C.A. No. 17-17403

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSTITUTE FOR FREE SPEECH,

Plaintiff-Appellant,

v.

XAVIER BECERRA,
in his official capacity as the Attorney General of California,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the United States District Court
for the Eastern District of California
D.C. No. 14-cv-00636-MCE-DAD
(Honorable Morrison C. England)

Alan Gura
GURA PLLC
916 Prince Street, Suite 107
Alexandria, Virginia 22314
703.835.9085
alan@gurapllc.com

Allen Dickerson
Zac Morgan*
INSTITUTE FOR FREE SPEECH
124 S. West Street, Suite 201
Alexandria, Virginia 22314
703.894.6800/F: 703.894.6811
adickerson@ifs.org

Attorneys for Appellant
INSTITUTE FOR FREE SPEECH

March 9, 2018
*admission pending

CORPORATE DISCLOSURE STATEMENT

The Institute for Free Speech, a nonprofit corporation organized under the laws of the Commonwealth of Virginia, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF JURISDICTION 2

ISSUE PRESENTED FOR REVIEW 3

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 3

STATEMENT OF THE CASE 6

A. Contents of Form 990, Schedule B 6

B. The Institute's Experiences With The Attorney General's Disclosure Program 9

C. The Institute's First Attempt To Obtain Injunctive Relief 11

a. Before the Eastern District of California 11
b. Before this Court 13

D. Subsequent Regulatory Developments 18

E. Related Proceedings Before The U.S. District Court For The Central District of California 19

F. The Institute's First Amended Complaint And Its Dismissal 22

STANDARD OF REVIEW 27

SUMMARY OF THE ARGUMENT 27

ARGUMENT 29

I. *Center for Competitive Politics v. Harris* Ought To Be Overturned 29

a. Compelled disclosure, in itself, constitutes First Amendment injury. 29

b. Exacting scrutiny is a heightened form of judicial review, not a synonym for rational basis 33

c. *Center for Competitive Politics v. Harris*'s holding rests upon an obvious legal error 37

d. Under the pre-*Center for Competitive Politics v. Harris* rules, the Institute would likely have prevailed on the merits 43

CONCLUSION 44

STATEMENT OF RELATED CASES 46

TABLE OF AUTHORITIES

CASES

Acorn Invs., Inc. v. City of Seattle,
887 F.2d 219 (9th Cir. 1989) 1, 15, 37, 38, 39, 40, 41

Am. Civil Liberties Union v. Clapper,
785 F.3d 787 (2d Cir. 2015) 32

Am. for Prosperity Found. v. Harris,
809 F.3d 536 (9th Cir. 2015) 18, 19, 37

Am. for Prosperity Found. v. Harris,
182 F. Supp. 3d 1049 (C.D. Cal. 2016)..*passim*

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..27

Bates v. City of Little Rock,
361 U.S. 516 ....15, 29, 32, 36

Buckley v. Valeo,
424 U.S. 1 (1976)..17, 29, 33, 34

Calif. Bankers Ass'n v. Shultz,
416 U.S. 21 (1974)... 30-31

Ctr. for Competitive Politics v. Harris,
136 S. Ct. 480 (2015)...17

Ctr. for Competitive Politics v. Harris,
784 F.3d 1307 (9th Cir. 2015) ....*passim*

Ctr. for Competitive Politics v. Harris,
2017 U.S. Dist. LEXIS 180557 (E.D. Cal. Oct. 31, 2017) 2, 24, 26, 35

Ctr. for Competitive Politics v. Harris,
2014 U.S. Dist. LEXIS 66512 (E.D. Cal. 2014) 12, 13

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010)..32

Citizens United v. Schneiderman,
2018 U.S Dist. LEXIS 3516 (2d Cir. Feb. 15, 2018) 2, 21, 24, 29, 30, 44

Elrod v. Burns,
427 U.S. 347 (1976)..35, 36

Fed. Election Comm'n v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007)..31

Friedrichs v. Calif. Teachers Ass'n,
2013 U.S. Dist. LEXIS 188995 (C.D. Cal. 2013) 44

Genusa v. City of Peoria,
619 F.2d 1203 (7th Cir. 1980) 41

Gibson v. Fla. Legis. Investigation Comm.,
372 U.S. 539 (1963)...15, 26, 30

Gonzalez v. Ariz.,
677 F.3d 383 (9th Cir. 2012) 43

Gooding v. Wilson,
405 U.S. 518 (1972)..31

Graham-Sult v. Clainos,
738 F.3d 1131 (9th Cir. 2013) 27

Hamdi v. Rumsfeld,
542 U.S. 507 (2004)..31

Harris v. Bd. of Supervisors,
366 F.3d 754 (9th Cir. 2004) 27

Hart v. Massanari,
266 F.3d 1155 (9th Cir. 2001) 43

In re Primus,
436 U.S. 412 (1978)..31

Keyishian v. Bd. of Regents of the Univ. of State of N.Y.,
385 U.S. 589 (1967)..32

Lady J. Lingerie, Inc. v. City of Jacksonville,
176 F.3d 1358 (11th Cir. 1999) 41

Mapp v. Ohio,
367 U.S. 643 (1961)..31

McCutcheon v. Fed. Election Comm'n,
572 U.S. __; 134 S. Ct. 1434 (2014) 36, 44

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995)..35

NAACP v. Ala. ex rel. Patterson,
357 U.S. 449 (1958)...1, 26, 29, 31, 32

NAACP v. Button,
371 U.S. 415 (1963)...15, 31

Nat'l Meat Ass'n v. Brown,
599 F.3d 1093 (9th Cir. 2010) 27

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000)..36

Shelton v. Tucker,
364 U.S. 479 (1960)..15

Talley v. Calif.,
362 U.S. 60 (1960)...15, 30, 31

United States v. Harriss,
347 U.S. 612 (1954)..32

United States v. Rumely,

345 U.S. 41 (1953)..32

United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.,
971 F.2d 244 (9th Cir. 1992)..22

Van Hollen v. Fed. Election Comm'n,
811 F.3d 486 (D.C. Cir. 2016)..35

Worley v. Cruz-Bustillo,
717 F.3d 1238 (11th Cir. 2013)..34

Wis. Right to Life, Inc. v. Barland,
751 F.3d 804 (7th Cir. 2014)..34

Williams-Yulee v. The Fla. Bar,
576 U.S. __; 135 S. Ct. 1656 (2015)..11

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008)..27

Yamada v. Snipes,
786 F.3d 1182 (9th Cir. 2015)..34

CONSTITUTIONS, STATUTES, AND REGULATIONS

U.S. Const. amend. I 3

26 U.S.C. § 501(c)(3)..6, 7

26 U.S.C. § 501(c)(6)..6

26 U.S.C. § 527 6

26 U.S.C. § 6103 7

26 U.S.C. § 6104 7

26 U.S.C. § 6104(b) 7

26 U.S.C. § 6104(c)(3) 8

26 U.S.C. § 6104(d)(3)(A) 7

26 U.S.C. § 7213(a)(1) 7

26 U.S.C. § 7213A(a)(2) 7

26 U.S.C. § 7213A(b)(1) 7

26 U.S.C. § 7216 7

26 U.S.C. § 7431 7

26 U.S.C. § 6033(b) 6

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

28 U.S.C. § 1291 3

28 U.S.C. § 2201 2

28 U.S.C. § 2202 2

28 U.S.C. § 1391(b) 2-3

42 U.S.C. § 1983 2

Cal. Gov. Code § 6254(k) 19

Cal. Gov. Code § 12585 ....5, 9

Cal. Gov. Code § 12586(a) 5, 9

Cal. Gov. Code § 12587.1 9

Cal. Gov. Code § 12590 12

11 Code of Calif. Regs § 301 ....4, 9

11 Code of Calif. Regs § 303 4

11 Code of Calif. Regs § 305 5

11 Code of Calif. Regs § 306(c) 9

11 Code of Calif. Regs § 310 ....10, 18

11 Code of Calif. Regs § 310(b) 18

Fla. Stat. § 496.407(2)(a) 38

OTHER AUTHORITIES

Docket, *Am. for Prosperity Found v. Becerra*,
Case Nos. 16-55727, 16-55786 (9th Cir.) 19

Fed. R. App. 4(a)(1)(A) 3

Br. of *Amici Curiae* States of Ariz., Mich., and S.C.,
Ctr. for Competitive Politics v. Harris,
No. 15-152 (U.S. 2015) 23

Supplemental Excerpts of Record, *Am. for Prosperity Found. v. Becerra*,
Case No. 16-55727 (9th Cir. Jan. 20, 2017) 22

Oral Argument, *Ctr. for Competitive Politics v. Harris*,
No. 14-15978 (9th Cir. Dec. 8, 2014) 14

INTRODUCTION

Sixty years ago, the U.S. Supreme Court explicitly held that the Constitution secures all Americans' right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958). Later decisions of both the Supreme Court and this Court affirmed the principle that one's associations are "immune[e] from state scrutiny," and have required the government to show a real need before demanding to know an organization's supporters. *NAACP*, 357 U.S. at 466; *Acorn Invs. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989).

Because this remains the controlling Supreme Court and circuit precedent, the decision below should be reversed.

The Attorney General requires that all charitable nonprofits give him a list of their major donors before they are legally allowed to fundraise in California. In 2015, a panel of this Court held that this demand imposes no First Amendment harm whatsoever. The Court ruled that unless a plaintiff demonstrates "additional harmful state action" or a risk of "private discrimination" as a result of donor disclosure, the government need only show that its demand is "not wholly without rationality". *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1313, 1317 (9th Cir. 2015) (citation and quotation marks omitted) (emphasis removed). In doing so, the Court purported to limit *NAACP v. Alabama* and its progeny—including a prior decision

of this Circuit—to their facts. Consequently, the district court below granted the Attorney General's motion to dismiss, reasoning that since the Institute did not allege that the Attorney General's disclosure demand "for nonpublic use has caused any threat, harm, or negative consequences" to the Institute or its donors, the disclosure imposed "no identified First Amendment burden." *Ctr. for Competitive Politics v. Harris* ("*CCP II*"), ER 9, 12.[1] It did so despite acknowledging Appellant's well-pled allegations that the Attorney General does not actually use the information demanded, and that it has, in the Second Circuit's words, "recklessly" administered its program and demonstrated "systematic incompetence in keeping donor lists confidential." *Citizens United v. Schneiderman*, 2018 U.S. App. LEXIS 3516 at *18 (2d Cir. Feb. 15, 2018).

To the extent that the district court's ruling was necessitated by any precedent of this Court, swift review by a higher authority is called for. To the extent that it is not, the district court ought to be reversed and cornerstone First Amendment precedent restored to its proper place.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202, and 42 U.S.C. § 1983. Venue was proper pursuant to 28

[1] The case is also available at: 2017 U.S. Dist. LEXIS 180557, at *13-14 (E.D. Cal. Oct. 31, 2017)

U.S.C. § 1391(b). The district court granted the Attorney General's motion to dismiss without leave to amend, and denied the Institute's motion for a preliminary injunction as moot, on October 31, 2017. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. On November 29, 2017, the Institute timely filed its notice of appeal. ER 133; Fed. R. App. 4(a)(1)(A).

ISSUE PRESENTED FOR REVIEW

Does the Attorney General's "Schedule B" disclosure program, which demands the names and addresses of "major donors" to charitable nonprofit organizations as a precondition of soliciting funds from Californians, violate the freedom of association protected by the First and Fourteenth Amendments?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, provides that the State "shall make no law…abridging the freedom of speech…or the right of the people peaceably to assemble." U.S. Const. amend. I.

11 Code of Calif. Regulations, § 310 ("Public Inspection of Charitable Trusts Records"), reads:

> (a) The register, copies of instruments and the reports filed with the Attorney General, except as provided in subdivision (b) and pursuant to Government Code section 12590, shall be open to public inspection at the Registry of Charitable Trusts in the office of the Attorney General, Sacramento, California, at such reasonable times as the Attorney General may determine. Such inspection shall at all times be

subject to the control and supervision of an employee of the Office of the Attorney General.

(b) Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104 (d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:

(1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or

(2) In response to a search warrant.

11 Code of California Regulations § 301 ("Periodic Written Reports"), in relevant part, reads:

Except as otherwise provided in the Act, every charitable corporation, unincorporated association, trustee, or other person subject to the reporting requirements of the Act shall also file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by such corporation, unincorporated association, trustee, or other person. Except as otherwise provided in these regulations, these reports include the Annual Registration Renewal Fee Report, ("RRF-1" 08/2017), hereby incorporated by reference, which must be filed with the Registry of Charitable Trusts annually by all registered charities, as well as the Internal Revenue Service Form 990, which must be filed on an annual basis with the Registry of Charitable Trusts, as well as with the Internal Revenue Service.

11 Code of California Regulations § 303 ("Filing Forms") reads:

All periodic written reports required to be filed under the provisions of section 12586 of the Government Code and section 301 of these regulations shall be filed with the Registry of Charitable Trusts, and include: (1) the Annual Registration Renewal Fee Report ("RRF-1"

08/2017); and (2) Internal Revenue Service Form 990, 990-EZ or 990-PF, as applicable.

11 Code of California Regulations § 305 ("Annual Filing of Reports"), in relevant part, reads:

> After the first periodic report is filed as required by section 304 of these regulations, periodic written reports shall thereafter be filed on an annual basis…

California Government Code § 12585 reads:

> (a) Every charitable corporation, unincorporated association, and trustee subject to this article shall file with the Attorney General an initial registration form, under oath, setting forth information and attaching documents prescribed in accordance with rules and regulations of the Attorney General, within 30 days after the corporation, unincorporated association, or trustee initially receives property. A trustee is not required to register as long as the charitable interest in a trust is a future interest, but shall do so within 30 days after any charitable interest in a trust becomes a present interest.
>
> (b) The Attorney General shall adopt rules and regulations as to the contents of the initial registration form and the manner of executing and filing that document or documents.

California Government Code § 12586(a) reads:

> (a) Except as otherwise provided and except corporate trustees which are subject to the jurisdiction of the Commissioner of Financial Institutions of the State of California under Division 1 (commencing with Section 99) of the Financial Code or to the Comptroller of the Currency of the United States, every charitable corporation, unincorporated association, and trustee subject to this article shall, in addition to filing copies of the instruments previously required, file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation,

> unincorporated association, or trustee, in accordance with rules and regulations of the Attorney General.

STATEMENT OF THE CASE

The Institute challenges the Attorney General's program requiring that he be provided with the unredacted contents of IRS Form 990, Schedule B as a precondition for membership in the state Registry for Charitable Trusts. Registry membership, in turn, is required before an organization may solicit charitable contributions within California.

A. Contents of Form 990, Schedule B

The Institute for Free Speech, like all charitable nonprofits regulated under 26 U.S.C. § 501(c)(3), is required to annually file its Form 990 and accompanying schedules and attachments with the Internal Revenue Service ("IRS"). 26 U.S.C. § 6033(b). Schedule B ("Schedule of Contributors"), requires organizations to list the name and addresses of "any one contributor, [that] during the year," made "total contributions of the greater of (1) $5,000; or (2) 2% of the" organization's total budget. ER 114 (Sch. B. at 1) (emphasis removed).

Form 990 and Schedule B are also filed by private foundations, labor organizations regulated under § 501(c)(6), and § 527 political organizations, such as the College Republicans or Democracy for America. But while private foundations and § 527 political organizations must make their donor lists available to the public, federal law permits most § 501(c) organizations to keep their donor lists private. 26

U.S.C. § 6104(b); 6104(d)(3)(A). In practice, this means that while the names and addresses of major donors are redacted from a § 501(c)(3)'s publicly available Schedule B forms, the dollar amounts given remain visible. Accordingly, the Attorney General's demand for unredacted copies of the Institute's Schedule B is a demand to know the identities of its major donors.

Donor anonymity is mandated by federal law, which bars officials from releasing private donor information, intentionally or otherwise. 26 U.S.C. §§ 6103 (general confidentially of tax returns); 6104 (controlling disclosure by nonprofit organizations organized under IRC §§ 501 and 527); 7431 (civil damages for unauthorized inspection or disclosure of returns or return information); 7213(a)(1) (criminal sanctions for disclosure of returns or return information by federal employees); 7213(a)(2) (criminal sanctions for disclosure of returns or return information by state employees); 7213A(a)(2), 7213A(b)(1) (criminal sanctions for unauthorized inspection of returns or return information, including by state employees); 7216 (criminal sanctions for disclosure of tax return or return information by tax preparers). Moreover, in 2006, Congress prohibited the disclosure of § 501(c)(3) donor lists to State officials, such as the Attorney General of California, if that official requested the donor list "for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or

administration of the charitable funds or charitable assets of such organizations." 26 U.S.C. § 6104(c)(3).[2]

Schedule B is one of several schedules filed by the Institute with the IRS. Other schedules require the reporting of financial arrangements with "interested persons" such as substantial contributors, or the reporting of non-cash contributions, including works of art, real estate, securities, drugs, medical supplies, and, interestingly, taxidermy. ER 27 (Instructions for Sch. L.) ("Transactions With Interested Persons") at 1; ER 31 (Form 990, Sch. M). In short, filings other than Schedule B provide an exhaustive overview of the Institute's financial dealings. The information disclosed on these forms is far more likely to indicate fraudulent activity or self-dealing. The Institute does not object to filing those schedules with the Attorney General, even with the understanding that, if necessary, he could use that financial information as evidence to obtain an administrative subpoena for a charity's unredacted Schedule B.

[2] The Institute has not filed a challenge to the IRS's collection of its major donor information. There are grounds for compelled disclosure in the IRS context that may survive exacting scrutiny. These include cross-referencing Schedule B information against personal tax returns to catch fraudulent attempts to claim tax deductions for charitable gifts that were never made. No such interest is present here.

B. The Institute's Experiences With The Attorney General's Disclosure Program.

The Institute for Free Speech has regularly prepared and filed its Form 990, Schedule B with the IRS. From 2008 until 2015, under its former name ("Center for Competitive Politics"),[3] the Institute annually filed its Form 990, including a redacted Schedule B as well as all other required (unredacted) accompanying schedules and attachments, with the Registry of Charitable Trusts. ER 67 (First Amended Complaint ("FAC") at 4, ¶ 10); ER 78 (FAC at 15, ¶ 50). Filing Form 990 is essential for Registry membership, which, in turn, is legally required before a charity may solicit donations within California. Cal. Code Regs. tit. 11, §§ 301, 306(c); Cal. Gov. Code § 12587.1; Cal. Gov. Code §§ 12585, 12586(a), ER 67 (FAC at 4, ¶ 9).

"[A]t some point in the year 2010, the Attorney General commenced a policy of seeking unredacted Schedule B information from Registry filers as a precondition to membership in the Registry." ER 67 (FAC at 4, ¶ 11). This was not made public, however, and "the Attorney General instead chose to enforce this policy through the issuance of delinquency letters" in cases "where Registry staff noticed that charities filed a redacted Schedule B." ER 68 (FAC at 5, ¶¶ 12-13). Because this case was

---

[3] The Center for Competitive Politics officially changed its name to the Institute for Free Speech on October 28, 2016. For clarity and consistency, even when discussing activities done under the name "Center for Competitive Politics," this brief will assign those actions to the Institute.

resolved on a motion to dismiss, the Institute has no concrete understanding why this *ad hoc* policy was developed, who supervised it, or how it was implemented. Indeed, "[i]t is unknown how many delinquency letters have been sent pursuant to the Attorney General's unwritten policy." ER 68 (FAC at 5, ¶ 14). It is also unclear "how many charities have been approved for Registry membership, despite having filed only redacted copies of Schedule B." *Id*. (FAC at 5, ¶ 16).

The Institute's own experience with the disclosure regime, however, is likely representative. "On January 9, 2014. . .[i]n keeping with its usual practice, and having received no notice of a change in the Attorney General's policy," the Institute submitted its Form 990, including a redacted Schedule B, with the Registry. ER 75 (FAC at 12, ¶ 40). This time, however, the Institute's filing triggered a demand letter asserting that its "**filing [was] incomplete** because the copy of Schedule B, Schedule of Contributors, d[id] not include the names and addresses of contributors." ER 96 (Demand Letter) (bold in original). The demand letter ordered the Institute to "submit a **complete** copy of Schedule B, Schedule of Contributors. . . as filed with the Internal Revenue Service," and to "address all correspondence to the undersigned." *Id*. (bold and underlining in original). The "undersigned" was an "Office Technician" for the Registry, named "A.B." *Id*.

Rather than forfeit its donors' privacy, the Institute filed suit in the U.S. District Court for the Eastern District of California on March 7, 2014. ER 124 (ECF

No. 1). During that litigation, on December 2014, the Registry sent a follow-up letter threatening further action that would be undertaken by the Attorney General if the Institute did not turn over its donor list.

Specifically, (1) the Institute could lose its California tax-exempt status, "be treated as a taxable corporation," and potentially be "subject to the minimum tax penalty;" (2) late fees would be imposed for the period "for which the report(s) are delinquent," and "[d]irectors, trustees, officers[,] and return preparers responsible for failure to timely file…[would be] **personally liable** for payment of all late fees;" and (3) "the Attorney General **[would] suspend the registration**" of the Institute. ER 98-99 (Warning Letter at 1-2 (bold in original)); *compare Williams-Yulee v. Fla. Bar*, 576 U.S. __, 135 S. Ct. 1656, 1664-1665 (2015) (Roberts, C.J., controlling op.) ("[R]estricting the solicitation of contributions to charity…threaten[s] the exercise of rights [] vital to the maintenance of democratic institutions" (citations and quotation marks omitted)).

In 2016, after failing to secure injunctive relief, the Institute "ceased soliciting contributions within the state of California." ER 79 (FAC at 16, ¶ 51).

C. The Institute's First Attempt To Obtain Injunctive Relief

a. Before the Eastern District of California

On March 7, 2014, the Institute filed its original complaint in federal court, and on March 20, moved for a preliminary injunction. ER 124-125 (ECF Nos. 1, 9).

In response, the Attorney General argued that Schedule B donor information "allows [the Attorney General] to determine, often without conducting an audit, whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons[,] or illegal or unfair business practices." *Ctr. for Competitive Politics v. Harris*, 2014 U.S. Dist. LEXIS 66512, at *20 (E.D. Cal. 2014) (quoting Def. Opp'n to Mot. for Prelim. Inj. at 13-14 (ECF No. 10) (internal citations omitted)). But the Attorney General did not explain the mechanism by which Schedule B did so.

The Attorney General argued that she kept her donor list database confidential. The Attorney General's support for this assertion was a sworn statement from Kevis Foley, the then-Registrar of Charitable Trusts. ER 70 (FAC at 7, ¶ 21). Despite California law requiring that "reports filed with the Attorney General…be open to public inspection," Cal. Gov. Code § 12590, Registrar Foley asserted that "'the Schedule B filed by public charities…has always been treated as a confidential document…not available for public viewing.'" ER 70 (FAC at 7, ¶ 24); ER 121.

In denying the Institute's motion, the district court uncritically accepted both the Attorney General's briefing and Registrar Foley's declaration, finding "that the requested information allows [the Attorney General] to determine 'whether an organization has violated the law, including laws against self-dealing, improper

loans, interested persons, or illegal or unfair business practices.'" *Ctr. for Competitive Politics v. Harris*, 2014 U.S. Dist. LEXIS 66512, at *20 (E.D. Cal. 2014) (quoting Def. Opp'n to Mot. for Prelim. Inj. at 13-14 (internal citations omitted)). The court also found that "the Registry is kept confidential and [the Institute's] Schedule B would not be disclosed publically." *Id*. at 21.

b. Before this Court

On May 15, 2014, the Institute timely appealed, and the district court stayed its proceedings fourteen days later.[4] ER 126.

Before this Court, the Attorney General argued that "in the absence of any showing of harm, the law does not require the Attorney General to explain the necessity of the required disclosure." 9th Cir. Opp'n Br. at 29. And at oral argument the Attorney General provided for the first time "an example," which appears to have been a hypothetical, "of how the Attorney General uses Form 990 Schedule B in order to enforce these laws." *CCP*, 784 F.3d at 1311.

---

[4] The December 2014 warning letter, discussed *supra* at 10, gave the Institute 30 days to comply before the aforementioned penalties were applied. Accordingly, the Institute moved in this Court to supplement the record with the letter and for an injunction against its enforcement. On January 5, 2015, the Court granted that motion and directed the Attorney General to "take no action against" the Institute "for failure to file an un-redacted IRS Form 990 Schedule B pending further order of this court." Order, *Ctr. for Competitive Politics*, No. 14-15978 (9th Cir. Jan. 5, 2015). The injunction was dissolved upon this Court's affirmance of the district court five months later.

Specifically, counsel posited a scenario involving a lightly capitalized charity disclosing over $2 million in donations, the vast majority of which came from inflating the value of a worthless painting. Oral Argument at 28:25, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. Dec. 8, 2014). The California law enforcement (as opposed to federal tax enforcement) interest served by knowing the names of donors to such an organization was not identified and remains unknown.[5] Additionally, the Attorney General continued to stress the alleged confidentiality of the mass donor database he had been collecting, on an *ad hoc* basis, since 2010.

This Court affirmed the district court. In doing so, the panel made three key errors.

First, the Court determined that many of the U.S. Supreme Court's landmark privacy of association cases were "inapposite" because they were "as-applied challenges involving the NAACP." *CCP*, 784 F.3d at 1312, n.3. In doing so, this

[5] Moreover, the public version of Form 990 would already provide the Attorney General with reason to be suspicious. It would show extremely low outlays and an extremely high professed income. Additionally, the public copy of Form 990 would list the amount of the painting donation, and that it was a non-cash contribution. Finally, a separate schedule of the Form, open to public inspection, would also list a "[d]escription of noncash property given," in this case that the donation was a painting, and its "FMV" (fair market value). ER 116 (Form 990, Sch. B., Part II); *see also* ER 31 (Form 990, Sch. M). (listing artwork as first reporting category for non-cash contributions). At that point, the Attorney General would be within his rights to subpoena additional information concerning the circumstances of that particular donation.

Court took five of the Supreme Court's most important cases regarding the privacy implications of the First Amendment, and limited their application to a particular time and a particular plaintiff. *Id*. (distinguishing *NAACP v. Alabama*, *NAACP v. Button*, 371 U.S. 415 (1963), *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963), *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960)). This Court also distinguished *Talley v. California*, 362 U.S. 60 (1960), where the Supreme Court facially struck down a Los Angeles disclosure regime in reliance upon *NAACP v. Alabama* and *Bates v. City of Little Rock*, reasoning that the basis for the *Talley* decision "was the historic, important role that anonymous pamphleteering has had in furthering democratic ideals." *Id*. at 1316 n.8. Combined, these footnotes amounted to the deletion of the most relevant U.S. Supreme Court precedent on the question before the Court.

Second, this Court distinguished *Acorn Investments v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), arguing that the case was about a First Amendment defense to government harassment. In *Acorn Investments*, this Court relied upon *NAACP v. Alabama*, among other cases, to facially invalidate a nonpublic disclosure regime aimed at the shareholders of panoram businesses. As discussed below at 37-43, *Acorn Investments* is not a case about government harassment, but rather the lack of tailoring in the disclosure program. Nevertheless, this Court determined that explanatory dicta in *Acorn Investments* about a Seventh Circuit decision was

"indistinguishable" from the facts before the *Acorn* Court, transforming that case into one where the government had enacted the disclosure regime purely to harass a regulated community. *CCP*, 784 F.3d at 1313. As such, since "there [wa]s no indication in the record that the Attorney General's disclosure requirement was adopted or is enforced in order to harass members of the [R]egistry or CCP in particular…the concern animating the holding[] of *Acorn*…does not apply." *Id*. For reasons discussed further below, this was a wildly inaccurate reading of the *Acorn* decision—but one that allowed the *CCP* panel to, once again, sidestep controlling authority.

Third, having distinguished away all relevant precedent, the *CCP* Court held that there is no inherent First Amendment injury where the government forcibly collects an organization's donor information, calling the Institute's claims to the contrary "a novel theory, but [one]…not supported by our case law or by Supreme Court precedent." *Id*. at 1312. Thus, while the Court applied what it called "exacting scrutiny" to "examine and balance the plaintiff's First Amendment injury against the government's interest," because the Institute was "incorrect" in "argu[ing] that compelled disclosure *itself* constitutes such an injury," the Court determined it need not "weigh that injury when applying exacting scrutiny." *Id*. at 1313-1314 (emphasis in original).

The Court then proceeded to analyze whether the Attorney General's program was properly tailored. It dismissed the Institute's arguments that "the Attorney General's systems for preserving confidentiality are not secure" as "speculative," bluntly stating that "[t]he Attorney General keeps Form 990 Schedule B confidential," and that "non-public disclosures" only "chill protected activity where a plaintiff fears the reprisals of a government entity." *Id*. at 1316.

Finally, the Court determined that the "reasons that the Attorney General has asserted" for the disclosure regime, namely that "having immediate access to Form 990 Schedule B increases h[is] investigative efficiency, and that reviewing significant donor information can flag suspicious activity," were "not 'wholly without rationality.'" *Id*. at 1317 (quoting *Buckley v. Valeo*, 424 U.S. 1, 83 (1976) (per curiam)). Thus, the Attorney General's ability to articulate a non-irrational justification, balanced against a judicially-declared lack of any First Amendment injury, meant the Institute's "First Amendment facial challenge to the Attorney General's disclosure requirement fail[ed] exacting scrutiny." *CCP*, 784 F.3d at 1317.[6]

This Court subsequently emphasized that *CCP* was the final word on the question of facial challenges to disclosure regimes, "le[aving] open" only "the

[6] The Institute sought a writ of *certiorari*, which was denied. *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015).

possibility…that a future litigant might 'show a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties that would warrant relief on an as-applied challenge.'" *Am. for Prosperity Found. v. Harris*, 809 F.3d 536, 539 (9th Cir. 2015) ("*AFPF*") (quoting *CCP*, 784 F.3d at 1317) (alteration and internal quotation marks omitted in original).

D. Subsequent Regulatory Developments

"Effective July 8, 2016, the Attorney General promulgated a new regulation" regarding the Schedule B donor disclosure regime. ER 77 (FAC at 10, ¶34). This regulation modified 11 Code of Calif. Regs § 310, which applies to "public inspection of charitable trust records," and generally commands that "reports filed with the Attorney General…shall be open to public inspection." (capitalization altered for clarity). The new regulation, 11 Code of Calif. Regs § 310(b), reads in full:

> Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104 (d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:
>
> > (1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or
> > (2) In response to a search warrant.

The Institute has never dealt with the Registry under this new regulation, which was only promulgated after no fewer than three lawsuits had been filed against the Attorney General, making his Schedule B donor database public knowledge. However, "[i]t is…unclear whether the Attorney General could avoid disclosing Schedule B forms under Government Code § 6254(k)," the California Public Records Act. *AFPF*, 809 F.3d at 542.

E. Related Proceedings Before The U.S. District Court For The Central District of California

In a similar, as-applied case brought by the Americans for Prosperity Foundation, discovery and a six-day merits trial were held in the United States District Court for the Central District of California. That court made a number of factual findings. *Am. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016) ("*AFPF II*"). The Attorney General has appealed that case to this Court, where it has been fully briefed, but no argument date has yet been set.[7]

The *AFPF II* court was bound by this Court's facial ruling in *CCP*, and thus "focuse[d] solely on" the Americans for Prosperity Foundation's ("AFPF") "as-applied challenge." *AFPF II*, 182 F. Supp. 3d at 1053. Nevertheless, AFPF urged facial invalidity of the Schedule B disclosure regime, and assembled a substantial record to that end.

[7] Docket, *Am. for Prosperity Found v. Becerra*, Case Nos. 16-55727, 16-55786 (9th Cir.).

The trial revealed that the Attorney General's claims, including the factual statements made in this Court's prior opinion in this very case, were a Potemkin village. The court found that:

> It is clear that the Attorney General's purported Schedule B submission requirement demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years. The record before the Court lacks even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts.

AFPF II, 182 F. Supp. 3d at 1055.

Indeed, testimony by the Attorney General's own staff demonstrated "that out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section, only five instances involved the use of a Schedule B," meaning that the Attorney General uses a Schedule B donor list perhaps once every two years, or in less than 1% of a decade's worth of investigations. *AFPF II*, 182 F. Supp. 3d at 1054 (citation omitted) (noting only "five instances" involving use of Schedule B). "And even in" the rare "instance[] where a Schedule B was relied on," the Attorney General's employee testified that "the relevant information it contained could have been obtained from other sources." *Id*. (citation omitted).

The assertions Registrar Foley swore to in this case were likewise shattered in the crucible of discovery and trial. "Subsequent to making that sworn statement to" the *CCP* court, "Foley admitted . . . that she was aware of numerous instances of failure to maintain the confidentiality of this information." ER 71 (FAC at 8, ¶ 26).

In fact, she had become aware of a number of public Schedule B forms in the course of her day-to-day work, but decided that "'there is room for errors to be made'" when attempting to safeguard donor information. ER 73 (FAC at 9, ¶ 32); *AFPF II*, 182 F. Supp. 3d at 1057.

Her testimony buttressed AFPF's review of the Registry's website: "AFP[F] identified 1,778 confidential Schedule Bs that the Attorney General had publically posted on the Registry's website, including 38 which were discovered the day before th[e] trial." *AFPF II*, 182 F. Supp. 3d at 1057. One of these inadvertent discoveries included the donors to Planned Parenthood Affiliates of California, a reproductive rights organization whose affiliates have been the target of violence. *Id.* Perhaps unsurprisingly, the "Attorney General . . .continuously maintained that the Registry is underfunded, understaffed, and underequipped when it comes to the policy surrounding Schedule Bs." *Id*. In sum, as the Second Circuit has noted, the Attorney General's system was "recklessly" administered with a "systematic incompetence in keeping donor lists confidential of such a magnitude as to effectively amount to publication." *Schneiderman*, 2018 U.S. App. LEXIS 3516 at *18 (describing the Registry's recordkeeping system).

As far as the Institute—or anyone else—knows for certain, this situation continues to the present day.[8]

F. The Institute's First Amended Complaint And Its Dismissal.

On August 12, 2016, the Institute amended its complaint, principally to provide judicial notice of the facts found by the *AFPF II* court.[9] *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (permitting judicial "notice of proceedings in other courts . . . if those proceedings have a direct relation to matters at issue") (internal citation and quotation marks omitted). The amended complaint pled that the *AFPF II* trial demonstrated that the Attorney General neither regularly used, nor properly protected, Schedule B information. *See*, *e.g.* ER 69 (FAC at 6, ¶¶ 18-19); ER71-72 (FAC at 8-10, ¶¶26-31). Additionally, the Institute renewed its motion for a preliminary injunction. ER 127 (ECF No. 39).

---

[8] Other evidence provided by the Attorney General's own staff in the *AFPF II* litigation provides the Institute with cause for alarm. Tania Ibanez, one of the Attorney General's staff, and the signer of an affidavit before the Eastern District of California in this case, stated that the mere act of filing a lawsuit to maintain donor privacy, or even being unwilling to provide a Schedule B to the Attorney General, caused her to immediately suspect that a charity is corrupt.
Supplemental Excerpts of Record at SER1073, *Am. for Prosperity Found. v. Becerra*, Case No. 16-55727 (9th Cir. Jan. 20, 2017).

[9] The amended complaint also alleged that the Attorney General's program is an unconstitutional "content-based restriction on charitable solicitation," ER 80 (FAC at 17), and "an unconstitutional search and seizure [that] violates the Fourth Amendment." ER 82 (*Id*. at 19) (capitalization altered). The Institute is not pursuing either additional claim on appeal.

The Attorney General moved to dismiss. ER 128 (ECF No. 44). That motion included a sworn statement by Ms. Tania Ibanez, who conceded that her office "do[es] not track what evidence is used in our investigations so it is not possible for me to catalogue all the times that Schedule B has been significant or of use in my investigations." ER 59 (Ibanez Decl. at 5, ¶ 15). She provided only two significant examples where Schedule B was used in the course (but not the initiation) of an enforcement act. *Id*. at ER 60. One case involved a private foundation, whose donors were therefore already public. And the second use occurred three years into a wide-ranging 50-state fraud investigation into the Cancer Fund of America, ER 48 (Morgan Ex. 3), ER 61(Ibanez Decl. at 7, ¶ 17), where California's decision to use Schedule B information was ultimately considered unnecessary by other attorneys general involved. Br. of *Amici Curiae* States of Ariz., Mich., and S.C. at 8, *Ctr. for Competitive Politics v. Harris*, No. 15-152 (U.S. 2015) (specifically citing the Cancer Fund of America investigation as evidence that the states can "effectively exercise oversight over non-profits actively soliciting donations within their jurisdiction and investigate, prosecute and deter fraudulent activities" without access to donor lists). Nor did the Attorney General provide concrete evidence[10] that the

[10] The Attorney General provided affidavits from Registrar David Eller (ER 50-54) and Ms. Ibanez (ER 55-63) which each asserted that the Attorney General had put in place procedures to address the incompetent administration of the Registry identified in the *AFPF II* trial. The Institute was provided no opportunity to plumb those assertions, and given its experience with Registrar Foley's prior assurances,

Registry had cured its "systematic incompetence in keeping donor lists confidential" or that Schedule B would not be subject to release via the Public Records Act. *Schneiderman*, 2018 U.S. App. LEXIS 3516 at *18.

The district court initially scheduled oral argument for October 6, 2016. However, two days before the argument and, on its own motion, the court vacated the hearing and considered the motions "submitted without oral argument." ER 129 (noting text of minute order at ECF No. 55). Over one year later, on October 31st, the court granted the Attorney General's motion to dismiss without leave to amend, and denied the Institute's motion for a preliminary injunction as moot.

The district court held that the Institute's facial challenge was foreclosed because "the appellate panel made it clear that compelled disclosure alone does not constitute a First Amendment injury." *CCP II*, ER 5 (citing *CCP*, 784 F.3d at 1314). Echoing the Attorney General's earlier arguments before this Court that "in the absence of any showing of harm, the law does not require the Attorney General to explain the necessity of the required disclosure," 9th Cir. Opp'n Br. at 29, the district court dismissed the complaint because it did not allege "'evidence to suggest that [the Institute's] significant donors would experience threats, harassment, or other

---

remains justifiably skeptical. In any event, these declarations cannot defeat well-pled assertions at the motion to dismiss stage.

potentially chilling conduct as a result of the Attorney General's disclosure requirements.'" *CCP II*, ER 4 (quoting *CCP I*, 784 F.3d at 1316).

The court did address the *AFPF II* litigation, going so far as to quote that court's finding "that the record before it lacked 'even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory[,] or enforcement efforts.'" *CCP II*, ER 12 (quoting *AFPF II*, 182 F. Supp. 3d at 1055). Nevertheless, the district court decided that in "the absence" of a request for as-applied relief on the basis of violence or harassment, "the balancing engaged in by *AFPF* [is] unnecessary." *CCP II*, ER 12; *cf. CCP*, 784 F.3d at 1316 ("non-public disclosures" only "chill protected activity where a plaintiff fears the reprisals of a government entity").

This Court's precedent, then, in *Center for Competitive v. Harris*, is now being read to foreclose any facial First Amendment challenge to any disclosure regime—so long as the proponents of that regime may muster up a non-irrational reason for its existence. Even if substantial evidence exists that the government's claims are constructed entirely of disprovable falsehoods and rhetorical sleight-of-hand, so long as a plaintiff cannot demonstrate with some exactitude that disclosure will generate "serious threats of violence," the government will always prevail. *CCP,* 784 F.3d at 1313; *CCP II*, ER 11 ("As indicated above, groups so qualifying were generally subjected to both government-sponsored hostility and brutal, pervasive private

violence both generally and a result of disclosure…such that they could not seek adequate relief from either law enforcement or the legal system." (citations omitted)).[11] Left unreviewed, all future facial challenges to disclosure regimes will face the same fate as the Institute's: they will be dismissed without leave to amend, even if the complaint alleges the State does not actually need or use the disclosed data to further a substantial governmental interest.

That is, First Amendment facial challenges to disclosure regimes within this Circuit appear to have been disallowed, on the basis of case law that conflicts with both U.S. Supreme Court precedent and prior precedent of this Court. Left to stand, the opinion below will do significant harm to the right of all Americans "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP*, 357 U.S. at 466; *Gibson*, 372 U.S. at 544-546 (finding "privacy in group association" an interest "of significant magnitude") (internal quotation marks omitted).

[11] Thus, just as this Court held that the *NAACP v. Alabama* line of cases did not provide a general right to "immunity from state scrutiny," 357 U.S. at 466, of donor lists, the district court dutifully applied this holding, finding that the Institute "cannot analogize its position to as-applied challenges…like the NAACP in the pre-Civil Rights Era." *CCP II*, ER 11.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of a motion to dismiss *de novo*," and "[d]ismissal without leave to amend is reviewed for abuse of discretion." *Graham-Sult v. Clainos*, 738 F.3d 1131, 1154-1155 (9th Cir. 2013). However, dismissal is inappropriate when "a complaint…contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and quotation marks omitted).

Additionally, in this Circuit, the party "seeking a preliminary injunction must demonstrate 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "In general," this Court "review[s] the denial of a preliminary injunction for abuse of discretion." *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). But "[w]hen the district court is alleged to have relied on an erroneous legal premise," this Court "review[s] the underlying issues of law *de novo*." *Id*

SUMMARY OF THE ARGUMENT

Before this Court's 2015 opinion in *Center for Competitive Politics v. Harris*, an unbroken sixty-year chain of U.S. Supreme Court precedent established that

compelled disclosure constitutes a First Amendment injury. Another forty years of U.S. Supreme Court precedent required courts to apply a robust standard of review, called exacting scrutiny, to a state's disclosure regime. And in 1989, this Court applied many of those precedents, including *NAACP v. Alabama*, *Talley v. California*, and *Buckley v. Valeo*, directly to an apparently nonpublic compelled disclosure regime, and found that it did not survive exacting scrutiny.

But in *CCP*, this Court mistakenly determined that compelled disclosure does not constitute a First Amendment injury, and that the Government can survive exacting scrutiny so long as it does not act irrationally. The Court compounded these errors by dismissing on-point Supreme Court precedents and misreading its own decision in *Acorn Investments v. City of Seattle*, allowing a line of explanatory dicta to swallow that Court's holding. Consequently, *CCP* must be overturned, either by this Court *en banc* or by a higher tribunal.

But even if *CCP* remains good law, the district court erred in failing to recognize that the Institute's well-pled facts demonstrate that the "reasons that the Attorney General has asserted for the disclosure requirement" are, in fact, "wholly without rationality." *CCP*, 784 F.3d at 1317 (quotation marks omitted). Therefore, even under the *CCP* decision, dismissal was improper.

ARGUMENT

I. *Center for Competitive Politics v. Harris* Ought To Be Overturned.

The *CCP* opinion shifts the burden of persuasion in First Amendment challenges to disclosure regimes. It violates six decades of U.S. Supreme Court precedent regarding the First Amendment harm inherent in the compelled disclosure of a group's supporters, goes against forty years of precedent explaining the exacting scrutiny analysis, and contains an obvious misreading of this Court's own precedent in *Acorn Investments v. City of Seattle*. We will take each error in turn.

a. Compelled disclosure, in itself, constitutes First Amendment injury.

For sixty years, the Supreme Court has consistently held that "immunity from state scrutiny of membership [and donor] lists...come[s] within the protection of the Fourteenth Amendment," and absent "a controlling justification" for the disclosure, is presumptively unconstitutional. *NAACP*, 357 U.S. at 466; *Buckley*, 424 U.S. at 66 (1976) ("Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably"); *Bates*, 361 U.S. at 518 (striking compelled disclosure requirement for "a statement as to dues, assessments, and contributions paid, by whom and when paid"). In short, disclosure—by itself—constitutes First Amendment injury. [12]

[12] While the outcome in the district court accords with the recent Second Circuit decision in *Citizens United v. Schneiderman*, 2018 U.S. App. LEXIS 3516 (2d Cir. Feb. 15, 2018), which upheld the New York attorney general's Schedule B

Moreover, the First Amendment protects the privacy of an organization's supporters beyond those rare instances where the government represses an unpopular organization or private discrimination will inevitably occur. Instead, privacy of association is afforded to "all legitimate organizations" and "may not be substantially infringed upon such a slender showing" of need. *Gibson*, 372 U.S. at 555-556.

The Supreme Court has not hesitated to strike compelled disclosure regimes facially, even where it makes "no appraisal of the circumstances, or substantiality of the claims of the litigants" and the "record is barren of any claim, much less proof" that disclosure would result in threats, harassments, or reprisals. *Talley*, 362 U.S. at 68-69 (Clark, J., dissenting) (emphasis removed). Thus, "all legitimate organizations are the beneficiaries of," the Constitution's "strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs." *Gibson*, 372 U.S. at 555-556; *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 98 (1974) (Marshall, J., dissenting) ("The First Amendment gives organizations such as the ACLU the right to maintain

---

disclosure regime against, *inter alia*, a First Amendment challenge, it is noteworthy that the Second Circuit did not dispute that disclosure imposes constitutional injury. Rather, despite conceding that disclosure imposes a "restraint on associational rights," it found that injury did not "have sufficient heft" to "outweigh[] the government's (and the public's) interests in disclosure." *Schneiderman*, 2018 U.S App. LEXIS 3516 at *16.

in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure") (collecting cases, including *NAACP v. Alabama*).

Many, although not all, of the landmark cases establishing this right stem from the legal and political fight conducted by the NAACP against segregationist Southern governments. *Compare NAACP*, 357 U.S. at 466 (striking down Alabama disclosure demand) *with Talley*, 362 U.S. at 65 (striking down Los Angeles disclosure statute). But the Fourth Amendment rights won by Dollree Mapp do not only apply to those in possession of obscene materials, *Mapp v. Ohio*, 367 U.S. 643 (1961), nor do the due process rights secured by Yaser Hamdi extend only to al-Qaida members housed ninety miles off the coast of Florida. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004). Those rights apply universally, even though the government may be more likely to abuse its authority where possessors of obscene material or violent terrorists are involved. In fact, we protect their rights in order to protect those of everyone else.

Associational liberty is no different. Like all "First Amendment freedoms[, it] need[s] breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *cf. Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) (Roberts, C.J., controlling op.) (quoting same); *In re Primus*, 436 U.S. 412, 432 (1978) (quoting same); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (quoting

same); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting same). Consequently, the First Amendment's protection of associational privacy is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates*, 361 U.S. at 523;[13] *see also Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 802 (2d Cir. 2015) (relying on *NAACP v. Alabama* to permit, in national security context, First Amendment claim against government metadata collection because of the Plaintiff's "members' interests in keeping their associations and contacts private").

Even in the context of campaign finance, where compelled disclosure is often upheld in the narrow instance where it will show the financial constituencies of candidates for office, *see Citizens United v. Federal Election Commission*, 558 U.S. 310, 367-71 (2010), the Court has always first conceded that the disclosure imposes inherent constitutional injury. In *Buckley*, the seminal Supreme Court case in the campaign finance realm, the Court noted that it "long ha[s] recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure *imposes* cannot be justified by a mere showing of some legitimate

[13] As the *NAACP* Court noted, "recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech." 357 U.S. at 461 (citing *United States v. Rumely*, 345 U.S. 41, 46-47 (1953) and *United States v. Harriss*, 347 U.S. 612, 625-626 (1954)). The same reasoning applies to disclosure laws infringing upon freedom of association.

governmental interest." 424 U.S. at 64 (emphasis supplied). The panel's holding to the contrary—that "compelled disclosure imposes" no actual injury—stemmed from its misreading of a preceding sentence, where the *Buckley* Court noted that some "compelled disclosure, in itself, *can* seriously infringe on privacy of association and believe guaranteed by the First Amendment." 424 U.S. at 64 (emphasis supplied). But that simply means that governments have to show whether the "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes" are "serious[]" injuries—that is, they must prove that the challenged regime is properly tailored. *Id*. The difference between a mild sprain and a compound fracture can be substantial, but that does not mean that a sprain is not a painful injury.[14]

Overturning the *CCP* Court's holding would allow this Circuit to recognize the inherent First Amendment injury imposed when a government demands to know a group's supporters and, in doing so, bring this Circuit back into harmony with sixty years of Supreme Court jurisprudence.

b. Exacting scrutiny is a heightened form of judicial review, not a synonym for rational basis.

Over the past several decades, the Supreme Court and this Circuit have developed a the exacting scrutiny standard for reviewing compelled disclosure

[14] That this Court's misreading of *Buckley* stemmed from such an elementary mistake is all the more reason to revisit the *CCP* decision.

regimes. *Buckley*, 424 U.S. at 66 (in disclosure context, "the subordinating interests of the State must survive exacting scrutiny"); *Yamada v. Snipes*, 786 F.3d 1182, 1194 (9th Cir. 2015) ("Because the challenged laws provide for the disclosure and reporting . . . we apply exacting scrutiny.").

"This is not a loose form of judicial review." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). Indeed, to the extent that there exists a continuum of judicial scrutiny, ranging from the rational basis review applied to economic regulations, on one hand, to the rigorous demand of strict scrutiny on the other, exacting scrutiny is only "possibly less rigorous than strict scrutiny." *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1250 (11th Cir. 2013) (citation and quotation marks omitted).

In 1976, the same year the Supreme Court issued the *Buckley* decision, Justice Brennan laid out the contours of the exacting scrutiny test:

> [E]xacting scrutiny . . is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. Thus encroachment cannot be justified upon a mere showing of a legitimate state interest. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. The gain to the subordinating interest provided by the means *must* outweigh the incurred loss of protected rights, and the government must employ means closely drawn to avoid unnecessary abridgment.

Elrod v. Burns, 427 U.S. 347, 362-63 (1976) (Brennan, J., plurality op.) (emphasis supplied, capitalization and punctuation altered for clarity, citations omitted).

Here, the Attorney General has demanded the donor lists of all charities operating in the State of California, and threatened those charities with penalties, fines, and a gag order for failure to comply. Furthermore, his collection of a government database of donors to civil society groups will likely discourage giving, cause fewer charities to speak and raise funds within California, and place at risk the names and addresses of donors to those that do.

"Disclosure chills speech." *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 488 (D.C. Cir. 2016) (Brown, J.). Undoubtedly, such chill will extend to individuals giving to controversial groups, whether through nefarious hacking-and-doxxing efforts or inadvertent disclosures due to the State's incompetent recordkeeping. These "unintended but inevitable results" must be outweighed by concrete, positive gains that further the Attorney General's interest in enforcing the law. *Elrod*, 427 U.S. at 363; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("[O]ur society accords greater weight to the value of free speech than the dangers of its misuse").

By applying exacting scrutiny in name only, this Court has permitted government actors to carry their burden by providing conclusory assertions that the government's accumulation of donor information serves the public good. *CCP II*,

ER 11. Even when the government does not, in fact, use donor information to initiate investigations into wrongdoing—as the district court was required to believe on a motion to dismiss—it matters not. In "the absence of any articulated burden" over and above the compelled disclosure itself, "balancing" is "unnecessary." *Id*.

Unless *CCP* is overturned, then, "a mere showing of a legitimate state interest," *Elrod*, 427 U.S. at 363, will be sufficient to override First Amendment objections. This holding flatly contravenes decades of Supreme Court authority discussing the contours of the exacting scrutiny standard. The Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000); *Bates*, 361 U.S. at 525 ("But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion . . . ."). And specifically, under exacting scrutiny,

> [I]t is *not enough* that the means chosen in furtherance of the interest be rationally related to that end. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights.

Elrod, 427 U.S. at 363 (emphasis supplied, citations omitted); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. __; 134 S. Ct. 1434, 1456 (2014) (Roberts, C.J., controlling op.) ("In the First Amendment context, fit matters").

Overturning *Center for Competitive Politics v. Harris* will reassert this Court's previous understanding of the exacting scrutiny analysis: that "a compelled

content-neutral disclosure rule is unconstitutional unless it furthers a substantial governmental interest." *Acorn Invs.*, 887 F.2d at 225.

c. *Center for Competitive Politics v. Harris*'s holding rests upon an obvious legal error.

The *CCP* panel decision contains a number of errors, one of which seriously mangled Circuit precedent. Consequently, it ought to be treated as less authoritative than more considered case law.

One such mistake, albeit in *dicta*, was the panel's determination that "under the California Public Records Act . . . it appears doubtful that the Attorney General would ever be required to make Form 990 Schedule B publicly available." *CCP*, 784 F.3d at 1316, n.9. Thankfully, this Court took steps to correct this error during the *AFPF* litigation, finding instead that it was "unclear whether the Attorney General could avoid disclosing Schedule B forms" under the Public Records Act. 809 F.3d at 542. Appropriately, given this risk, the Court upheld a preliminary injunction against the public disclosure of AFPF's Schedule B. *Id*. at 542-43.[15]

Another obvious error: the opinion stresses that "California is not alone in requiring charitable organizations to file an unredacted Schedule B…Hawaii, Mississippi, and Kentucky share the same requirement." *CCP*, 784 F.3d at 1310, n.1.

---

[15] At a minimum, given the risk of disclosure either unintentionally or through California's public records laws, the Institute requests the same relief here.

This was not true then, and is not true now. Only one other State in the entire country does so: New York.[16]

These misapprehensions of the state of the law may have been harmless. The same cannot be said for the Court's plain error in distinguishing *Acorn Investments v. City of Seattle*, a 1989 holding of this Court which ought to control here.

In *Acorn Investments*, the City of Seattle enacted a compelled disclosure law as part of a business licensing regime. Like the Attorney General's Schedule B program, the regime compelled the applicant to provide its funders, in that case by listing the business's shareholders. *Acorn Invs.*, 887 F.2d at 225. Like the Attorney General's Schedule B program, if an "applicant fail[ed] to provide this information…the agency may refuse to process the application," making it impossible for the applicant to conduct business. *Id*. The data collected by this regime does not appear to have been made public,[17] and the government stated that it would not retaliate against shareholders. *Id*. ("However, the rule expressly provides that no applicant will be denied a license because of the identity of its shareholders.").

---

[16] Florida once had a similar policy, but its legislature revoked it. Fla. Stat. § 496.407(2)(a) (effective July 1, 2014).

[17] At a minimum, the *Acorn Investments* Court made no mention that the disclosure regime was a public one, and that possibility plays no role in its analysis.

Relying on *Talley v. California*, *NAACP v. Alabama*, and *Buckley v. Valeo*, this Court applied exacting scrutiny to this nonpublic disclosure regime. *Id*. Vitally, the Court did not require a showing that disclosure would lead to harassment, either by the State or private actors. Instead it held that:

> [T]he Supreme Court has recognized [that] forcing an association engaged in protected expression to disclose the names of its members may have a chilling effect . . . .This chilling effect exists even when it is not the government's intention to suppress particular expression."

Id. That is, the *Acorn* Court assumed that disclosure imposes First Amendment injury, in and of itself, and "[f]or this reason, a compelled content-neutral disclosure rule is unconstitutional unless it furthers a substantial governmental interest." *Id*.

The City argued that its compelled disclosure program served, "in the least intrusive manner," to assist in "enforce[ment]." *Id*. at 226. Specifically, the City's director of licensing testified that enforcing violations of the relevant business code was difficult "because corporate officers and managers were either not properly listed on the license application or could not be located. With the shareholder disclosure rule," however, the City could "gain accountability … from the actual owners." *Id*. (quotation marks and citations omitted, ellipsis in original); *compare CCP*, 784 F.3d at 1317 ("The Attorney General . . . argues that having immediate access to Form 990 Schedule B increases her investigative efficiency, and that reviewing significant donor information can flag suspicious activity").

Although the *Acorn Investments* Court credited the City's law enforcement and accountability interests, it "fail[ed] to see how the City's interest . . . is served by notifying shareholders that the doors of the panoram booths be cut off two feet from the bottom or that the booths be lighted." 887 F.2d at 226; *compare AFPF II*, 182 F. Supp. 3d at 1055 ("It is clear that the Attorney General's purported Schedule B submission requirement demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years."). Since the City's licensing regime in *Acorn Investments* was geared toward management concerns, there was no need for the government to demand the identities of a business's shareholders. 887 F.2d at 226 ("[T]he City is free to take appropriate enforcement action" when a business "fail[s] to comply" with City rules, and "shareholders will be held accountable in the only way they can be held accountable—through a diminution of the value of their stock…that will happen automatically whether or not their names are disclosed"); *compare supra* at 8 (discussing how information on publicly available schedules could serve the Attorney General's stated law enforcement interests and, when relevant, provide probable cause for a subpoena into donor information).

The *Acorn* Court

> [C]onclude[ed] that a shareholder disclosure statute that potentially chills protected expression cannot stand if the information sought is not reasonably related to the furtherance of a legitimate and substantial governmental interest in regulating the protected activity.

Acorn Invs., 887 F.2d at 226. Finding a mismatch between ends and means under *NAACP v. Alabama*'s exacting scrutiny test, the Court facially scuttled Seattle's shareholder disclosure law—precisely the relief the Institute sought here. *Id*. To this day, *Acorn Investments* not only remains good law, but has been applied outside this Circuit. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir. 1999) (striking down law requiring nonpublic disclosure to the government on theory that such compelled disclosure itself is the harm when it does not serve a "substantial" governmental interest).

Yet, the *CCP* Court held that *Acorn Investments* merely stood for the proposition that "compelled disclosure can also infringe First Amendment rights when the disclosure requirement itself is a form of harassment intended to chill protected expression." 784 F.3d at 1313. Because the *CCP* record contained "no indication . . . that the Attorney General's disclosure requirement was adopted or is enforced in order to harass members of the registry in general or CCP in particular," this Court found *Acorn Investments* inapposite. *Id*.

This misreading appears to stem from a contextual error. During the *Acorn Investments* litigation, the district court, which rejected Acorn's challenge, "sought to distinguish the Seventh Circuit decision in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), which struck down as unconstitutional a similar shareholder disclosure provision in an adult bookstore licensing ordinance." *Acorn Invs.*, 887

F.2d at 226. It was argued that because the ordinance at issue in *Genusa* "required the officers, directors and shareholders holding more than ten percent of the corporation's stock to disclose extensive background information . . . more personal information than that sought by Seattle," the City's ordinance passed muster. *Id*. The *Acorn* Court conceded that Peoria demanded more information than Seattle did, but refused to distinguish the case on the grounds that

> [T]he Seventh Circuit's analysis did not focus on the nature of the information to be disclosed. Rather, the court questioned whether there was any relevant correlation between the asserted governmental interest in obtaining the information and the information required to be disclosed.

Id. That is to say, the *Genusa* Court, like this Court in *Acorn*, applied exacting scrutiny.

Then, and only then, did the *Acorn* Court repeat the Seventh Circuit's finding that the Peoria ordinance must have been enacted to harass. *Id*. But this Court *did not suggest that the City of Seattle's ordinance suffered the same infirmity*. It simply stated that

> *Genusa*, therefore, fully supports our conclusion that a shareholder disclosure statute that potentially chills protected expression cannot stand if the information sought is not reasonably related to the furtherance of a legitimate and substantial governmental interest in regulating the protected activity.

Id. Tellingly, the *Acorn* Court did not discuss *Genusa* until after it had already concluded that the City's law enforcement interest had an insufficient nexus to its

disclosure demand. *Id.* ("no logical connection"). The *Acorn* Court's review of *Genusa* is explanatory dicta.

Unlike other errors in the *CCP* opinion, this Court's mistaken decision to distinguish *Acorn Investments* was fundamental and essential to the outcome. *CCP*, 784 F.3d at 1313 ("Thus, the concern animating the holdings of *Acorn* and *Genusa* does not apply here."). This error must be rectified, given "that a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'" *Gonzalez v. Ariz.*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (quoting *Hart v Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

d. Under the pre-*Center for Competitive Politics v. Harris* rules, the Institute would likely have prevailed on the merits.

As the foregoing demonstrates, the *CCP* opinion is out of alignment with foundational Supreme Court case law and this Court's most on-point precedent. Before *CCP* changed the rules, the Institute would likely have prevailed on the merits.

Under the pre-*CCP* judicial regime, once the Institute alleged that the Attorney General was forcibly compelling the disclosure of organizational members or financial supporters, the burden would fall to the government to demonstrate that the First Amendment injury imposed was worth the harm. And the Institute's allegations that the Attorney General does not, in fact, use Schedule B information more than once every couple years, *AFPF*, 182 F. Supp. 3d at 1054, and *never* to

initiate an investigation, ER 69 (FAC at 6, ¶ 19), would indicate a "substantial mismatch between the Government's stated objective and the means selected to achieve it." *McCutcheon*, 134 S. Ct. at 1446. Pleading related to the State's "recklessly…systematic incompetence in keeping donor lists confidential" would further increase the Government's burden. *Schneiderman*, 2018 U.S. App. LEXIS 3516 at 18. A Court applying the pre-*CCP* case law would likely be compelled to rule against a Government unable to offer more than conclusory and discredited statements, at least at the motion to dismiss stage.

Therefore, *CCP* must be overturned.[18]

CONCLUSION

For the foregoing reasons, the district court should be reversed.

[18] If the Court disagrees, and determines that the Institute's "claims are presently foreclosed by" binding Circuit precedent, Appellant urges the Court to affirm the district court's decision on the papers. *Friedrichs v. Calif. Teachers Ass'n*, 2013 U.S. Dist. LEXIS 188995 at *5 (C.D. Cal. 2013) (quotation marks omitted). Swift affirmance will conserve judicial resources and liberate the Institute to seek a writ of *certiorari*.

Respectfully submitted,

s/Allen Dickerson
Allen Dickerson
Zac Morgan*
Institute for Free Speech
124 S. West Street, Suite 201
Alexandria, Virginia 22314
703.894.6800/F: 703.894.6811
adickerson@ifs.org

Alan Gura
Gura PLLC
916 Prince Street, Suite 107
Alexandria, Virginia 22314
703.835.9085
alan@gurapllc.com

*admission pending

STATEMENT OF RELATED CASES

The Institute is aware of related proceedings challenging the Attorney General's Schedule B program, albeit on a different theory. Those cases are presently before this Court as case numbers 16-55727, 16-55786 (*Americans for Prosperity Foundation v. Becerra*), 16-56855, 16-56902 (*Thomas More Law Center v. Becerra*).

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-17403

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1. The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is [10,598] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ] The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/Allen Dickerson

Date: 3/9/18

("s/" plus typed name is acceptable for electronically-filed documents)

C.A. 17-17403

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, I filed the foregoing Plaintiff-Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Allen Dickerson
Allen Dickerson