-8.

[11] The Attorney General suggests that because of budget cuts at the IRS, she must obtain Petitioner's and others' private donor information. Opp. at 2, *id*. at n.1. She has provided no evidence supporting this proposition, which is irrelevant. Petitioner's First Amendment rights do not wax and wane with Congressional appropriations.

III. THE NINTH CIRCUIT'S RULING CREATED SIGNIFICANT CIRCUIT SPLITS.

The Attorney General claims that despite the Ninth Circuit's sharp break with this Court's holdings "[t]here is no disagreement in the lower courts for this Court to resolve." Opp. at 18. As support, she cites to a number of campaign finance cases. Of course, with the exception of *SpeechNow.org v. FEC* and *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012), the cases cited by the Attorney General were also cited in the Petition, and all of these cases support the existence of a circuit split because they applied exacting scrutiny rather than the rational basis review conducted by the court below.[12]

The Attorney General also disputes the existence of a circuit split on the question of First Amendment injury, claiming that "[t]he lower courts also agree that, under 'exacting scrutiny,' a plaintiff must demonstrate that the challenged disclosure requirement places an actual burden on associational rights." Opp. at 19-20. She provides no citation for this mistaken assertion, and fails to rebut the Petition's analysis. Pet. at 18-20.

Moreover, the Second Circuit's ruling in *Am. Civil Liberties Union v. Clapper* specifically found a "concrete, fairly traceable, and redressable injury"

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[12] Neither *SpeechNow* nor *Madigan* supports the application of rational basis review masquerading as exacting scrutiny. 599 F.3d at 696; 697 F.3d at 477.

when private "information [is] obtained," but not made public, "by the government." 785 F.3d 787, 802-803 (2d Cir. 2015) (citation omitted). That position is in sharp conflict with the decision here, but Respondent asks this Court to ignore the circuit split because *Clapper* was decided on statutory grounds, and to instead permit the Second Circuit to reverse its view of the ACLU's injury based upon a pending appeal.[13] This is not a serious challenge to the existence of a circuit split, and provides no comfort to the 110,000 charities whose contributors' associational freedoms are being usurped by Respondent's ongoing policies. Opp. at 2.

Arguments concerning *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999) fare no better. The Attorney General states only that the "Eleventh Circuit did not discuss the evidence, if any, of the actual burden on plaintiffs' First Amendment rights," and consequently "it also did not presuppose any actual burden." Opp. at 21. This is unpersuasive. The *City of Jacksonville* court "did not discuss" evidence of specific harm to those plaintiffs because the harm—compelled disclosure of shareholder identities without cause—was apparent.

[13] That case, *Citizens United v. Schneiderman*, No. 14-cv-3703, 2015 U.S. Dist. LEXIS 97683 (S.D.N.Y. July 27, 2015), challenged a regulation operating in a manner similar to the Attorney General's unwritten disclosure policy. In its First Amendment analysis upholding that regulation, the district court relied almost entirely upon the Ninth Circuit's opinion in this case.

Respondent also suggests that *City of Jacksonville*'s exacting scrutiny analysis is comparable to the Ninth Circuit's rational basis review. Opp. at 21. It is not. Pet. at 24-25.

No court has held, as the Ninth Circuit did, that compelled disclosure of donor identities to the government raises no First Amendment concerns and can be justified by the mere invocation of a governmental interest. That decision necessarily created a number of circuit splits that only this Court can resolve. Certiorari is especially urgent here because once state and local authorities are permitted to amass databases of Americans' private charitable giving and organizational affiliations there will, as a practical matter, be no remedy. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1137 (9th Cir. 2010) ("One injury to Proponents' First Amendment rights is the disclosure itself. Regardless of whether they prevail at trial, this injury will not be remediable on appeal.").

CONCLUSION

The Petition for a writ of certiorari should be granted.

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Respectfully submitted,

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