Nos. 16–55727 & 16-55786

In the
United States Court of Appeals for the Ninth Circuit

AMERICANS FOR PROSPERITY FOUNDATION,
Plaintiff-Appellee/Cross-Appellant,
v.
XAVIER BECERRA,
in his official capacity as the Attorney General of California
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Central District of California

Brief *Amicus Curiae* of Free Speech Defense and Education Fund, Free Speech Coalition, Citizens United, Citizens United Foundation, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, U.S. Justice Foundation, Family Research Council, Western Center for Journalism, Conservative Legal Defense and Education Fund, The Leadership Institute, Public Advocate of the United States, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, 60 Plus, 60 Plus Association, America's Foundation for Law and Liberty, America's Liberty Committee, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Liberty Guard, Coalition for a Strong America, The Jesse Helms Center, Americans for Constitutional Liberty, CatholicVote.org, Eberle Communications Group, Inc., ClearWord Communications Group, Davidson & Co., and JFT Consulting, Inc. in Support of Plaintiff-Appellee and Affirmance

JOSEPH W. MILLER
Ramona, CA 92065
Attorney for Amicus Curiae USJF
MICHAEL BOOS
Washington, D.C. 20003
Attorney for Amici Curiae CU & CUF
*Attorney of Record
January 27, 2017

HERBERT W. TITUS*
JEREMIAH L. MORGAN
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070
Attorneys for Amici Curiae

DISCLOSURE STATEMENT

The *amici curiae* herein, Free Speech Defense and Education Fund, Free Speech Coalition, Citizens United, Citizens United Foundation, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, U.S. Justice Foundation, Family Research Council, Western Center for Journalism, Conservative Legal Defense and Education Fund, The Leadership Institute, Public Advocate of the United States, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, 60 Plus, 60 Plus Association, America's Foundation for Law and Liberty, America's Liberty Committee, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Liberty Guard, Coalition for a Strong America, The Jesse Helms Center, Americans for Constitutional Liberty, CatholicVote.org, Eberle Communications Group, Inc., ClearWord Communications Group, Davidson & Co., and JFT Consulting, Inc., through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1, 29(c).

All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of

them, except for Eberle Communications Group, Inc., ClearWord Communications Group, Davidson & Co., and JFT Consulting, Inc. Eberle Communications Group, Inc., ClearWord Communications Group, Davidson & Co., and JFT Consulting, Inc. have no parent company and are privately held corporations none of whose stock is publicly traded. The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, Jeremiah L. Morgan, William J. Olson, and Robert J. Olson of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amicus* United States Justice Foundation also is represented herein by Joseph W. Miller, 932 D Street, Suite 2, Ramona, California 92065. *Amici* Citizens United and Citizens United Foundation are also represented herein by Michael Boos, 1006 Pennsylvania Avenue SE, Washington, D.C. 20003.

s/Herbert W. Titus
Herbert W. Titus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*

Free Speech Defense and Education Fund, Inc., Free Speech Coalition, Inc., Citizens United, Citizens United Foundation, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, United States Justice Foundation, Family Research Council, Western Center for Journalism, Conservative Legal Defense and Education Fund, The Leadership Institute, Public Advocate of the United States, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., 60 Plus, 60 Plus Association, America's Foundation for Law and Liberty, America's Liberty Committee, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Liberty Guard, Coalition for a Strong America, The Jesse Helms Center, Americans for Constitutional Liberty, and CatholicVote.org are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code ("IRC"). Eberle Communications Group, Inc., ClearWord Communications Group, Davidson & Co., and JFT Consulting, Inc., are for-profit firms which assist nonprofit organizations in their programs and fundraising. Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application

of the law. Their interest also includes protecting the constitutional rights of their donors.[1] Many of this *amici* recently filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit involving similar issues.[2]

STATEMENT OF THE CASE

California, like many other states, requires most charitable organizations to register and then file annual renewals as a condition of conducting charitable solicitations in that state. Under California's Supervision of Trustees and Fundraisers for Charitable Purposes Act, Cal. Gov't Code §§ 12580, *et seq*., the California Attorney General is charged with enforcing California's laws regulating charitable solicitation registration. *See* Cal. Gov't Code § 12584. Without the Attorney General's permission, it is illegal for charitable entities, such as Plaintiff-Appellee Americans for Prosperity Foundation (the

---

[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] *See* Citizens United v. Schneiderman, U.S.C.A. 2nd Cir., No. 16-3310, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al*. (January 13, 2017).

"Foundation" or "AFPF"), to communicate their message to California residents whenever contributions are sought.

Each year since 2001, the Foundation successfully renewed its annual registration, until 2013 when it received a delinquency letter from the Attorney General. *See* A.G. Br. at 14; AFPF Brief at 10. The deficiency letters stated that AFPF had failed to file a complete, unredacted IRS Form 990 Schedule B, "Schedule of Contributors," disclosing the names and addresses of its largest donors. *Id*. at 1.

Never before had the Attorney General required such a submission. Rather, the long-standing policy of the Attorney General's office (and the practice in almost every other state which has a charitable solicitation law) has been not to require filing an unredacted Schedule B.[3] Rather, nonprofits file a redacted Schedule B. Acting unilaterally, the Attorney General ordered this change — without any change in the authorizing statute. *See* AFPF Brief at 10.

The California legislature vests the Attorney General with complete and unbridled discretion to make all rules and regulations regarding the required

[3] *See* 50-State Survey on Schedule B Submission Requirements in Connection with Charitable Registration Filings, AFPF Brief at ADD-35 (showing only California, Hawaii, and New York demand unredacted Schedules B).

reports, without any statutory standards: "The Attorney General shall make rules and regulations as to the time for filing reports, the contents thereof, and the manner of executing and filing them." Cal. Gov't Code § 12586(b). No limitation is placed on the California Attorney General, who is given "broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities." Cal. Gov't Code § 12598(a). Although the California Attorney General claims that, like other states, "tax-exempt organizations are supervised and regulated by **the State**,"[4] in reality, in California, tax-exempt organizations are supervised by **the Attorney General**.

The Attorney General now threatens AFPF and other like charities with fines and suspension of the "privilege" to conduct charitable solicitation in California unless they disclose the unredacted confidential list of their large donors' names, addresses, and contribution amounts that appear in Schedule B. This effectively would impose a ban on making charitable solicitation by mail, email, telephone, and personal solicitations to an organization's members, supporters, and others who live in California. Therefore, in December 2014, the Foundation filed suit against the Attorney General, alleging a violation of the

[4] A.G. Brief at 5 (emphasis added).

First Amendment to the U.S. Constitution. On April 21, 2016, the district court issued a permanent injunction against the Attorney General, prohibiting that office from demanding the Foundation's confidential, unredacted Schedule B, leading to this appeal.

Not surprisingly, the Attorney General erroneously describes charitable solicitation activity to be a "privilege," allowed only by the beneficence of the Attorney General. *See* A.G. Brief at 5. This view runs entirely counter to the U.S. Supreme Court's view that "**charitable appeals for funds** … involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are **within the protection of the First Amendment**." Schaumburg v. Citizens for Better Env't, 444 U.S. 620, 632 (1980) (emphasis added). *See also* Ill. ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 611 (2003) ("The First Amendment protects the right to engage in charitable solicitation.").

Having summarily reduced the right to charitable solicitation to a mere "privilege," the Attorney General has mistakenly claimed that it was error for "the district court [to] excuse[] plaintiff from making a threshold showing of First Amendment harm…." A.G. Br. at 20. However, a showing of First

Amendment harm is **not** the threshold issue. Instead, the real threshold issue is whether the "broad powers" granted to the Attorney General to "prevent charitable fraud" constitute a prior restraint in violation of the First Amendment. If the power conferred upon the Attorney General is unconstitutional, there is no need to determine whether the harm done is unconstitutional.

ARGUMENT

The Attorney General asserts that this case should be governed by this Court's previous opinions in Center for Competitive Politics v. Harris, 784 F.3d 1307 (9th Cir. 2015), and Americans for Prosperity Foundation v. Harris, 809 F.3d 536 (9th Cir. 2015). *See* A.G. Brief at 1. However, those cases applied, and relied upon cases applying, the First Amendment in the context of campaign finance regulation, and are entirely inapplicable here. The district court recognized this fact, distinguishing the campaign finance precedents as "unique," tailored to:

> substantial governmental interests in "provid[ing] the electorate with information" about the sources of election-related spending, in "deter[ring] actual corruption," in "avoid[ing] the appearance of corruption.... [District Court Op. at 5.]

None of those interests are present here. Thus, the court below concluded that, although this Court's prior AFPF decision relied upon Chula Vista Citizens for

Jobs & Fair Competition v. Norris, the holding of that case was "properly limited to the electoral context." *Id*.

I. THE ATTORNEY GENERAL'S SCHEDULE B REQUIREMENT DOES NOT COMPLY WITH THE SUPREME COURT'S FIRST AMENDMENT PRECEDENTS GOVERNING CHARITABLE SOLICITATIONS.

During the 23-year period from 1980 to 2003, the United States Supreme Court addressed four times the constitutionality of state statutes and city ordinances governing charitable solicitors under the First Amendment.[5] On three of those occasions, the Court found that such legislative efforts — all of which were purportedly designed to prevent fraud — were unconstitutional. Only once, in 2003, did such an effort pass constitutional muster. In that case, the Court allowed the Illinois Attorney General to bring a common law fraud action against a "for-profit fundraising corporation[] … for fraudulent charitable solicitations," based upon "intentionally misleading statements designed to deceive the listener" as to the "percentage of charitable donations [they] retain for themselves." Madigan at 605-06. But, the Court pointedly emphasized, the "bare failure to

[5] Village of Schaumburg v. Citizens for a Better Envt., 444 U.S. 620 (1980), Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984), Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988), Madigan v. Telemarketing Associates, 538 U.S. 600 (2003).

disclose that information directly to potential donors does not suffice to establish fraud." *Id.*

Distinguishing the three previous charitable solicitation cases in which the Court had "invalidated state or local laws," the Court explained that those laws "categorically restrained solicitation by charities or professional fundraisers if a high percentage of the funds raised would be used to cover administrative or fundraising costs." *Id.* at 610. In contrast, the Court continued, "unlike Schaumburg, Munson, and Riley [this case] involves **no prophylactic** provision proscribing any charitable solicitation if fundraising costs exceeded a prescribed limit":

> Instead, the Attorney General sought to enforce the State's generally applicable antifraud laws against Telemarketers for "specific instances of deliberate deception." [*Id.* at 610 (emphasis added).]

Unlike the Attorney General of Illinois in Madigan, the Attorney General of California has chosen to exercise his "broad powers" to require production of the donor information on the IRS Schedule B, expanding the prophylactic reach of the California Trustees and Fundraisers for Charitable Purposes Act — purportedly "to police and prevent charitable fraud." Defendant-Appellant's Opening Brief ("A.G. Br.") at 5-6. To be sure, as the Madigan Court put it,

although "the First Amendment does not shield fraud" (*id.* at 612), it does shield charitable solicitors from "'unduly burdensome' prophylactic rule[s] [that are] unnecessary to achieve the State's goal of preventing donors from being misled." *Id.* at 616.

To guard against such government overreach, the Madigan Court summarized its opinions in Schaumburg, Munson, and Riley as having taken "care to leave a **corridor** open for fraud actions to guard the public against false or misleading charitable solicitations." Madigan at 617 (emphasis added). To that end, the Madigan Court spelled out a very narrow constitutional passageway, allowing for "a properly tailored fraud action [in which] the State bears the full burden of proof," including proof that the solicitor "made a false representation of a material fact knowing that the representation was false" and that the representation was "made … with the intent to mislead…." *Id.* at 620. But requiring an unredacted Schedule B as a condition for permitting charitable solicitation falls far short of this constitutional mark. A charitable organization's desire to protect the identity of its donors does not evince an intent to deceive. And the Attorney General's requirement of a wholesale disclosure of the

confidential donor information is a superhighway, not a narrow pathway, to reach the state's purported goal of preventing fraud.[6]

It appears that the California Attorney General hopes to avoid this Madigan stricture against prior restraints by his claim that the state's charitable solicitation registration law is designed not just to "protect… the public from fraud," but also to protect the public from "illegality." *See* A.G. Br. at 6. *See also id.* at 25. This claim appears to be, at best, a make-weight for the absence of any evidence that the mandated disclosure of the donors' names and addresses has anything to do with fraud or any other specified offense.

Indeed, other than the specific interest in "fraud prevention," the Attorney General has proffered only glittering generalities, such as his claim that "Schedule B information … allows the Attorney General to determine whether an organization has violated the law and whether a charity is truly operating as a charity deserving of tax-exempt status or is engaged in **improper** activities." *See id.* at 48 (emphasis added). Not only is "improper" not an equivalent of

---

[6] When the Attorney General does get specific, recounting a few incidents when the donor information contained in Schedule B has increased his "'investigative efficiency,'" it appears that in those cases he did **not** need **all** Schedule B donor information of **all** registering solicitors, but rather could acquire such information on an as-needed basis in accordance with the IRS rules governing the disclosure of such information. *See* A.G. Br. at 49-55.

"illegal," but embraces a wide range of synonyms from "inappropriate" to "unsuitable" to "indecent" to "unbecoming." Equipped with such a fistful of adjectives, the California Attorney General would be well armed to shut the State's door to a charity that is deemed to be **not** "operating as a charity deserving tax-exempt status."

If, as the Madigan Court has ruled, the First Amendment allows for only a narrow passageway to vindicate the state's interest in "preventing fraud," *a fortiori*, the pathway to Schedule B donor information must likewise be "narrowly tailored to the State's interest in preventing" abuses other than the state's primary interest of fraud prevention. Not only is the demand for donor information **not** "narrowly tailored," it is not tailored at all, but sweeps up a multitude of donor names to be used at the Attorney General's discretion, including exposing donors to charitable causes with which he disagrees.

II. THE CALIFORNIA CHARITABLE SOLICITATION REGISTRATION ACT IS AN UNCONSTITUTIONAL PRIOR RESTRAINT.

A. Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton Governs This Case.

The California Attorney General cited Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002), for support of his claim that "[t]he State's interest in performing [its] regulatory and oversight function and securing compliance with the law is compelling … and so far more than adequate strength to justify any minimal burden on plaintiff's First Amendment rights." A.G. Br. at 47. Instead, Watchtower undermines his constitutional claim.

According to the Attorney General, Watchtower found that "fraud prevention [is] an 'important' government interest that supports regulation of solicitation activity," A.G. Br. at 47. In fact, Watchtower found that while:

> the interest in **preventing fraud** could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides **no support** for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. [*Id.* at 168 (emphasis added).]

In Watchtower, a Jehovah's Witness was engaged in door-to-door canvassing, distributing handbills advocating his cause to "anyone interested in

reading it" (*id.* at 153), and seeking donations to forward his religious cause. Similarly, here, AFPF "actively works to advance free-market policies, including by hosting events and fundraising in California." AFPF Br. at 25.

In Watchtower, pursuant to § 116.03 of the Village of Stratton ordinances, before distributing his handbills door-to-door to Village residents, the Jehovah's Witness was required to complete and file with the Village mayor a "Solicitor's Registration Form" to obtain a "Solicitation Permit." *Id.* at 155, n.2. Similarly, here, before soliciting California residents to advance its cause, AFPF must complete and file the prescribed registration form annually with the State's Attorney General, including "its annual IRS Form 990 and all schedules and attachments, including Schedule B." *See* A.G. Br. at 7.

In Watchtower, the registration ordinance purportedly was designed to protect the people of the Village of Stratton from "'flim flam' con artists who prey on small town populations" and to prevent "fraud." Watchtower at 158. So too here, the California charitable solicitation act purportedly was allegedly designed to "prevent charitable fraud." A.G. Br. at 6.

The Supreme Court found the Village of Stratton registration ordinance to be unconstitutional under the First Amendment on the ground that:

> It is **offensive** — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a **citizen must first inform the government** of her desire to speak to her neighbors and then **obtain a permit** to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law **requiring a permit** to engage in such speech constitutes a **dramatic departure** from our national heritage and constitutional tradition. [*Id*. at 165-66 (emphasis added).]

It is equally offensive to the First Amendment for the State of California to require AFPF to inform the Attorney General of the names and addresses of its donors in order to obtain a permit to communicate its free market message to the state's residents.

B. As a Prior Restraint, the California Solicitation Law Is a *Per Se* Violation of the Freedom of the Press.

Although the Watchtower case was resolved on general First Amendment principles common to both the speech and press guarantees, the Court addressed the constitutionality of the Stratton Village ordinance more specifically as a violation of the freedom of the press.[7] Historically speaking, the Court recalled

---

[7] "[There are those] who view the Press Clause as somehow conferring special and extraordinary privileges or status on the 'institutional press.' I perceive two fundamental difficulties with [such a] reading of the Press Clause. First, although certainty on this point is not possible, the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege.... The second fundamental difficulty with interpreting the Press Clause … is one of definition. The very task of including some entities within

that "the doctrine of the freedom of the press embodied in our Constitution [was] engendered [by] the struggle in England," *id.* at 162, over the licensing system that prevailed in that country until 1694, the year in which Blackstone declared that the "press became properly free." *See* IV W. Blackstone, Commentaries on the Laws of England 152, n. a (Univ. Chi. Facsimile ed. 1769). Not only did Blackstone celebrate the "liberty of the press" as "indeed essential to the nature of a free state," but also he declared that, "properly understood," the liberty of the press "consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." *Id.* at 151. Freed from the shackles of the power of the licensor to censure, Blackstone summarized: "**Every freeman** has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." *Id.* at 151-52 (emphasis added).

169 years after Blackstone penned these immortal words, the U.S. Supreme Court ruled "invalid on its face" an ordinance that required a permit

---

the 'institutional press' while excluding others [is] reminiscent of the abhorred licensing system [that] the First Amendment was intended to ban. [In my view] the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." First National Bank of Boston v. Bellotti, 435 U.S. 765, 797-802 (1978) (Burger, C.J., concurring).

before a person could "distribute literature in the City of Griffin." *See* Lovell v. Griffin, 303 U.S. 444, 451 (1938). The Court explained:

> **Whatever the motive** which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the **freedom of the press** was primarily directed against **the power of the licensor**. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the **prevention of that restraint was a leading purpose** in the adoption. [*Id.* (emphasis added).]

In lock-step with Blackstone, the Supreme Court initially appeared to agree that the "no licensure" principle of the freedom of the press was absolute — no exceptions. As the Court put it in Lovell, the permit requirement was unconstitutional — "[w]hatever the motive …." *Id.* In the 1971 Pentagon Papers case, however, this absolutist view commanded the concurrence of only two justices then on the Court — Hugo Black and William O. Douglas. In a joint concurring opinion, Justice Black, echoing the voice of James Madison, wrote "that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *See* New York Times v. United States, 403 U.S. 713, 717 (1971). Otherwise, Justice Black continued,

the press would serve the governors and cease to serve the governed: "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *Id.*

However, the two justices were outvoted, and the Pentagon Papers case was resolved by a *per curiam* decision coalescing around the view that "'[a]ny system of prior restraints of expression comes to this Court bearing a **heavy presumption** against its constitutional validity.'" *Id.* at 714 (emphasis added). In support of this presumption, the Pentagon Papers Court relied upon Near v. Minnesota, 283 U.S. 697 (1931), in which the Court ruled that, while "the chief purpose of the [press] guaranty [was] to prevent previous restraints upon publication[,] the protection even as to previous restraint is not absolutely unlimited." *Id.* at 713, 716.

In a concurring opinion in the Pentagon Papers, Justice Brennan identified the extremely high barrier over which the government must climb to satisfy the "heavy presumption." New York Times at 714. Justice Brennan observed: "Our cases have thus far indicated that such cases may arise only when the Nation 'is at war.'" *Id.* at 726. Reaching all the way back to Near, Justice Brennan emerged with only three specific examples of prior restraints that fit

within the exception: "'[N]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.'" *Id.* Except for these rarities, the Court has applied the historic *per se* rule as stated in Lovell.

For example, in Watchtower, the Court posed this question:

> "Does a municipal ordinance that requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded to anonymous pamphleteering or dis-course?" [Watchtower at 160.]

After review of its relevant precedents, the Court endorsed the English historical view of the "doctrine of the freedom of the press," concluding that "[t]o require a censorship through license … makes impossible the *free and* ***unhampered*** distribution of pamphlets strik[ing] at the very heart of the constitutional guarantees." *Id.* at 162 (emphasis added). Then, in a telling summation, the Court refused to apply, or even to state, any "standard of review [to] use in assessing the constitutionality of this ordinance … to resolve th[e] dispute because [of] the breadth of speech affected by the ordinance and the nature of the regulation…." *Id.* at 164. For these reasons, balancing of the interests of fraud prevention and other abuses was found to be inappropriate. Like the Stratton

Village ordinance, the California licensing system governing charitable solicitations constitutes a *per se* violation of the freedom of the press, notwithstanding any purported government interest in preventing crime or protecting privacy. *See* Watchtower at 168.

C. As a Prior Restraint, the California Solicitation Regulations Unconstitutionally Intrude Upon AFPF's and the California Householders' Freedoms of Speech and the Press.

By its charitable solicitation regulations, the California Attorney General controls whether AFPF has access to the state's residents in order "to advance free-market policies" and to solicit funds to support its "educational programs to engage citizens nationwide about the benefits of the free market." *See* AFPF Br. at 25. Indeed, the Attorney General candidly asserts that "those entities that wish to enjoy the privilege and related benefits of operating and soliciting funds as tax-exempt organizations are supervised and regulated by the State." A.G. Br. at 5. In other words, by and through his solicitation regulations, it is the California Attorney General, not the individual California householder, who determines whether AFPF enjoys the "privilege" of presenting its free market message. Such a regulatory scheme, wherein a government official interposes

the State between the speaker or writer and the listener or reader, is flat-out unconstitutional and has been recognized to be so since 1943.

In Martin v. City of Struthers, 319 U.S. 141 (1943), a city ordinance made it "unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing." *Id.* at 142. Admitting that he had violated this ordinance, a Jehovah's Witness claimed that his conviction and fine violated his right of freedom of the press. *Id.* The Supreme Court agreed.

In an opinion written by Justice Black, the Court ruled that "[t]he right of freedom of speech and press … embraces the right to distribute literature [and] protects the right to receive it." *Id.* at 143. Justice Black acknowledged that, on its face, the Struthers ordinance "substitutes the judgment of the community for the judgment of the individual householder," thereby denying to each householder his First Amendment right to "determine whether he is willing to receive" the Jehovah's Witness message. *Id.* In support of the ordinance, the City contended that the ordinance protected the City's residents from

"annoyance, including intrusion upon the hours of rest, and at the prevention of crime." *Id.* at 144. The Court rejected these claims as incompatible with the First Amendment:

> While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. "Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." [*Id.* at 145.]

Today, the preferred method of communication may be direct mail or robo calls (automated telephone calls) — rather than walking door-to-door — but he principle remains the same. In order to reach the California householder, one must first obtain a permit by registering as a charitable organization, thereby substituting the Attorney General's judgment for that of the householder. According to the rule in Struthers, it is each householder — not the Attorney General — who must have the "full right to decide whether he will" open his mail or answer his telephone. *Id.* at 147.

This is precisely what the Supreme Court ruled in Rowan v. United States Post Office Dept., 397 U.S. 728 (1970). Citing Struthers, the Court wrote:

> Mr. Justice Black … while supporting the "freedom to distribute information to every citizen," acknowledged a limitation in terms of leaving "with the homeowner himself" the power to decide "whether distributors of literature may lawfully call at a home." [*Id.* at 736.]

In Rowan, after combing the history of a statute designed to stop the mailing of certain literature, the Court declared that Congress had deliberately denied to the Postmaster General any power to interpose certain mail from a particular sender to a particular addressee, having conferred upon "the addressee complete and unfettered discretion in electing whether or not he desired to receive further material from a particular sender." *Id.* at 734. "To hold less," the Court continued, "would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home." *Id.* at 737. As the Court decided in Struthers, it would not make good sense for someone other than the householder to determine what is heard or read in his home; furthermore, it is a First Amendment violation to "substitute[] the judgment of the community for the judgment of the individual householder." Struthers at 144.

Yet that is precisely what the California charitable solicitation act does. Substituting the judgment of the Attorney General for the judgment of the State's householders, the Act denies (i) AFPF the unfettered opportunity to "distribute"

its free market views and (ii) California householders the unfettered opportunity whether to "receive" those views, both in violation of the freedom of the press.

III. AS APPLIED HERE, THE REQUIRED DISCLOSURE OF THE NAMES AND ADDRESSES OF DONORS TO AMERICANS FOR PROSPERITY FOUNDATION VIOLATES THE FIRST AMENDMENT PRINCIPLE OF ANONYMITY.

Having determined that the Attorney General had, in fact, failed to keep Schedule B information confidential, the district court below discounted the Attorney General's argument that his "office is only seeking disclosure of AFP's Schedule B for *nonpublic* use and therefore there is no potential for public targeting of private donors," *See* Part II of Dist. Ct. Opinion. In its brief, AFPF marshals more than ample record evidence demonstrating the falsity of the Attorney General's claim. *See* AFPF Br. at 16-24, 66-69. Additionally, AFPF has established ample grounds upon which the district court found that the new Schedule B donor disclosure requirement puts an unconstitutional burden upon AFPF's freedom of association, even if the Attorney General faithfully kept such information from the general public. *See id.* at 25-39, 69-71. But more than AFPF's and its donors' freedom of association is at stake. As AFPF points out, their First Amendment right of association includes "the right to speak and associate anonymously." *Id.* at 42. This claim of anonymity is rooted in the

freedom of the press and thus is a claim different from the freedom of association rule in NAACP v. Alabama, 357 U.S. 449 (1958), upon which AFPF primarily relies. *See* AFPF Br. at 42.

In Talley v. California, 362 U.S. 60 (1960), Justice Hugo Black explained why First Amendment press principles cannot give way to government demands to know the identity of the speaker. Talley involved a criminal prosecution for violation of a Los Angeles municipal ordinance which restricted the distribution of hand-bills:

> "No person shall distribute any **hand-bill in** any place under any circumstances, which does not have printed on the cover, or the face thereof, the **name and address** of the following:
> "(a) [t]he person who printed, wrote, compiled or manufactured the same" [and] "(b) [t]he person who caused the same to be distributed…." [*Id.* at 60-61 (emphasis added).]

Hand-bills were defined broadly to include "any hand-bill, dodger, commercial advertising circular, folder, booklet, **letter,** card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public." *Id.* at 63, n.4 (emphasis added). The Court struck down the ordinance, based on the principle of anonymity.

Of course, in the present case, the organization sending the solicitation letter has been identified, but yet the government demands the right to know

more — to learn the identity of those large donors who support that organization financially and make the sending of those letters possible. Therefore, the Attorney General's demand for information in this case is even more intrusive than the Los Angeles municipal ordinance that was struck down in Talley.

The Talley case is instructive in at least two respects: first, for the approach taken by the Court to reach its result, and second, for the historical analysis applied to better understand the interests that the First Amendment was intended to protect.

First, the Talley Court reviewed the state of the law, noting that its decision in Lovell v. Griffin "held void on its face an ordinance that comprehensively forbade any distribution of literature … without a license."[8] Talley at 62. The Talley Court then discussed Schneider v. State, 308 U.S. 147 (1939), which rejected efforts by Irvington, New Jersey; Milwaukee, Wisconsin; Worcester, Massachusetts; and Los Angeles, California, to find a way around Griffin, arguing that those "ordinances had been passed to prevent either frauds,

[8] As noted above, the requirement that a charity must maintain "membership" on the list of approved charities maintained by the California Attorney General is tantamount to requiring charities to obtain a license before communications may be sent. *See* Section I.B., *supra*.

disorder, or littering…." However, the result in the Supreme Court was the same. As the Court explained:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin*, 303 U.S., at 452. [Talley at 64.]

Applied here, a charity's right to mail into California to spread its message and solicit contributions cannot be conditioned on a state's demand for information about the persons responsible.[9] Freedom of the press is wholly inconsistent with any form of government licensure.[10]

The Talley Court also considered and rejected Los Angeles' rationale for its ordinance, explaining that the real threat presented by the ordinance was not so much in the public knowing the identity of the person putting out the hand-bill, but in the government having that information.

---

[9] Based on the principles articulated herein, *inter alia*, these *amici* have long believed that the entire scheme of state charitable solicitation laws cannot withstand a constitutional challenge grounded in the press freedom.

[10] The Attorney General's requirement harkens to the "Decree of Star Chamber of July 11, 1637" and the "Licensing Order of June 14, 1643," which required, *inter alia*, pre-publication application by and licensing of publishers, provoking John Milton's monumental defense of freedom of the press. J. Milton, *Areopagitica* (Liberty Fund: 1999).

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to **criticize oppressive practices and laws** either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of **literature critical of the government**. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for **books that were obnoxious to the rulers**. [Talley at 64-65 (emphasis added).]

It is no defense for the Attorney General to assure nonprofits that the names and addresses of donors will be withheld from public disclosure and will only be used by the government,[11] as the press freedom was designed first and foremost to limit the access of government to such information.

Lastly, if Talley stands for the proposition that the Foundation could mail letters into California without identifying that they came from the Foundation — and it does — it also stands, even more strongly, for the proposition that California cannot demand the names of those who made the mailing of those letters financially possible.

---

[11] Moreover, as detailed in the district court opinion, the Attorney General has been reckless in the protection of this information, and has allowed public disclosure of 1,400 confidential financial reports. *See* District Court Op. at 8-10.

IV. IT IS LIKELY A FEDERAL FELONY FOR THE CALIFORNIA ATTORNEY GENERAL TO CONDITION CHARITABLE SOLICITATION REGISTRATION UPON DISCLOSURE OF CONFIDENTIAL DONOR INFORMATION.

In the Attorney General's Statement of the Case, it states, "In light of declining oversight by the IRS, state regulators are an increasingly critical part of the effort to police and prevent charitable fraud." A.G. Br. at 5-6. In fact, if there is any declining oversight by the IRS, it is the oversight of violations of federal law by state Attorneys General who demand unredacted Schedules B.

A. IRS Form 990 Schedule B Is a Protected Federal Form.

Although the IRS Form 990 is a public information form, and taxpayers are generally required to make a copy publicly available upon request, the specific tax return information required by the Attorney General — confidential donor information at issue in this case — is the exception to that rule.[12] Indeed,

[12] The IRS Form 990 Schedule B donor information is expressly exempted from the federal requirement that organizations must provide their IRS Forms 990 for public inspection. *See, e.g.*, IRS, "Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors' Identities Not Subject to Disclosure," https://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations-Returns-and-Applications:-Contributors'-Identities-Not-Subject-to-Disclosure.

the IRS Form 990 Schedule B "Schedule of Contributors"[13] is robustly protected from disclosure outside the IRS. On this form, the nonprofit must submit to the IRS the "Name, address, and ZIP+4" of all "Contributors" over a certain threshold (generally those who contributed $5,000 or more in one fiscal year), their "Total contributions" for the year, and certain other information about the type of contribution. As to nonprofit organizations other than private foundations or IRC section 527 political organizations, the General Instructions which accompany Schedule B state: "the names and addresses of contributors aren't required to be made available for public inspection."[14] For as many years as the filing of a Schedule B has been required by the IRS, no state with a charitable solicitation law requiring registration and reporting required an unredacted Schedule B, until demands made recently by the Attorney General of California and the Attorney General of New York.[15] Contrary to the letter and spirit of the

---

[13] This Schedule B form is required by federal law to be filed with the IRS by many nonprofit organizations that file IRS Form 990, 990-EZ, or 990-PF.

[14] *See* https://www.irs.gov/pub/irs-pdf/f990ezb.pdf at 5.

[15] *See* Citizens United v. Schneiderman, U.S.C.A. 2nd Cir., No. 16-3310, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al*. (January 13, 2017).

statutory scheme enacted by Congress in the Internal Revenue Code, this requirement violates federal law.

B. Federal Law Prohibits the Disclosure of Schedule B Donor Information Except as Lawfully Authorized by the IRS.

The Internal Revenue Code establishes strict rules in IRC § 6103, protecting "returns" and "tax return information" (defined in IRC § 6103(b)(2) and (3)) from disclosure. IRC § 6103's statutory scheme has broad proscriptions against disclosing federal tax returns and tax return information, and specifically lists the circumstances under which such disclosure is permissible. IRC § 7213 prescribes harsh penalties for "willful" violation of IRC § 6103, which is a felony. Incoming IRS employees are trained to protect such tax return information from public disclosure — including to state officials. By law, state officials may have limited access to such tax returns, but only through requests made to the IRS, providing sufficient justification for law enforcement purposes. *See* IRC section 6104(c)(2). There is no provision of federal law which sanctions the demands of the Attorney General to taxpayers to provide these returns to state officials, and penalize those who choose to keep their donor information confidential.

These *amici* submit that the Attorney General is attempting an end-run around the strictures of IRC § 6103 by demanding from public charities what the Attorney General is not entitled to obtain directly from the IRS. A public charity's Form 990 Schedule B information constitutes a "return" under IRC § 6103(b)(1), and donors' identities and addresses constitute tax "return information" under IRC § 6103(b)(2). Such tax return information was required, collected, and filed for federal purposes, not to comply with any state requirement. And, in the absence of an actual valid law-enforcement purpose, no Attorney General may obtain such information from the IRS, either under IRC § 6103 or under IRC § 6104. The Attorney General has not attempted to avail himself of access to these forms through the IRS — and for good reason. He would not be able to obtain this donor information under Section 6103. Nor would the Schedule B information be available by resort to IRC § 6104, despite the fact that that section requires mandatory disclosure of certain tax items — including Form 990 information — because § 6104 expressly exempts Schedule B donor information from the reach of the statute. Not only is confidential donor information exempted from the provision requiring public disclosure of recent

Forms 990, but such information is also beyond the reach of the States — except for an investigation for cause.[16]

C. The Federal Statutory Scheme Protects the Records the Attorney General Demands.

Clearly, then, the Form 990 Schedule B information (setting forth the names and addresses of contributors) not only is not required to be disclosed by the exempt organizations, but it is also to be kept confidential by the IRS. Indeed, IRC § 6103 underscores the fact that return information is confidential.

The intent of Congress in developing its statutory scheme to protect confidential donor information is expressly revealed by two IRC sections. IRC § 6104(b) governs disclosure of Form 990 information by the government:

> The information required to be furnished by sections 6033, 6034, and 6058, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe. **Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization** or trust (other than a private foundation, as defined in section 509 (a) or a political organization exempt from taxation under section 527) which is

---

[16] The Internal Revenue Code authorizes the California Attorney General to request the Schedules B from the IRS, but only pursuant to a specific investigation for cause, subject to the approval of the United States Secretary of Treasury. *See* IRC § 6104(c)(2)(D). Absent such cause, there is no authority for the IRS to disclose donor information to State officials.

> required to furnish such information.... [26 U.S.C. § 6104(b) (emphasis added).]

And IRC § 6104(d) governs disclosure of Form 990 information by the exempt organization itself:

> In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, paragraph (1) shall not require the disclosure of the **name or address of any contributor** to the organization. In the case of an organization described in section 501(d), paragraph (1) shall not require the disclosure of the copies referred to in section 6031(b) with respect to such organization. [26 U.S.C. § 6104(d)(3)(A) (emphasis added).]

It is in the face of those very clear provisions of the Internal Revenue Code that the Attorney General devised a method of circumventing the federal statutes by demanding the confidential information from the tax-exempt organizations themselves, as a prerequisite to conducting charitable solicitations in the State of California. The Attorney General's demand for confidential donor information violates the carefully constructed statutory scheme set forth in the Internal Revenue Code.

D. The Attorney General's Demand Also Violates IRC § 7213(a)(4).

The Attorney General's action appears to also violate section 7213(a)(4) of the IRC, as the statute provides:

> It shall be unlawful for any person willfully **to offer** any **item of material value** in exchange for any **return** or return information (as defined in section 6103(b)) **and to receive** as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution. [26 U.S.C. § 7213(a)(4) (emphasis added).]

Although no judicial decision on point has been identified, the actions of the Attorney General appear to fall within the prohibition of the statute. Certainly, it is easy to argue that the Attorney General's approval of a charity's application, which is required to solicit contributions in California, constitutes an "item of material value." By holding out its permission in exchange for an organization's return information, the Attorney General's actions appear to fit squarely within that statute's prohibition.

It is not an overstatement to view the demands of the Attorney General as a form of extortion — by conditioning permission to solicit funds (the lifeblood of any organization) upon "voluntary" disclosure of protected confidential donor information. In so doing, the Attorney General is violating the protections for such return information crafted by Congress in enacting IRC § 6103 and, moreover, appears to be in specific violation of IRC § 7213(a)(4).

CONCLUSION

For the foregoing reasons, the decision of the district court enjoining the Schedule B disclosure requirement should be affirmed, and the district court should be directed to enjoin the Schedule B disclosure requirement for all charities.

Respectfully submitted,

/s/ Herbert W. Titus

*HERBERT W. TITUS
JEREMIAH L. MORGAN
WILLIAM J. OLSON
ROBERT J. OLSON
Attorney for Amici Curiae
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

JOSEPH W. MILLER
UNITED STATES JUSTICE FOUNDATION
932 D Street, Ste. 3
Ramona, California 92065-2355
Co-Counsel for Amicus Curiae
U.S. Justice Foundation

MICHAEL BOOS
CITIZENS UNITED
1006 Pennsylvania Avenue SE
Washington, D.C. 20003
Co-Counsel for Amici Curiae
Citizens United and
Citizens United Foundation

January 27, 2017
*Attorney of record

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al*. in Support of Plaintiff-Appellee and Affirmance complies with the word limitation set forth by Fed. R. App. P. 29(a)(5) and Circuit Rule 28.1-1(c), because this brief contains 7,460 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point CG Times.

/s/ Herbert W. Titus

_____

Herbert W. Titus
Attorney for *Amici Curiae*

Dated: January 27, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.*, in Support of Plaintiff-Appellee and Affirmance, was made, this 27th day of January 2017, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ Herbert W. Titus

_____

Herbert W. Titus
Attorney for *Amici Curiae*