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 PHILANTHROPY ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ALEXANDER L. REID
SHIRA M. HELSTROM
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

THOMAS M. PETERSON
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, California 94105

ALLYSON N. HO
Counsel of Record
JOHN C. SULLIVAN
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether, as the Ninth Circuit held in this case, state governments can force charitable organizations to turn over, in bulk, the names of donors who give anonymously, where there is no compelling government interest served by the forced disclosure, states already have ample tools to ensure that charitable organizations comply with the law, and the forced disclosures implicate serious practical and constitutional concerns—including the abridgment of First Amendment freedoms of religion, speech, and association.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae The Philanthropy Roundtable is a leading network of charitable donors. Its 650 members include individual philanthropists, family foundations, and other private grantmaking institutions. *Amicus*'s mission is to foster excellence in philanthropy, to protect philanthropic freedom, to assist donors in achieving their philanthropic intent, and to help donors advance liberty, opportunity, and personal responsibility in the United States and abroad.[1]

Amicus therefore seeks to advance the principles and preserve the rights of private giving, including the freedom of individuals and private organizations to determine how and where to direct charitable assets—while also seeking to reduce or eliminate government regulation that would diminish private giving or limit the diversity of charitable causes Americans support.

As an organization whose members include individual charitable donors and private grantmaking institutions, *amicus* has a substantial interest in the outcome of this case, which implicates not only donor

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for petitioner and respondent were timely notified of and consented to the filing of this *amicus* brief.

privacy, but also donor freedom to choose which organizations and causes to support. *Amicus* respectfully submits that the California Attorney General's demand that donor lists—including the identities of anonymous donors—be turned over to the State by all Internal Revenue Code § 501(c)(3) organizations that solicit contributions in California implicates serious practical and constitutional concerns. It unnecessarily abridges philanthropic freedom and threatens to chill charitable giving, thereby weakening the ability of individual donors, grantmaking institutions, and operating charities to carry out their charitable goals and missions. The Ninth Circuit's decision permitting California's bulk collection of donor identities should not be permitted to stand.

While many donors are happy to see their contributions publicized, a sizable number simply will not give unless they can keep their donations confidential. Their reasons are many and varied. Some follow the teaching of the 12th-century Jewish theologian Maimonides, who believed that the second highest form of giving was "to give to the poor without knowing to whom one gives, and without the recipient knowing from whom he received." Others take their lead from the Gospel of Matthew, where Jesus taught that "when you give to the needy, sound no trumpet before you" and "do not let your left hand know what your right hand is doing, so that your giving may be in secret." Still others wish to shield their families from unwanted and potentially dangerous publicity. And some want the freedom to support

controversial organizations without fear of reprisal or ostracism. Given all of these important concerns—each of which is implicated by the Ninth Circuit's decision in this case—*amicus* respectfully requests that the petition be granted and the Ninth Circuit's judgment be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Privately funded efforts to solve social problems, enrich culture, and strengthen society are among the most significant American undertakings, and have been for hundreds of years. The United States is now among the most generous nations in the world when it comes to charitable giving, with gifts by individuals (including bequests) totaling nearly $287 billion in 2014—a record-breaking sum. LILLY FAMILY SCHOOL OF PHILANTHROPY, INDIANA UNIVERSITY—PURDUE UNIVERSITY AT INDIANAPOLIS, GIVING USA 2015: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2014 (2015). Over one million nonprofit organizations benefited from those donations, including religious organizations, schools, hospitals, foundations, food pantries, and homeless shelters. *Ibid.*

America's culture of charitable giving has flourished because its legal framework—including the individual deduction for charitable donations and the income tax exemption for charitable organizations—marks a critically important boundary between

government and civil society. It is understandable that government would prefer to maximize its influence and control over the vast resources of the private nonprofit sector. But that is not the system of self-rule established by our Constitution. Regrettably, however, the Ninth Circuit's decision to allow the State of California to collect, in bulk, the names of charitable donors who choose to give anonymously—without any compelling reason for the intrusion—transgresses this crucial boundary and raises serious practical and constitutional concerns. Nearly one-eighth of all charities in the United States are registered with the state Attorney General to solicit donations in California. KAMALA D. HARRIS, OFFICE OF THE ATTORNEY GENERAL, CALIFORNIA DEPARTMENT OF JUSTICE, GUIDE TO CHARITABLE GIVING FOR DONORS 1, available at http://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/CharitiesSolicitation.pdf?. So the stakes for donor privacy and freedom in this case implicate donors and charities across the country.

This Court ruled unanimously in *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958), that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." The Court therefore held that the State of Alabama could not compel the NAACP to reveal the names and addresses of its members because doing so would expose its supporters "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" and thereby

restrain "their right to freedom of association." *Id.* at 462. This case implicates the same concerns—and this Court's review is needed now given the vital interests at stake.

It cannot seriously be questioned that many donors simply will not give unless they can keep their donations confidential. Many donors, for example, give anonymously out of deeply held religious convictions. Some do so to live a more private life and avoid broadcasting their wealth to the world. Others do so for the same reasons articulated by this Court in *NAACP* v. *Alabama*—to avoid "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" associated with supporting unpopular or controversial causes. *Id.* at 462. And still more—the majority, in fact—do so to avoid unwanted solicitations by other organizations to which they would rather not contribute. Forced disclosure of donor names to state governments—which lack the needed privacy protections available at the federal level—threatens serious unintended consequences for individual donors and charitable organizations across the nation. At the same time, state governments already have ample tools for carrying out their proper roles in ensuring that charitable organizations comply with the law—including targeted use of state Attorneys General's *parens patriae* authority and subpoena power.

This Court's review is needed to restore the critical boundary between government and private charity, and avoid the harmful consequences that are

likely to flow if the Ninth Circuit's decision is permitted to stand—i.e., a chilling effect on activity that is stringently protected by the Constitution and exceedingly important to American civil society. The petition should be granted, and the Ninth Circuit's judgment reversed.

I. The State's Collection Of Charitable Donor Names Implicates Serious Constitutional And Practical Concerns.

The compelled disclosure of donor names in bulk to state governments is not only unnecessary to legitimate oversight, see Pet. 26-29, but also harmful to a significant component of charitable giving—donor anonymity. The State of California's unwarranted intrusion into individuals' charitable giving not only has serious practical implications, but also constitutional dimensions as well—unnecessarily impinging on the freedom of religion, speech, and association.

Donors may have any number of legitimate reasons for desiring to remain anonymous—including motivations that implicate deeply held moral or religious beliefs. For example, Jewish donors may request anonymity according to Maimonides' teaching that the second highest form of tzedakah ("charity" or "righteousness") is to give anonymously to an unknown recipient, and the third highest is to give anonymously to a known recipient. See, e.g., JULIE SALAMON, RAMBAM'S LADDER: A MEDITATION ON GENEROSITY AND

WHY IT IS NECESSARY TO GIVE 6-7, 109-26, 127-46 (2003). Christian donors may request anonymity consistent with Matthew's admonition that "when you give to the needy, do not announce it with trumpets" and "do not let your left hand know what your right hand is doing, so that your giving may be in secret." *Matthew* 6:2. Muslims have a similar concept, called sadaqah. Qur'an, *Surat Al-Baqarah* 2:271 ("If ye disclose (acts of) charity, even so it is well, but if ye conceal them, and make them reach those (really) in need, that is best for you."). And Hindu donors may choose to give an anonymous gift, or *gupt dān*, as an act of both self-renunciation and generosity. See ERICA BORNSTEIN, DISQUIETING GIFTS: HUMANITARIANISM IN NEW DELHI 26-27 (2012).

Donors may also prefer to give anonymously for the same important reasons articulated by this Court in *NAACP* v. *Alabama*—to avoid the threat of public censure, condemnation, and even physical harm to themselves and their families that can be associated with giving to unpopular or controversial causes. This Court ruled in that case that the Fourteenth Amendment protected the NAACP's right to keep its membership list confidential. Revealing that information, the Court warned, "[was] likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *NAACP* v. *Alabama*, 357 U.S. at 462-63. And as the Court recognized even before *NAACP* v. *Alabama*, under our Constitution the government cannot direct private associations to implement the government's preferred

policies. *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. 518 (1819) (rejecting attempt by the State of New Hampshire to seize control of Dartmouth College, a private university established by charitable contributions).

Indeed, there are strong historical reasons for protecting donor privacy and freedom—both for the donors' sake as well as the public good. When President Andrew Jackson was inflamed by abolitionist successes, for example, he tried to use postmasters to expose abolitionist sympathizers to public ridicule, pressure, and threats. See Jennifer Rose Mercieca, *The Culture of Honor: How Slaveholders Responded to the Abolitionist Mail Crisis of 1835*, 10 RHETORIC & PUBLIC AFFAIRS 51, 66 (2007). And the history of philanthropy in America is rich with examples of individuals and organizations acting where government has refused to act, or in ways the government simply does not like. It was charitable giving by individuals that educated Native Americans at Dartmouth and Hamilton colleges; that set up thousands of schools for African-Americans during the Jim Crow era; and that eliminated hookworm in the United States when some state governments refused to acknowledge that the parasites were endemic among their residents. See Alexander Reid, *Renegotiating the Charitable Deduction*, 71 TAX ANALYSTS 21, 27 (2013). Protecting donor confidentiality helps ensure that controversial philanthropic causes—precisely those that are working to sway public policy—can exist in a safe space where their donors are free from harassment.

In addition to exercising their freedom of religion, speech, and association, donors may also choose to give anonymously for exceedingly important practical reasons. For example, during times of economic recession, anonymous giving increases significantly as donors "who have suffered little, or even prospered, during the downturn" may not want to appear insensitive to the plights of others less fortunate. Ben Gose, *Anonymous Giving Gains in Popularity as the Recession Deepens*, THE CHRONICLE OF PHILANTHROPY (Apr. 30, 2009), available at https://philanthropy.com/article/Anonymous-Giving-Gains-in/162627. During the recent severe downturn, for instance, the North Texas Food Bank—which distributes food to charities in 13 counties—received its first-ever $1 million gift in December 2009 from a woman who asked to remain anonymous. *Ibid.* "'She said she would not have been able to look herself in the mirror over the holidays had she not made the gift,'" the food bank's chief executive was quoted as saying about the anonymous donor. *Ibid.*

Donors may also choose to give anonymously out of concern that the identity of the donor might overshadow the efforts of the charity. See, e.g., Claire Cain Miller, *Laurene Powell Jobs and Anonymous Giving in Silicon Valley*, NY TIMES, BITS (May 24, 2013, 8:05 AM), available at http://bits.blogs.nytimes.com/2013/05/24/laurene-powell-jobs-and-anonymous-giving-in-silicon-valley/?_r=0 (quoting Ms. Powell Jobs, the widow of Apple founder Steve Jobs, as saying "[w]e're really careful about amplifying the great work of

others in every way that we can, and we don't like attaching our names to things").

Anonymity also may encourage giving by donors who might otherwise be uncomfortable making a public showing of wealth and who desire to lead a more private life. Chuck Feeney, for example, donated nearly his entire fortune of around $4 billion anonymously. See CONOR O'CLERY, THE BILLIONAIRE WHO WASN'T 327-28 (2007). As Feeney has explained, "'I had one idea that never changed in my mind—that you should use your wealth to help people. I try to live a normal life, the way I grew up * * * * I set out to work hard, not to get rich." *Id.* at 324. In fact, Feeney did not reveal his billion-dollar philanthropy until years later, and then only reluctantly, when the release of documents associated with a business transaction would likely have disclosed his donations. *Ibid.* And, of course, giving anonymously protects donors from unwanted solicitations from organizations to which they would rather not donate. A study by the Center on Philanthropy at Indiana University identified the desire to minimize solicitations from other organizations as the most frequently cited motivation for giving anonymously (followed by "deeply felt religious conviction," and next by "a sense of privacy, humility, [or] modesty"). ELEANOR T. CICERCHI & AMY WESKEMA, SURVEY ON ANONYMOUS GIVING, CENTER ON PHILANTHROPY, INDIANA UNIVERSITY—PURDUE UNIVERSITY AT INDIANAPOLIS 9-10 (1991).

Of course, many donors choose to give publicly for similarly compelling reasons. See, e.g., GIVING WELL:

THE ETHICS OF PHILANTHROPY, 202-17 (Patricia Illingworth et al. eds., 2011) (explaining that public giving helps create a culture of giving); see also Paul G. Schervish, *The sound of one hand clapping: the case for and against anonymous giving*, 5 VOLUNTAS: INT'L J. OF VOLUNTARY & NONPROFIT ORGS. 1, 3 (1994) (noting that donors recognize reasons both for and against anonymous giving). But that is precisely the point—it is a choice for *donors* to make. And the freedom enjoyed by private individuals and associations in giving for public benefit has been a hallmark of American civil society since the Founding. Writing in 1831, the philosopher Alexis de Tocqueville observed that "[t]here is nothing, in my opinion, that merits our attention more than the intellectual and moral associations of America." ALEXIS DE TOCQUEVILLE, 3 DEMOCRACY IN AMERICA 902 (1840). Rather than wait for government to act in the public interest, Americans have long created charitable associations to act in furtherance of those interests. "In democratic countries," Tocqueville wrote, "the science of association is the mother science; the progress of all the rest depends upon its progress," he concluded. *Ibid.*

Today, through charitable contributions, Americans exercise some of their most cherished constitutionally protected rights—creating organizations that engage in freedom of speech, freedom of association, and freedom of religion. In this way, charitable giving is not just a "sweetener" of our quality of life. It is, as Tocqueville saw, fundamental not only to our civil society but also to our republican form of

government. Just as the principles of federalism constrain the federal government's power to tax the states and the states' power to tax the federal government, so too do the individual freedoms of speech, association, and religion that the Constitution guarantees to Americans constrain government's unwarranted intrusion into charitable giving—including the bulk collection of donor identities at issue here—without a compelling interest and narrow tailoring.

If the Ninth Circuit's decision is permitted to stand, it will not only needlessly erode donor freedom and privacy and thereby put an important component of charitable giving at serious risk. It will also set a dangerous precedent for government intrusion into charitable organizations across the board. The tax deduction for charitable donations provides a helpful analogy. Charitable gifts are not consumption because the donor receives nothing in return for the gift; such gifts are therefore excluded from the economic definition of income. See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 365-66 (1972) (noting that the charitable-contribution deduction is necessary to ensure accurate measurement of a donor's income). And the deduction does not exist to "subsidize" philanthropy, though its good effects are many—rather, it exists to shield private donations from government interference (through taxation) with individual choices about how best to further the public interest. See John E. Tyler III, *So Much More Than Money: How Pursuit of Happiness and Blessings of Liberty Enable and*

Connect Entrepreneurship and Philanthropy, 12 INT'L REV. OF ENTREPRENEURSHIP 51, 68-74 (2014); Reid, *Renegotiating the Charitable Deduction*, *supra*, at 27.

So too with donor confidentiality, which, as this Court recognized in *NAACP* v. *Alabama*, similarly protects individuals from government overreach and interference with the exercise of constitutional rights. The State of California's claim of entitlement to the bulk collection of donor identities implicates the same fundamental concerns articulated in *NAACP* v. *Alabama*, and this Court's review is needed to keep government within its proper bounds, protect donor freedom and privacy, and prevent further unwarranted incursions into private charitable giving that will chill the exercise of First Amendment freedoms and upset long-settled donor expectations of privacy and confidentiality.

II. States Have No Compelling Interest In The Bulk Collection Of Donor Names, Particularly Given The Serious Risks Of Public Disclosure.

As the petition explains (at 25-30), the State of California has failed to articulate a legitimate reason—much less a compelling one—for the bulk collection of donor names. That is not surprising, given that federal tax laws, which require limited disclosure of donor identities to the IRS, have no state analogue that could justify the disclosure to which

California claims it is entitled. In the absence of a compelling state interest, no government agency should compel a charity to identify its donors where, as here, the risk of public disclosure—through state FOIA requests or otherwise—is grave.

Amicus recognizes the *federal* government's legitimate interest in allowing the IRS to identify substantial contributors to certain charities on a confidential basis through limited disclosure requirements. These transparency measures help to prevent donors from claiming fraudulent deductions, protect charities against self-dealing, and ensure that charitable grants support genuinely charitable organizations. But even in these limited instances where donor identities are disclosed, the disclosure is to the federal government to satisfy discrete federal law requirements, which have no state law analogue, and with privacy protections that have no state law parallels either.

At the federal level, donor names are required to ensure compliance with discrete, technical provisions of the Internal Revenue Code. Section 507, for example, provides for the termination of private foundation status based on the aggregate tax benefits received by statutorily defined "disqualified" persons, which include "substantial contributors." 26 U.S.C. § 507; 26 U.S.C. § 4946(a)(1)(A). Section 4941 prohibits self-dealing transactions between substantial contributors and private foundations. See 26 U.S.C. § 4941. Other provisions prohibit private foundations from holding excess business holdings together with

substantial contributors (26 U.S.C. § 4943); prohibit excess benefit transactions by public charities with substantial contributors (26 U.S.C. § 4958); and prohibit donor-advised funds from conferring prohibited private benefits on donors (26 U.S.C. § 4967).

State governments, however, lack the same interest in collecting donor identities because they do not have analogous rules to enforce. Indeed, the California Franchise Tax Board has expressly stated that California does not have analogous rules to the federal government and does not raise any state tax revenue by applying federal tax rules that require donor identities. See, e.g., CALIFORNIA FRANCHISE TAX BOARD, SUMMARY OF FEDERAL INCOME TAX CHANGES 436-37 (2006), available at https://www.ftb.ca.gov/Archive/Law/legis/06FedTax.pdf (analyzing Pension Protection Act, which modified many of the federal rules applicable to exempt organizations, and determining that the impact of those changes on California revenue is "not applicable").

What is more, at the federal level, Congress has enacted strong confidentiality rules to protect donor identities from public disclosure. See, e.g., 26 U.S.C. § 6104(d)(3)(A) (providing that public inspection of returns from § 501(c) organizations "shall not require the disclosure of the name or address of any contributor to the organization"). When a charitable organization discloses the names of its major donors to the IRS, that information (unlike other tax documents) is not available for public inspection. This confidentiality in charitable giving is grounded in the constitutional

freedom of association, and it is one of the most important elements of philanthropic freedom. Because the information at issue is not generated by compliance with state regulatory requirements, it is unsurprising that the strong protections at the federal level prohibiting disclosure of donor information—see, e.g., 26 U.S.C. § 6104(b)—have no analogue in state law.

Once donor names are in the hands of state Attorneys General, they are much more vulnerable to public disclosure through the operation of state FOIAs. For example, the California Public Records Act (CPRA), Cal. Gov't Code § 6254(k), is an exceedingly disclosure-oriented statute. See, e.g., *CBS, Inc.* v. *Block*, 725 P.2d 470, 473 (Cal. 1986) ("Maximum disclosure of the conduct of governmental operations was to be promoted by the Act."). Although the CPRA has various exceptions, they must be narrowly construed—and they are permissive, not mandatory. *Marken* v. *Santa Monica-Malibu Unified Sch. Dist.*, 136 Cal. Rptr. 3d 395, 405 (Cal. Ct. App. 2012) (citing cases).

Especially in light of the privacy concerns at stake, it is critical that courts ensure government has advanced a truly compelling interest before it can collect donor names in bulk. This is underscored by recent events at the federal level—where safeguards are the strongest—concerning troubling allegations of biased government decision making and cyber breaches of personal information from over 100,000 individual tax returns. See, e.g., Lisa Rein &

Jonnelle Marte, *IRS: Hackers stole personal information from 104,000 taxpayers*, WASH. POST (May 26, 2015), available at http://tablet.washingtonpost.com/rweb/biz/hackers-stole-personal-information-from-104000-taxpayers/2015/05/26/18b7adfde3d9767686b63e1f927b3acd_story.html. Because the Ninth Circuit failed to apply that exacting standard properly, and because that failure can have potentially severe repercussions throughout the country, this Court's review is needed now to prevent government overreach, protect donor privacy, and preclude the chilling of First Amendment rights.

III. States Have Ample Tools For Ensuring Charities Comply With State Law That Obviate Any Need For The Bulk Collection Of Donor Names.

As explained above, state governments lack the same interest as the federal government in collecting donor identities because they do not have analogous laws to enforce. Yet states have ample tools for carrying out their proper mission of ensuring that charities comply with state laws. Thus both state and federal officials properly demand accountability and transparency when it comes to matters like compensation, fundraising, grantmaking, institutional structures, and a host of other nonprofit management concerns. In addition, national organizations like the Association of Fundraising Professionals, Independent Sector, the Council on Foundations, and the National Council of Nonprofits promote codes of

conduct and examples of best practices. State and regional associations of funders and nonprofits provide guidance. There are numerous ombudsman organizations like GuideStar, GiveWell, CharityWatch, and Charity Navigator. And, of course, the press observes and reports heavily on nonprofit activity.

State Attorneys General serve as "*parens patriae*" (i.e., the protector for those unable to protect themselves) for charitable organizations in the state because charities have no shareholders. They also possess subpoena power. These authorities are more than ample to assist state Attorneys General police the charities within their borders. This helps explain why the California Attorney General's proffered reasons for needing disclosure lack any connection with donor identity—as each California Code provision cited by the Attorney General in her Ninth Circuit briefing addresses director and officer transactions, not donor behavior. App. 5a (noting Attorney General's citation of Cal. Corp. Code §§ 5233, 5236, and 5227 for justifying investigations into "self-dealing, improper loans, or other unfair business practices"). This is because—unlike donors—directors and officers are fiduciaries whose duties and obligations are prescribed by state regulation. See Cal. Corp. Code §§ 5230-5239. And the state's subpoena power would be available to address any individual instances of donor misbehavior. The bulk collection of donor names at the state level is simply not needed—especially given the success of federal and state regulators in ensuring compliance with already existing regulations that have made fraud and self-enrichment rare

among charitable organizations. See Joanne Florino, *Policing Philanthropy?*, PHILANTHROPY MAGAZINE (Summer 2015), available at http://www.philanthropyroundtable.org/site/print/policing_philanthropy.

In sum, the right to choose how and where to make charitable gifts, even unpopular ones, is fundamental to Americans' exceptional philanthropic freedom. It also implicates fundamental constitutional rights. The Ninth Circuit's decision in this case allows unwarranted government intrusion into the exercise of those rights, with potentially dire consequences for charities throughout the United States. This Court's review is needed to restore the proper balance between philanthropic freedom and legitimate government oversight.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALEXANDER L. REID
SHIRA M. HELSTROM
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

THOMAS M. PETERSON
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, California 94105

ALLYSON N. HO
Counsel of Record
JOHN C. SULLIVAN
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com