No. 15-152

In the Supreme Court of the United States

CENTER FOR COMPETITIVE POLITICS,
Petitioner,

v.

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

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

BRIEF OF THE STATES OF ARIZONA, MICHIGAN, AND SOUTH CAROLINA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* STATES OF ARIZONA , MICHIGAN, AND SOUTH CAROLINA[1]

As the chief law enforcement authorities of sovereign States, the Attorney Generals of Arizona, Michigan, and South Carolina prosecute various fraudulent acts committed by non-profits soliciting donations within their respective jurisdictions. Like the vast majority of states, *amici* States undertakes this responsibility without requiring non-profits to report annually the names of the significant donors as the Attorney General of California is requiring the Petitioner Center for Competitive Politics to do.

The issues presented in the Petition merit this Court's review. Although *amici* States retain a keen interest in deterring and prosecuting fraud, they support Petitioner's arguments and oppose the positions taken by the Attorney General of California. *Amici* States take this position because they also have a vital interest in protecting their citizens' First Amendment right of freedom of association against unconstitutional interference. Rather than re-urge Petitioner's arguments here, *amici* States limit their discussion to the description of the majority rule—that disclosure of significant donors is not required to solicit within a state—adopted by 48 states, and an explanation of the dangers posed by California's departure from that rule. These dangers demonstrate the rationale for this Court's decisions requiring the

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[1] *Amici* States submit this brief pursuant to Supreme Court Rule 37.4. Counsel of record for all parties received notice of *amici* States' intent to file this brief.

application of exacting scrutiny when government officials seek to obtain donor lists from private organizations.

SUMMARY OF ARGUMENT

The *amici* States agree with Petitioner, Center for Competitive Politics, that the petition for certiorari should be granted. The decision of the Ninth Circuit Court of Appeals squarely conflicts with the rulings of this Court and the decisions of other courts of appeal. This *amicus* brief focuses on two major flaws with that ruling.

This Court has consistently recognized, perhaps most famously in *Buckley v. Valeo*, 424 U.S. 1 (1976), that mandatory disclosure rules invariably chill the freedom of association. As a consequence, such interference in the citizenry's First Amendment rights is subject to "exacting scrutiny." This heightened standard of review requires a showing that the governmental intrusion must be relevantly correlated to a compelling governmental interest. The action of the Attorney General of California to demand that all non-profits surrender the identities of their substantial supporters is not so narrowly tailored for two reasons.

First, the generalized demand for disclosure of donor names and addresses increases the possibility that unscrupulous public officials could target donors for various forms of retribution. Even if the names of significant donors are never released to the public, government officials might use the donor information to single out their political opponents for retribution. Thus, the First Amendment harm is inherent in the disclosure to the government official and does not

require an additional showing of a likelihood of public disclosure or probability of retaliation.

Second, the link between the required disclosure of donor information and the California Attorney General's asserted governmental interest is tenuous. Forty-eight states have virtually identical governmental interests to those asserted by California's Attorney General, yet they do not require the sweeping disclosure of donor information demanded by Ms. Harris. The unique nature of California's intrusion into associational privacy suggests that it should not survive application of exacting scrutiny.

BACKGROUND

Before asking Californians for financial support, a § 501(c)(3) nonprofit corporation must be a member of that state's Registry of Charitable Trusts ("Registry"), which is administered by the Attorney General. CAL. GOV'T CODE §§ 12584; 12585. Petitioner has been a Registry member since 2008. As part of its annual re-registration filings, Petitioner provides the Attorney General with its public copy of Form 990, the tax form filed by nonprofit corporations with the Internal Revenue Service ("IRS"). CODE OF CALIF. REGS. tit. 11, § 301; CAL. GOV'T CODE § 12586; 26 U.S.C. § 6033(b). Form 990 is a 12-part document, the submission of which may require completion of up to 16 schedules which provide additional detail. One of these documents, Schedule B, requires a non-profit to list the contact information of each contributor who has given the greater of $5,000 or 2% of the total funds raised by the organization in a calendar year.

Petitioner submitted its entire Form 990 and associated schedule to the California Registry, but redacted the names and addresses of its major contributors. Petitioner did so pursuant to its understanding of federal law, which explains that copies of Form 990 "shall not require the disclosure of the name or address of any contributor to the organization." 26 U.S.C. § 6104(d)(3)(A). While other states require non-profits to submit a copy of Form 990, only one other state, New York, currently enforces a requirement of submitting the names and addresses of Schedule B contributors. Indeed, while the 50 states' regulatory approaches to out-of-state non-profit solicitation of their citizens differ in many respects, 48 states agree that disclosure of Schedule B contributors' names and addresses is not required. In fact, Arizona, as well as Delaware, Idaho, Indiana, Iowa, Montana, Nebraska, South Dakota, Texas, Vermont, and Wyoming, requires no registration at all for common non-profits.[2]

California's Attorney General has informed Petitioner that failure to submit a copy of its Schedule B including "the names and addresses of contributors" was an incomplete registration. Failure to comply with the disclosure request would result in suspension from the Registry. Pet. 7. Petitioner challenges the constitutionality of California's disclosure requirement.

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[2] Arizona requires veterans' organizations to register and Texas requires law enforcement, public safety, and veterans' organizations to register.

ARGUMENT

I. DISCLOSURE TO A STATE OFFICIAL IS A COGNIZABLE FIRST AMENDMENT INJURY

"Time for some traffic problems in Fort Lee."[3]

With that eight-word email, Bridget Anne Kelly, then serving as Deputy Chief of Staff for New Jersey Governor Chris Christie, vividly demonstrated why disclosure of a political membership roll to a state official is, in itself, a First Amendment harm that must be justified by a compelling state interest. Kelly's infamous message, which resulted in the politically motivated partial closure of the George Washington Bridge, was to settle a score with the Mayor of Fort Lee who had dared to decline to endorse Governor Christie's re-election effort.

The Christie gubernatorial administration is far from the first and will certainly not be the last to, as President Richard Nixon's White House counsel James Dean put it, "use the available federal machinery to screw our political enemies."[4] While hope springs eternal that the better angels of our elected officials prevail, experience has shown that state and federal office-holders are subject to human frailty, including the potential to misuse donor information.

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[3] *Christie administration traffic jam correspondence*, MOTHER JONES: DOCUMENTS, http://www.motherjones.com/documents/1003323-christie-administration-traffic-jam-correspondence (last visited Aug. 31, 2015).

[4] Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 1689 (1973).

Accordingly, this Court should reinforce *Buckley,* which struck down mandatory disclosure on a facial challenge. 424 U.S. at 64.The Ninth Circuit's reasoning that compelled disclosure of political donor information is problematic only where the information is made public and the reaction to the disclosure exerts a chilling effect is inconsistent with this Court's *Buckley* decision. Merely placing this information in the hands of government officials constitutes a cognizable First Amendment injury. This Court should grant the petition to overturn the Ninth Circuit's holding that the Attorney General of California's demand that all non-profits surrender the identities of their donors is narrowly tailored to achieve a compelling state interest.

II. THE REQUIRED DISCLOSURE OF DONOR INFORMATION IS NOT NARROWLY TAILORED TO ACHIEVE THE CALIFORNIA ATTORNEY GENERAL'S LEGITIMATE GOVERNMENTAL INTEREST.

State scrutiny of an organization's membership roll is an infringement on the First Amendment's guarantee of privacy of association, which can only be justified by "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64. The Ninth Circuit failed to apply this long-established principle in two ways. First, the Ninth Circuit erroneously held that Attorney General Harris' disclosure policy did not impose any actual burden upon the First Amendment rights of Petitioner or its donors. The Ninth Circuit further erred in holding the disclosure requirement "to be justified by compelling

state interests and is narrowly tailored to achieve those interests." Pet. App. 44a. *Amici* States concur in Petitioner's arguments on the first question, but wish to bring to the Court's attention several reasons that California's disclosure requirement is not tailored to any compelling state interest.

A. The Vast Majority of States Do Not Require Disclosure

Disclosure of significant donors is not relevantly correlated to the state's valid law enforcement interests. All 50 state attorneys general possess a law enforcement interest in preventing non-profits from defrauding their citizens, yet only California and New York require disclosure of the unredacted Schedule Bs containing donors' names and addresses.

Perhaps to lessen the glare of California's uniquely invasive donor disclosure requirement, the Ninth Circuit erroneously claimed that five other states also require the submission of an un-redacted Schedule B. Pet. App. 5a. In fact, only New York also imposes this sweeping mandatory disclosure. While Hawaii, Kentucky and Mississippi statutes require submission of IRS Form 990, they do not mandate submission of non-public versions of Schedule B.[5] Although Florida briefly joined New York and California in requiring submission of un-redacted Schedule Bs, the Florida legislature acted quickly to reverse this policy and

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[5] HAW. REV. STAT. ANN. § 467B-6.5 (2014); KY. REV. STAT. ANN. §§ 367.650-670 (2014); MISS. CODE ANN. § 79-11-507 (2014).

explicitly allows non-profits to file redacted Schedule B.[6]

Not only do 48 states not require annual submission of unredacted Schedule Bs, 11 of those states do not require registration at all. In 2013, Arizona joined Delaware, Idaho, Indiana, Iowa, Montana, Nebraska, South Dakota, Texas, Vermont, and Wyoming in adopting this non-registration standard.

B. The States That Do Not Require Disclosure Adequately Pursue Their Valid Law Enforcement Interests

Despite *amici* States' lack of donor disclosure requirements, they routinely and effectively exercise oversight over non-profits actively soliciting donations within their jurisdiction and investigate, prosecute and deter fraudulent activities.

Earlier this year, *amici* States joined with every other state in a civil enforcement action against four sham cancer charities and the individuals who run them pursuant to the state's consumer protection, charitable solicitation, and/or charitable trust enforcement authority. Collectively the sham non-profits raised more than $187 million from donors across the United States.[7]

Here, the Ninth Circuit erred in holding that the California Attorney General's disclosure requirement

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[6] FLA. STAT. 496.407 (2)(a) (2014).

[7] Complaint, FTC, 50 States, and D.C. v. Cancer Fund of America, Inc., et al., No. 2:15-cv-00884-NVW (D. Ariz. May 18, 2015).

is narrowly tailored to a compelling state interest. For this Court to adopt the Ninth Circuit's reasoning, it would have to jettison its long-standing precedent and conclude that the 48 states not mandating disclosure of donor information either lack California's law enforcement interests or simply inadequately regulate non-profit organizations. To the contrary, *amici* States share California's law enforcement concerns and diligently regulate non-profits; however, *amici* States have struck a constitutional balance between their law enforcement interests and their citizens' First Amendment rights. Rather than impose sweeping mandatory donor disclosure rules, *amici* States have satisfied their law enforcement interests by traditional methods such as compliance audits and subpoenaing donor information after developing a particularized suspicion of wrongdoing.

As Petitioner notes, the Ninth Circuit's ruling below effectively transforms exacting scrutiny into a version of rational basis review. *Amici* States agree. Simple law enforcement interests cannot justify the California Attorney General's generalized mandatory donor disclosure requirements.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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