No. 16-452

In The Supreme Court of the United States

ROBERT R. BENNIE JR.,

Petitioner,

v.

JOHN MUNN, in his official capacity as Director of the Nebraska Department of Banking and Finance, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2, Southeastern Legal Foundation (SLF) and the Center for Constitutional Jurisprudence (CCJ) respectfully move for leave to file the accompanying *amici curiae* brief in support of Robert R. Bennie, Jr., Petitioner. Petitioner has consented to the filing of this *amici curiae* brief. John Munn, Jack E. Herstein, and Rodney R. Griess, Respondents appearing in their official capacities, have withheld consent to the filing of this *amici curiae* brief. Accordingly, this motion for leave to file is necessary.

SLF is a non-profit, public interest law firm and policy center founded in 1976 and organized under the laws of the State of Georgia. SLF is dedicated to bringing before the courts issues vital to the preservation of private property rights, individual liberties, limited government, and the free enterprise system.

CCJ is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. One of those core principles is the freedom of speech at issue in this case. The Center is currently representing True the Vote, Inc., in its litigation challenging the unconstitutional targeting of conservative groups by the Internal Revenue Service. *See True the Vote, Inc. v. IRS*, 831 F.3d 551 (D.C. Cir. 2016), *pet'n for cert. sub nom True the Vote, Inc. v. Lois Lerner* (filed Nov. 3, 2015).

SLF and CCJ regularly appear as *amici curiae* before this and other federal courts to defend the U.S. Constitution and the individual right to the freedom of political speech. *See Common Cause v. Schmitt*, 455 U.S. 129 (1982) and *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

SLF and CCJ agree with Petitioner that the Eighth Circuit's decision warrants review because it exacerbates a circuit split on the standard by which a court of appeals should review a trial court's "ordinary firmness" finding and because the issue involved in the circuit split is one that recurs in every First Amendment retaliation appeal. SLF and CCJ will not repeat those arguments in its brief. Rather, SLF and CCJ write separately to address the chilling effect and suppression of free discussion and debate on public issues that result when government actors retaliate, harass, and even prosecute Americans for taking part in the democratic process.

SLF and CCJ believe that the arguments set forth in their brief will assist the Court in resolving the issues presented by the petition. Neither SLF nor CCJ have a direct interest, financial or otherwise, in the outcome of the case. Because of their lack of a direct interest, SLF and CCJ believe that they can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, SLF and CCJ respectfully request that this Court grant leave to participate

as *amici curiae* and to file the accompanying *amici curiae* brief in support of Petitioner, Robert R. Bennie, Jr.

Respectfully submitted,

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QUESTION PRESENTED

Robert Bennie, a successful financial advisor, was one of the leaders of the Lincoln, Nebraska, Tea Party. Because Bennie called President Obama "a communist" in a prominent newspaper, state regulators pressured Mr. Bennie's employer to impose heightened supervision, conduct unannounced audits, and levy other sanctions to provide them with "some comfort."

The Constitution prohibits government officials from retaliating against individuals for protected speech. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). To prevail on a First Amendment retaliation claim, a plaintiff must show, among other things, that a person of "ordinary firmness" would have declined to speak in light of the government's adverse action. The courts of appeals have split on whether a trial court's determination on this issue is subject to clear error or de novo review. The question presented, which the court below viewed as "likely [] dispositive," is:

In light of the First Amendment's strong speech protections, are "ordinary firmness" decisions reviewed on appeal solely for clear error, as the Third, Sixth, and Eighth Circuits hold, or are they reviewed de novo, as the First, Ninth, Tenth, Eleventh, and D.C. Circuits hold?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

Page

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court.

The Center for Constitutional Jurisprudence (CCJ) is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. One of those core principles is the freedom of speech at issue in this case. CCJ is currently representing True the Vote, Inc., in its litigation challenging the unconstitutional targeting of conservative groups by the Internal Revenue Service. *See True the Vote, Inc. v. IRS*, 831 F.3d 551 (D.C. Cir. 2016), *pet'n for cert. sub nom True the Vote, Inc. v. Lois Lerner* (filed Nov. 3, 2015). It previously represented the National Organization for Marriage in its successful challenge to the IRS's illegal disclosure of its Schedule B donor list. *Nat'l Org. for Marriage, Inc.*

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[1] No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37. All parties were notified of *amici curiae's* intention to file this brief at least 10 days prior to the filing of this brief. Petitioner has consented to the filing of this brief in a letter on file with the Clerk of Court. Respondents withheld consent.

v. IRS, No. 13-CV-1225, 2014 WL 5320170 (E.D. Va. Oct. 16, 2014).

SLF and CCJ have an abiding interest in the protection of the freedoms set forth in the First Amendment – namely the freedom of speech. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions. SLF and CCJ are profoundly committed to the protection of American legal heritage, which includes protecting the freedom of speech, a vital component to its system of laws.

SUMMARY OF THE ARGUMENT

The freedom to publicly speak on political issues is critical to a functioning democracy. A primary purpose of the First Amendment is to protect public discourse, which includes actions like those taken by Mr. Bennie: active involvement in political movements and political parties, supporting the right to bear arms, exclaiming "God Bless America," and being attentive and at times critical of our elected leaders. Rather than protect Mr. Bennie's constitutional right to the free discussion of political affairs, state regulators who disagreed with Mr. Bennie's political beliefs targeted him and used the full force of their power and the law to effectively silence him. They harassed him with unjustified investigations and inquiries, interfered with his client relationships, and requested that his employer

subject him to heightened supervision. Despite its ultimate ruling, the district court found that the state regulators' actions were politically motivated and arguably unconstitutional.

This case involves a straightforward question regarding the standard of review of "ordinary firmness" decisions. However, *amici curiae* file this brief because the underlying issues regarding the now pervasive governmentally coerced silencing of political opponents raises serious constitutional concerns. While there are many examples, *amici curiae* bring three occurrences of political targeting by government actors to this Court's attention: concerted targeting by the Internal Revenue Service (IRS) and other federal agencies of organizations whose members are "conservative" or "patriots"; intimidation through demands that non-profit organizations release their closely safeguarded, and constitutionally protected, donor lists; and threatened prosecution by the Department of Justice (DOJ), Federal Bureau of Investigation (FBI), and state attorneys general for refusing to buy into and promote government-mandated action to stop alleged human-caused climate change.

Admittedly, the examples discussed by *amici curiae* in this brief may appear, at first glance, distinguishable from Mr. Bennie's case – they involve many government actors, many targets, and have been highly publicized. However, it is imperative that when the government attempts to suppress political speech, *all* Americans have the ability to protect their freedom of speech, no matter how "de minimis" the retaliation

may at first appear. By granting the petition for writ of certiorari, this Court has the opportunity to reaffirm the highest protections for political speech, and to provide guidance to lower courts faced with similar cases of political retaliation.

ARGUMENT

I. This case presents an opportunity for the Court to prevent forced self-censorship and ensure Americans can engage in open political discourse, as intended by the Framers.

Since 1724, freedom of speech has famously been referred to as the "great Bulwark of liberty." 1 John Trenchard & William Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious* 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). Upon ratification, the First Amendment "was understood as a response to the repression of speech and the press that had existed in England[.]" *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). Through the First Amendment, our Founding Fathers sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 11 (Oxford University Press 1988). "Believing in the power of reason as applied through public discussion,

they eschewed silence coerced by the law – the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

As this Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). " 'The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.' " *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)).

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes by the people.' " *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). This free discussion necessarily "includes discussions of candidates, structures and forms of government, the manner in which government is operated, and all such matters relating to political processes." *Mills*, 384 U.S. at 218-19. Of these, the Court has observed that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to

the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). In finding a state law regulating the content of permissible speech during a judicial campaign unconstitutional, this Court explained that "'[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges.'" *Republican Party v. White*, 536 U.S. 765, 781 (2002) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989) (internal quotations omitted).

In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court took this a step further and reaffirmed the principle that "[p]olitical speech is indispensable to decisionmaking in democracy[.]" *Id.* at 349 (internal quotations omitted). "The people determine through their votes the destiny of the nation. It is therefore important – vitally important – that all channels of communication be open to them during every election. . . ." *United States v. Int'l Union United Auto., Aircraft and Agric. Implement Workers of Am.*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting).

II. This case presents the Court with an opportunity to address the now pervasive attempts by government actors to coerce their political opponents into silence through retaliation, harassment, and even prosecution.

Mr. Bennie's case is not unique. Throughout the country, government actors are ignoring both the original purpose of the First Amendment and this Court's well-settled jurisprudence protecting political speech. They do so to coerce political opponents into silence. While the instances of retribution through intimidation, harassment, and even prosecution may not share the same facts or even precise legal questions, they all invoke the First Amendment and effectively muzzle the very agencies our Founding Fathers thoughtfully and deliberately selected to keep our society free.

Occurrences of political targeting by government actors of those who they believe hold the "wrong" views have become all too frequent. The following presents three such examples that are likely to come before this Court sometime in the near future – concerted targeting by the IRS and other federal agencies of organizations whose members are "conservative" or "patriots"; intimidation through demands that non-profit organizations release their closely safeguarded, and constitutionally protected, donor lists; and threatened prosecution by the DOJ, FBI, and state attorneys general for refusing to buy into and promote government-mandated action to stop alleged human-caused climate change.

This case provides the Court with an opportunity to not only reaffirm the highest protections for political speech, but also to provide guidance to lower courts where many similar cases are currently pending.

A. The Internal Revenue Service sought to silence conservative organizations applying for tax-exempt status through scare tactics including audits, federal investigations, unfair questioning, and multi-year processing delays.

According to its website, the mission of the IRS is to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with *integrity and fairness to all*." IRS, *The Agency, its Mission and Statutory Authority*, https://www.irs.gov/uac/the-agency-its-mission-and-statutory-authority (last visited Nov. 2, 2016) (emphasis added). "IRS employees accomplish this mission by being *impartial* and handling tax matters in a manner that will promote public confidence." Treasury Inspector General for Tax Administration, U.S. Department of Treasury, Ref. No. 2013-10-053, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (TIGTA Report) 6 (May 14, 2013) (emphasis added).[2] One such tax matter is the review of applications for tax-exempt status as charitable or educational organizations pursuant to 26 U.S.C.

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[2] https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

§§ 501(c)(3) and (4). The statute sets forth objective requirements, and if an applicant establishes those requirements, the IRS is to grant the application and award the organization its tax-exempt status. 26 U.S.C. §§ 501 *et seq*.

On average, from start to finish, it takes the IRS approximately three to four weeks to process a tax-exempt status application. *The IRS Targeting Investigation: What is the Administration Doing?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 2 (2014) (statement of Cleta Mitchell, Esq.).[3] Unless, however, the applicant applied in 2010, 2011 or 2012, and its name suggested in any way that its members were conservative or patriotic. A review by the Treasury Inspector General for Tax Administration and a subsequent congressional hearing established that those potentially conservative organizations waited years to receive responses to their applications – responses that came in the form of unprecedented questioning, unjustified audits of both the organizations and their members, harassing visits from agencies ranging from the IRS to the FBI, and steep fines for regulatory infractions that remain unsubstantiated to this day. *See generally The IRS Targeting Investigation: What is the Administration Doing?: Hearing Before the H. Comm. on Oversight and*

[3] https://oversight.house.gov/wp-content/uploads/2014/02/Mitchell.pdf.

Gov't Reform, 113th Cong. (2014);[4] *see also* TIGTA Report.

While the IRS sought to silence many applicants[5] through overt viewpoint discrimination, one only needs to review the agency's treatment of Catherine Engelbrecht to understand the gravity of its unconstitutional actions. Ms. Engelbrecht, a successful Texas business woman, formed two organizations, True the Vote and King Street Patriots, and in 2010, she applied with the IRS for tax-exempt status for both. As Ms. Engelbrecht explained at the lengthy House Committee on Oversight and Government Reform hearing, prior to filing the two applications, other than filing her annual tax returns, she had no interaction with the government. *See The IRS Targeting Investigation: What is the Administration Doing?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2014) (statement of Catherine Engelbrecht).[6] That all changed in 2010. After filing her applications for True the Vote and King Street Patriots with the IRS, Ms. Engelbrecht, her family, her business, and her nonprofit organizations became the subjects of over a

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[4] https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg87094/html/CHRG-113hhrg87094.htm.

[5] The TIGTA Report explained that "[t]he Determinations Unit sent requests for information that we later (in whole or in part) determined to be unnecessary for 98 (58 percent) of 170 organizations that received additional information request letters." TIGTA Report at 18.

[6] https://oversight.house.gov/wp-content/uploads/2014/02/Engelbrecht.pdf.

dozen audits or inquiries by the federal government. *See generally id.*

In 2011, the IRS commenced an audit of both Ms. Engelbrecht personally and of her family-owned business, each audit going back a number of years. *Id.* at 3. In 2012, the Occupational Safety and Health Administration inspected her business on a select occasion and despite a lack of findings, imposed fines exceeding $20,000. *Id.* In 2012 and 2013, the Bureau of Alcohol, Tobacco and Firearms commenced audits of her business. *Id.* And, with respect to her non-profit organization, in 2010, the FBI continuously requested membership lists implying that it was somehow related to domestic terrorism cases. *Id.* All matters have since been dropped. *Id.* The timing of the audits, inspections and investigations hardly seems like a coincidence and provides further evidence of the coordinated political targeting that occurred.

In addition to the endless harassment from federal agencies, the IRS subjected Ms. Engelbrecht to over one hundred questions regarding her organizations applying for tax-exempt status – many of which the Inspector General found were "unnecessary." *True the Vote v. IRS*, 831 F.3d 551, 560 (D.C. Cir. 2016). After waiting for three years for the IRS to respond to the applications, Ms. Engelbrecht sued the IRS and asked the court to order the agency to grant her organizations' applications for tax-exempt status, to find that the IRS violated the First Amendment, and to enjoin the IRS from future violations with respect to the organizations. *True the Vote v. IRS*, 71 F. Supp. 3d 219,

224 (D.D.C. 2014). The IRS finally granted True the Vote and King Street Patriots their tax-exempt status, but only after a lawsuit, congressional scrutiny, and an internal investigation.[7] *Id.* at 224.

Even more telling than Ms. Engelbrecht's story are the aforementioned Inspector General's findings. The May 2013 Inspector General's report states what many like Ms. Engelbrecht already knew – that "The Determinations Unit [of the IRS] developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names." *True the Vote*, 831 F.3d at 559 (quoting TIGTA Report at 5). The Inspector General concluded that "the criteria developed by the Determinations Unit gives the appearance that the IRS is not impartial in conducting its mission. The criteria focused narrowly on the names and policy positions of organizations instead of tax-exempt laws and Treasury Regulations." *Id.* (quoting TIGTA Report at 6-7).

The excessive delays and discriminatory processing discussed in the Inspector General's report cannot be understated and support the viewpoint discrimination claims asserted by Ms. Engelbrecht and so many

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[7] The district court found the claims for injunctive and declaratory relief moot because the IRS eventually granted the plaintiffs' applications for tax-exempt status. *True the Vote*, 71 F. Supp. 3d at 229. On appeal, the court found the district court "erred in concluding that the litigation . . . had been mooted by the government's putative voluntary cessation of the conduct" and reversed the district court's dismissal of the claims for injunctive and declaratory relief and remanded the action for further proceedings. *True the Vote*, 831 F.3d at 564.

others. This Court has held that "the tax code may not 'discriminate invidiously . . . in such a way as to aim at the suppression of dangerous ideas.'" *Id.* at 561 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)). When the government "targets not subject matter, but particular views taken by speakers on a subject . . . [,]" *Rosenberger v. Rector Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), it engages in an "egregious form of content discrimination." *Id.* Just like the IRS' targeting of conservative organizations solely because of their assumed political beliefs, the state agency actions taken against Mr. Bennie were motivated by his ideology and thus, offend the First Amendment.

B. Through mandatory disclosure requirements, states seek to limit the ability of donors and non-profits to engage in free speech.

The IRS is not the only government agency abusing its power to silence others. Over the last decade, a growing number of states[8] started demanding the identities of all significant donors to non-profit educational and charitable groups as a precondition to speaking with potential donors. These demands come

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[8] For example, California's Attorney General requires organizations to annually submit the complete IRS Form 990 Schedule B, which lists the names and addresses of persons who have given $5,000 or more to the organization during the preceding year. *See* Cal. Code Regs. tit. 11, § 301. *See also* N.Y. Comp. Codes R. & Regs. tit. 13 § 91.5(c)(3)(i)(a).

despite a complete lack of evidence that seizing donor information will in fact advance any state interest. Supporters of these disclosure requirements have openly acknowledged that their goal is to chill speech. United States Senator Chuck Schumer, the sponsor of a proposed federal bill mandating such disclosure proclaimed, "I think it is good when somebody is trying to influence Government for their purposes, directly with ads and everything else. It is good to have a deterrent effect." *See The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections: Hearing Before the S. Rules and Admin. Comm.*, 113th Cong. (2014).[9]

These disclosure requirements undermine this Court's consistent recognition that the freedom to associate, and to speak in concert with others, would inevitably be chilled by unjustified intrusion. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1976). In *NAACP*, this Court announced that unjustified "state scrutiny" of organizational membership was inconsistent with all Americans' rights to "pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP*, 357 U.S. at 466.

Two decades later, this Court affirmed that principle and explained that when a government compels disclosure of an organization's financial supporters, the government intrudes upon the First Amendment's

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[9] http://www.rules.senate.gov/public/?a=Files.Serve&File_id=5E5559A2-9A30-41B7-849B-6C1938C7EA61.

protection of free association. *Buckley*, 424 U.S. at 64 (compelled disclosure has been "long . . . recognized" as a "significant encroachment[] on First Amendment rights."); *NAACP*, 357 U.S. at 462 ("[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as taking First Amendment activity); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974) ("an organization may have standing to assert that constitutional rights of its members be protected from governmentally compelled disclosure of their membership in organization, and that absent a countervailing governmental interest, such information may not be compelled"); *id.* at 98 (Marshall, J., dissenting) ("[t]he First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure").

These disclosure requirements also attack the lifeblood of many non-profit organizations – confidentiality. *See, e.g.*, Ted Hart, et al., *Nonprofit Internet Strategies: Best Practices for Marketing, Communications, and Fundraising Success* 64 (2005) ("It is extremely important to develop ethical rules and guidelines surrounding information and confidentiality. . . . [D]onors count on non-profits to respect their privacy."). It "is indispensable to the trust relationship that must exist between a non-profit organization and its constituents." Eugene R. Tempel, ed., *Hank Rosso's Achieving Excellence in Fund Raising*

400 (2d ed. 2003). Both empirical research and recent experience support the proposition that mandatory disclosure deters people from exercising their First Amendment rights to support public advocacy organizations. *See* Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, Institute for Justice (Mar. 2007).[10]

Most recently, the California Attorney General demanded the unredacted Form 990 Schedule B for Americans for Prosperity (AFP), a non-profit corporation organized under 26 U.S.C. § 501(c)(3) whose mission is to fight for lower taxes, less government regulation, and economic prosperity for all. In other words, the State sought AFP's donor list. Recognizing the constitutional infirmities inherent in the State's demand, the organization filed a lawsuit seeking injunctive relief. *Am. for Prosperity Found. v. Harris*, No. 14-9448, 2016 U.S. Dist. LEXIS 53679, at *3 (C.D. Cal. Apr. 21, 2016). As the district court explains in its order granting the requested relief, AFP presented overwhelming evidence that disclosure of its donors would submit them to "public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." *Id.* at *12. For example, donors testified that at AFP events they were subjected to pushing, shoving, shouting, yelling, spitting, entrapment in tents, and even death threats. *Id.* at *12-14.

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[10] http://ij.org/report/disclosure-costs/.

The chilling effect of the threats and harassment AFP's donors endured cannot be overstated and provides a small glimpse into why the authors of the The Federalist chose to remain anonymous when advocating the adoption of the Constitution. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). The retaliation inflicted on political opponents as a result of demanding their donor lists is just another example of why the Founders viewed protecting the right to political speech as indispensable to protecting liberty.

C. Multiple federal agencies, including the Department of Justice and Federal Bureau of Investigation, along with over a dozen state attorneys general, have launched investigations to silence an important public policy debate regarding the unproven scientific theory of man-made, catastrophic climate change.

Even more egregious than the aforementioned constitutional violations which result in deterrence and retaliation, is the criminalization by the DOJ, the FBI, the Environmental Protection Agency (EPA), Congressmen, and state attorneys general of those who dare to challenge the unproven scientific theory of man-induced, catastrophic climate change. Scientists do not use the term "consensus," despite regular use of the term by politicians and bureaucrats who promote government-mandated action to stop alleged human-caused climate change. The scientific method has little space for opinion, and no room at all for the democratic

process. However, it is that "consensus" that has federal and state agencies and attorneys general investigating, and threatening prosecution of, so-called "climate change deniers."

In May 2015, United States Senator Sheldon Whitehouse called for Racketeer Influenced and Corrupt Organizations Act (RICO) investigations of any alleged "climate change deniers"[11] and publicly commenced the "Climate Inquisition," as it is now commonly referred to. Several months later, a group of 20 academics[12] working in "consultation with Senator Whitehouse"[13] sent an open letter to President Obama and U.S. Attorney General Loretta Lynch calling for them to prosecute "corporations and other organizations that have knowingly deceived the American people about the risks of climate change" under RICO. *See*

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[11] https://www.whitehouse.senate.gov/news/speeches/time-to-wake-up-climate-denial-recalls-tobacco-racketeering.

[12] Signatories included academics from George Mason University, the University of Washington, Rutgers University, the University of Maryland, the National Center for Atmospheric Research, Florida State University, the University of Miami, the University of Texas – Austin, Columbia University, and the Atmospheric Research in Vermont.

[13] Records obtained by Competitive Enterprise Institute in response to a Freedom of Information Act request strongly suggest that Senator Whitehouse consulted with the academics. *See* News Release, Competitive Enterprise Institute, *CEI Defeats RICO-20 Ringleader in FOIA Lawsuit* (May 3, 2016), https://cei.org/content/cei-defeats-rico-20-ringleader-foia-lawsuit.

Letter from 20 Academics to President Obama, Attorney General Lynch and OSTP Director Holdren (Sept. 1, 2015).[14]

Attorney General Lynch heard those calls and in a hearing on March 9, 2016, before the Senate Judiciary Committee, she told Senator Whitehouse that she had discussed the potential for bringing civil action against those who question human-caused climate change. Melanie Hunter, *AG Lynch: DOJ Has Discussed Whether to Pursue Civil Action Against Climate Change Deniers*, CNSNEWS.com (Mar. 9, 2016). She also stated that she had "referred it to the FBI to consider whether or not it meets the criteria for which we could take action."[15] *Id.* Recognizing the DOJ's abuse of power, five Members of the U.S. Senate sent a letter to Attorney General Lynch chastising her for her "blatant violation of the First Amendment" and calling her "abuse of power" one that "rises to the level of prosecutorial misconduct." Letter from Senators Ted Cruz, Mike Lee, Jeff Sessions, David Perdue, and David Vitter to Attorney General Loretta Lynch (May 25, 2016).[16] They called on her to stop her investigation and to "explain what steps you are taking as the federal official charged with protecting the civil rights of American citizens to prevent state law enforcement

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[14] http://web.archive.org/web/20150920110942/http://www.iges.org/letter/LetterPresidentAG.pdf.

[15] http://www.cnsnews.com/news/article/melanie-hunter/ag-lynch-doj-has-discussed-whether-pursue-legal-action-against-climate.

[16] http://www.perdue.senate.gov/imo/media/doc/DOJ%20Letter.pdf.

officers from unconstitutionally harassing private entities or individuals simply for disagreeing with the prevailing climate change orthodoxy." *Id.* Rather than addressing the Senators' concerns, Assistant Attorney General Peter Kadzik responded and refused to "confirm or deny the existence" of any investigation. Letter from Assistant Attorney General Peter J. Kadzik, Office of Legislative Affairs, Dept. of Justice, to Senators Mike Lee, Ted Cruz, Jeff Sessions, David Perdue, and David Vitter (June 29, 2016). He continued to explain that the DOJ only engages in the "fair, evenhanded administration of the federal criminal laws" – a proposition that Kadzik's personal actions call into question. *Id.*

While the investigations by the FBI and DOJ continue behind closed doors, more than a dozen state attorneys general have made their investigations very public. On March 29, 2016, those state attorneys general held a press conference and announced their coalition, "AGs United for Clean Power," and their intention to investigate and prosecute climate change deniers. Press Release, Office of New York Attorney General Eric T. Schneiderman, *A.G. Schneiderman, Former Vice President Al Gore and a Coalition of Attorneys General from Across the Country Announce Historic State-Based Effort to Combat Climate Change* (Mar. 29, 2016).[17] They accused anyone who does not buy into government-mandated action to stop alleged human-caused climate change of lying, misleading the

[17] http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across.

public, committing fraud, being selfish, and destroying the planet. *Id.* They threatened to go after anyone disagreeing with them with "the fullest extent of the law." *Id.*

Notably, the press conference was both preceded and followed by action. Many months before the press conference, at least two states had launched investigations into ExxonMobil for allegedly lying to the public and its shareholders over the dangers of climate change.[18] On the heels of the press conference, the attorney general of the U.S. Virgin Islands, Claude Walker, launched an investigation into ExxonMobil. He engaged a private law firm (under a very lucrative contingency arrangement) which in turn served a subpoena on the Competitive Enterprise Institute (CEI), a group known for its research on energy and climate issues. *United States Virgin Islands v. ExxonMobil Oil Corp.*, No. 16-2469 (D.C. Super. Ct. Apr. 9, 2016).[19] The

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[18] In 2015, New York Attorney General Eric Schneiderman opened an investigation of ExxonMobil for alleged Martin Act violations. *See* Justin Gillis and Clifford Kraus, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times, Nov. 5, 2015, http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html?_r=0. In early 2016, California Attorney General Kamala Harris launched a similar investigation against ExxonMobil for violations of securities law and other statutes. *See* John Schwartz, *California Said to Target Exxon in Climate Inquiry*, N.Y. Times, Jan. 20, 2016, http://www.nytimes.com/2016/01/21/science/california-said-to-target-exxon-in-climate-inquiry.html.

[19] Subpoena to Competitive Enterprise Institute dated Apr. 4, 2016, *United States Virgin Islands v. Exxon Mobil*, No. 16-2469 (D.C. Super. Ct. Apr. 9, 2016), https://cei.org/sites/default/files/

subpoena demanded all documents dating back to 1997 in CEI's possession regarding climate change, greenhouse gases, carbon tax, climate science and other similar issues. *Id.* CEI challenged the subpoena as violating the First Amendment, and after a heated legal battle, Attorney General Walker eventually withdrew his subpoena.[20]

While the withdrawal of the subpoena constituted a win for free speech, that win is only temporary. The DOJ and FBI investigations continue, as do a number of state investigations. The investigations all have one thing in common – they constitute abuses of power. As Oklahoma Attorney General Scott Pruitt and Alabama Attorney General Luther Strange explained, the investigations are an "attempt to silence core political speech on one of the major policy debates of our time." Press Release, Office of Attorney General, State of Alabama, *AG's Strange and Pruitt Condemn Attempts to Silence Those Who Disagree with President Obama's Energy Agenda* (Mar. 30, 2016).[21] As they further noted, "scientific and political debate is healthy, and it should be encouraged." It should "not be silenced with threats of criminal prosecution by those who believe that their position is the only correct one and that all

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CEI%20Subpoena%20from%20USVI%20AG%20Claude%20Walker%20April%207%202016.pdf.

[20] https://cei.org/sites/default/files/Virgin%20Islands%20DC%20Subpoena%20Termination%20Notice.pdf.

[21] http://www.ago.state.al.us/News-800.

dissenting voices must therefore be intimidated and coerced into silence." *Id.*

Our Founding Fathers designed the Constitution to protect fundamental rights of speech and expression. In one of the most profound free speech cases in our country's history, Justice Brandeis explained: "Believing in the power of reason as applied through public discussion, [the Founders] eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. The remedy to be applied is more speech, not enforced silence." *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring). EPA Administrator Gina McCarthy is frequently cited as calling those who embrace human-caused climate change "normal people," implying that anyone who disagrees is "not normal." John Siciliano, *EPA Chief Says Climate Change Deniers Not 'Normal,'* Washington Examiner, June 23, 2015.[22] *Amici curiae* contend that the Framers of our Constitution would be appalled that "not normal" now constitutes grounds for federal prosecution.

[22] http://www.washingtonexaminer.com/epa-chief-says-climate-change-deniers-not-normal/article/2566896.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner in the Petition for Writ of Certiorari, *amici curiae* respectfully request that this Court grant the Petition for Writ of Certiorari.

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No. 16-452

ROBERT R. BENNIE JR.,
Petitioner,
v.
JOHN MUNN, in his official capacity as Director of the Nebraska Department of Banking and Finance, et al.,
Respondents.

AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 7th day of November, 2016, send out from Omaha, NE 2 package(s) containing 3 copies of the MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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Subscribed and sworn to before me this 7th day of November, 2016.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

ANDREW H. COCKLE
General Notary
State of Nebraska
My Commission Expires Apr 9, 2018

Andrew H. Cockle
Notary Public

Patricia C. Billotte
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33624

Robert R. Bennie, Jr. v. John Munn, in His Official Capacity as Director of the Nebraska Department of Banking and Finance, et al.
U.S. Supreme Ct. No. 16-452
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ROBERT R. BENNIE JR.,
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JOHN MUNN, in his official capacity as Director of the
Nebraska Department of Banking and Finance, et al.,
Respondents.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 5186 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 7th day of November, 2016.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

ANDREW H. COCKLE
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