Nos. 16-55727, 16-55786

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff, Appellee and Cross-Appellant,

v.

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

Defendant, Appellant and Cross-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:14-cv-09448-R-FFM
The Honorable Manuel L. Real, District Judge

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE/CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

The NAACP Legal Defense and Education Fund, Inc. is a not-for-profit corporation. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal organization, founded in 1940 under the leadership of Thurgood Marshall to achieve racial justice and ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color. As an organization that both relies upon private donations and engages in litigation and advocacy that some may consider controversial, LDF has long had an interest in guarding against retaliation against its donors and supporters. In *NAACP v. State of Alabama*, 357 U.S. 449, 462-63 (1958), the cornerstone legal authority governing this case, the petitioner was represented by Thurgood Marshall, alongside other founding LDF attorneys, including Robert L. Carter, who presented the oral argument to the Supreme Court. Mr. Carter also presented oral argument in *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), which is also relevant to the issues at bar.

As a nonprofit registered in the State of California, LDF has serious concerns about the California Attorney General's policy of requiring nonprofits to disclose a list of major donors as a condition of registering with the State. LDF has long relied on First Amendment safeguards to protect the confidentiality of its donors from unnecessary government intrusion. The Attorney General's position

in this case, if adopted by this Court, would call well-established First Amendment protections into question and could substantially chill associational activities.[1]

SUMMARY OF ARGUMENT

For more than half a century, public interest organizations like LDF have relied on a consistent line of Supreme Court precedent requiring the government to identify a compelling justification before it can force disclosure of organizational membership and/or donor lists. These cases recognize that forcing an organization to release such data to the State not only divulges the First Amendment activities of individual members and donors, but may also deter such activities in the first place. Specifically, individuals may legitimately fear of any number of negative consequences from disclosure, including harassment by the public, *e.g.*, *NAACP v. State of Alabama*, 357 U.S. 449, 462-63 (1958), adverse government action, *e.g.*, *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960), and reprisals by a union or employer, *e.g.*, *Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 272 (2d Cir. 1981). Or they may simply "prefer not to have their . . . affiliations . . . disclosed publicly or subjected to the possibility of disclosure." *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

1968), *aff'd, Roberts v. Pollard*, 393 U.S. 14 (1968).

Under these decisions, the likelihood that individuals will face adverse consequences from disclosure is a factor courts consider when deciding whether or not the government's interest justifies the First Amendment burden. *See Davis v. FEC*, 554 U.S. 724, 744 (2008). But in order to satisfy the First Amendment, *any* mandatory disclosure of individuals' donations to or membership in an organization must be justified by a compelling government interest.

Although the non-profit at issue in this case may enjoy the financial support of especially well-resourced patrons and may espouse a set of policy views that may not align with LDF's mission, the precedent established by this case and the positions taken by the Attorney General here could impact not just LDF, but also other civil rights and civil liberties groups, smaller non-profits with fewer resources, and other states. Moreover, even assuming the California Attorney General intends only the most socially beneficial uses of the associational data he collects, the Attorney General's broad view of his own power could be adopted by other, less benign, governmental authorities and used to suppress advocacy or expel a particular group from the State. Indeed, it was exactly such conduct by Alabama in the 1950s, via its attorney general, that led to the landmark Supreme Court decision blocking the State from forcing such disclosures. *Alabama*, 357 U.S. 449. The risk of similar over-reaching compels LDF to weigh in here and

share its perspective about the development, meaning, and effects of the case law that limits the forced disclosure of non-profit information.

In this case, California's Attorney General advocates a significant and unnecessary departure from decades of Supreme Court precedent, arguing that the First Amendment provides *no* protection from compelled disclosure of organizational donor or member lists unless the organization can present "objective evidence" demonstrating that a specific disclosure will "subject donors to threats, harassment, or reprisal from either Government officials or private parties." AG Br. 26 (quotation marks omitted). If accepted, this approach would give the government unchecked power to compile, and publish, databases of its citizens' organizational affiliations for any (or no) reason, unless particular organizations can *prove* compelled disclosure would lead to "threats, harassment, or reprisal."

The Attorney General's proposal is precarious and unworkable. Starting with its civil-rights-era decisions of the late 1950s, the Supreme Court has repeatedly recognized the dangers of providing the government with unchecked power to collect its citizens' organizational affiliations, and has therefore applied exacting scrutiny to requests for disclosure of such information even where the record does not contain evidence establishing that compelled disclosure would lead directly to threats or harassment. Those concerns are equally applicable today. In an increasingly polarized country, where threats and harassment over the Internet

and social media have become commonplace, speaking out on contentious issues creates a very real risk of harassment and intimidation by private citizens and by the government itself. Furthermore, numerous contemporary issues—ranging from the Black Lives Matter movement , to gay marriage, to immigration—arouse significant passion by people with many divergent beliefs. Thus, now, as much as any time in our nation's history, it is necessary for individuals to be able to express and promote their viewpoints through associational affiliations without personally exposing themselves to a legal, personal, or political firestorm.

The Attorney General's proposal substantially under-protects this important right, because legitimate concerns about disclosure are not always based on concrete fears of immediate, and provable, threats or reprisals. Instead, they can also be based on trepidation about giving the government or the public permanent access to one's organizational affiliations—information that the government might misuse, or that may become deeply unpopular if the political climate changes. For example, even if a potential LDF donor has difficulty presenting "objective evidence" establishing that the disclosure of her contribution would lead to reprisals, she might still be hesitant about making a donation if she knew that doing so would mean that her name would be permanently on file with the U.S. Department of Justice, especially when the nominee to be United States Attorney

General once described the NAACP as an "un-American … organization."[2]

Even where, as here, the government does not presently intend to publicly disclose its database of citizens' organizational affiliations, the importance of First Amendment scrutiny of compelled disclosure requirements is not diminished. Numerous cases recognize that governments themselves are able to use organizational affiliation information in damaging ways. *E.g.*, *Shelton*, 364 U.S. at 486-87. Thus, even if a given administration insists that the information it collects will only be used for socially beneficial purposes, once a database exists, it can be exploited by a future government with less benign motives. Additionally, given the difficulty of protecting sensitive data stored on computers—as the security lapses and public posting of data in this case confirm—assurances of confidentiality often have little value in practice.

This Court should hold that whenever the government requires an organization to disclose its members or donors, it must first satisfy "exacting scrutiny" by identifying an interest of sufficient importance, closely connected and narrowly tailored to the disclosure, to justify the intrusion on individuals' "right to privacy" in their "political associations and beliefs." *Brown v. Socialist Workers*

[2] Nomination of Jefferson B. Sessions III, To Be U.S. District Judge for the Southern District of Alabama, S. Hrg. 99-1047, at 3, 42, 48, 51 (Mar. 13, 19, 20, and May 6, 1986) ("Sessions Nomination Hearing"). Although initially LDF grew out of the NAACP, it has been an independent organization with its own board of directors since 1957.

'74 Campaign Committee (Ohio), 459 U.S. 87, 91 (1982). When there *is* evidence that disclosure would "subject [donors] to threats, harassment, or reprisal," then the government's interest must be especially compelling, and as-applied exceptions may be granted to facially valid disclosure rules. *Id.* at 98-100. But even where the chill to First Amendment interests is less immediate and dramatic, the government must *always* identify *some* compelling interest to justify forced disclosure of individuals' associational affiliations. Indeed, LDF in the *Alabama* case criticized the State for "not demonstrat[ing] any valid reason for requiring" forced disclosures, Petitioner's Reply Br. 1958 WL 92279, at *10, and the Court "conclude[d] that [the state had] fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have," 357 U.S. at 466. Here, for the reasons explained by AFPF (at 50-63), the Attorney General has identified no interest justifying its assembly of a database of every major donor to every non-profit that operates in California.

ARGUMENT

I. The Compelled Disclosure Of An Organization's Donors Is Always Subject To First Amendment Scrutiny.

A. For More Than Fifty Years, The Supreme Court Has Emphasized The First Amendment Harms From Forced Disclosure of Organizational Affiliations.

Compelled disclosure of organizations' donors and members became an issue of national importance during the 1950s and 60s, as governments throughout the South imposed onerous disclosure requirements on groups like the NAACP as a tactic to suppress their expression and political activity, or expel them from a given jurisdiction. In response, the Supreme Court declared that such forced disclosures impose substantial First Amendment harms, and required governments seeking to force organizations to turn over donor and membership rolls to demonstrate a compelling government interest, with a close connection to the required disclosure. Since then, the Supreme Court has consistently affirmed the constitutional principle that organizations have a First Amendment interest in keeping associational donors and members private, and that compelled disclosure always requires governmental interests sufficiently important to justify the First Amendment burden.

The Court's first major decision in this area came in *Alabama*, in which, upon a bill of complaint filed by the Attorney General of Alabama, a state court ordered the NAACP to disclose the names and addresses of all Alabama NAACP

"members" and "agents" pursuant to an Alabama law regulating the activity of non-profits in the State. 357 U.S. at 453. While Alabama wrapped its actions in a "cloak of legality," the NAACP urged the Court to "view[] [them] against a background of open opposition by state officials and an atmosphere of violent hostility to [the NAACP] and its members" because the NAACP sought "the elimination of racial segregation and other barriers of race." Br. for Petitioner, 1957 WL 55387, at * 17. The Court unanimously "recognized the vital relationship between freedom to associate and privacy in one's associations," writing that it "is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy" restrains freedom of association, and that "[i]nviobility of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Alabama*, 357 U.S. at 462. Indeed, the Court analogized "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs" to "[a] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands." *Id.* Nowhere did the Court, or the state of Alabama, question the NAACP's concerns about harassment and retaliation, let alone suggest that it bore the burden of making some threshold showing confirming the nature or specificity of its concerns.

The Supreme Court again confronted a compelled disclosure requirement in *Shelton v. Tucker*, which addressed an Arkansas statute that compelled every teacher, as a condition of employment, to file an annual affidavit listing every organization to which she belonged or regularly contributed within the preceding five years. 364 U.S. at 480. In declaring the statute unconstitutional, the Court again recognized that compelled disclosure of a teacher's "every associational tie" necessarily "impair[s] that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Id.* at 485-86.

The next year, in *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), the Court affirmed a preliminary injunction barring Louisiana from enforcing a law requiring any state organizations to provide the Louisiana Secretary of State with their members' names and addresses. *Id.* at 295. Because the case was in a "preliminary stage," the question whether NAACP members would face reprisals if their names were disclosed was disputed. But the Court, relying on *Alabama* and *Shelton*, affirmed the imposition of a preliminary injunction. *Id.* at 296-97.

Subsequently, in *Roberts v. Pollard*, the Court affirmed a decision by a three-judge district court invalidating, under the First Amendment, an Arkansas state court's investigative subpoena seeking a list of contributors to the Arkansas

Republican Party. 393 U.S. at 14. The three-judge court noted that "there is no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions" to the Republican Party, but that it would be "naive not to recognize" that disclosure would subject "at least some" contributors to the "potential" for "economic or political reprisals of greater or lesser severity." 283 F. Supp. at 258. The court therefore held that, even where there was no evidence of any actual reprisals, the government must provide some justification for a compelled disclosure. *See id.* at 258-59. Concluding that Arkansas's investigatory justification was insufficient, the court barred the State from requiring disclosure of the contributions. *Id.* at 259.

The Supreme Court's more modern precedents have applied the same basic framework to disclosure laws. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court applied "exacting scrutiny" to a statute requiring disclosure of donations more than $100 per year to a candidate for office. *Id.* at 63-64. Referencing the *Alabama* line of cases, the Court reiterated that it "is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute." *Id.* at 68. Given this First Amendment burden, the Court held the associational interest in privacy "must be weighed carefully against the interests which Congress has sought to promote by this legislation." *Id.* In the context of elections, the Court held that the government's interests were sufficient

to justify the compelled disclosure at issue, though it left open the possibility for as-applied challenges. *Id.* at 67-72. The Supreme Court later recognized just such an as-applied exception to a similar state disclosure regime in a case involving the Socialist Workers Party. *Brown*, 459 U.S. at 89.

More recently, in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), the Supreme Court again emphasized that compelled disclosure requirements are subject to First Amendment balancing. In that case, individuals who signed a petition seeking a referendum to reverse the expansion of rights for same-sex domestic partners challenged a law that made their petition signatures public. The Court applied "exacting scrutiny" to the disclosure law, but, as in *Buckley*, the Court recognized that the government has particularly strong interests in electoral transparency and integrity that outweighed individual First Amendment interests in most cases. *Id.* at 196-200. As in *Buckley*, the Court recognized that a more limited challenge could succeed if a specific organization established that, in the context of a specific petition, threats of harassment or retaliation were particularly likely or serious. *Id.* at 201-02.

In all of these cases, from *Alabama* up through *Doe No. 1*, the Supreme Court has demonstrated considerable and consistent solicitude for the right to privacy in association. That solicitude does not mean that all disclosure requirements violate the First Amendment. For instance, as the Court recognized

in *Buckley* and *Doe No. 1*, the government has particularly compelling interests in the election context that generally justify disclosure requirements. But compelled disclosure of an organization's members or donors is *always* a material intrusion on First Amendment rights, and it can only be justified by a weighty government interest.

B. There Is No Threshold Requirement To Show Harassment From A Particular Disclosure Requirement Before First Amendment Scrutiny Applies.

In the face of this precedent, the California Attorney General argues that First Amendment protections for associational privacy are available only to organizations that can introduce "objective evidence" of "threats, harassment, or reprisal" that would "flow[] from" the challenged disclosure. AG Br. 26. Such a threshold requirement would seriously threaten the First Amendment interest in associational anonymity that the Supreme Court has long recognized. If accepted, the Attorney General's approach would give the government a free hand to assemble a database of associational affiliations, and even to disclose that database to the public, for *no reason at all*, except in the handful of cases in which there is "objective evidence" that the disclosure would harm members of or donors to a particular organization. Unsurprisingly, the Supreme Court has never recognized such a roadblock; to the contrary, it has applied "exacting scrutiny" and required a compelling government interest regardless of the availability of "objective

evidence" demonstrating that a compelled disclosure requirement would lead to "threats, harassment, or reprisal." Other courts of appeal have done the same.

The Attorney General overlooks nearly all of this precedent, and rests its argument on this Court's decisions 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). This Court should read those decisions narrowly to avoid conflicting with decades of Supreme Court precedent. To the extent those decisions require the Attorney General's preliminary inquiry into the existence of "objective evidence" of "threats, harassment, or reprisals" before applying First Amendment scrutiny, they are wrong, and this Court should call for the decisions to be reconsidered en banc.

1. A Threshold Requirement To Show Harassment From A Particular Disclosure Conflicts With Supreme Court and Court of Appeals Precedent.

In many of the cases discussed above, pp. 8-13, *supra*, the Supreme Court applied First Amendment scrutiny to compelled disclosure requirements even where there was no "objective evidence" that the disclosure would lead to "threats, harassment, or reprisal." Indeed, the Supreme Court has *never* upheld a compelled disclosure requirement without considering whether it was supported by adequate government interests.

In *Shelton*, for instance, the Court invalidated the requirement that Arkansas

teachers identify their organizational affiliations because "the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." 364 U.S. at 486. There was no "objective evidence" that Arkansas would discriminate against those with particular organizational affiliations, and no evidence that the fear of such discrimination motivated any teacher to cease her affiliations. The Court nevertheless held that the government had failed to justify its compelled disclosure requirement with interests that were sufficiently important and sufficiently connected to the compelled disclosure at issue. *Id.* at 487-88.

The Court's affirmance in *Roberts v. Pollard* further demonstrates that the government must always justify a compelled disclosure requirement under exacting scrutiny. The three-judge court recognized that "there [was] no evidence of record . . . that any individuals have as yet been subjected to reprisals on account of" the compelled disclosure requirement at issue. 283 F. Supp. at 258. Nevertheless, the court applied First Amendment scrutiny and barred the disclosure because it would be "naive not to recognize" the "potential" for "at least some" reprisals from the broad disclosure sought by the government. *Id.* Further, the disclosure at issue would chill First Amendment activity simply because "many people doubtless would prefer not to have their political party affiliations and their campaign contributions disclosed publicly." *Id.* Despite the lack of record

evidence of reprisals, the Supreme Court affirmed the judgment in that case, 393 U.S. 14, and has subsequently cited *Pollard* as precedent in compelled-disclosure decisions, *e.g.*, *Buckley*, 424 U.S. at 64-65.

In *Buckley*, the Supreme Court also applied First Amendment scrutiny without requiring record evidence that the compelled disclosure at issue would lead to harassment or reprisals. The Court explained that "compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64 (emphasis added). It then considered whether the government interests sufficiently justified the disclosure requirement, despite the lack of evidence of reprisals.

Other circuits have relied on these decisions to reject government arguments that the First Amendment does not apply unless the plaintiff introduces concrete evidence of harassment or intimidation. For instance, in *Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969), the D.C. Circuit invalidated a requirement for the Communist Party to disclose its members, even though there was "no direct evidence in the record in this case as to the degree of harassment that one named as a member of the Communist Party may suffer as a result" of disclosure. *Id.* at 1148 & n.20.

Similarly, in an opinion in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), Judge J. Skelly

Wright rejected the government's argument that no First Amendment scrutiny was necessary because there was no evidence of a chilling effect from compelled disclosure.[3] As Judge Wright explained, "[c]hilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern." *Id.* at 1118. If there is "concrete evidence of a successful chill, the case is a stronger one, and the burden on government to justify its regulation must be heavier." *Id.* at 1118. But the absence of "concrete evidence . . . does not mandate dismissal"; instead, the court must "evaluate the likelihood of any chilling effect, and . . . determine whether the risk involved is justified in light of the purposes served by the statute." *Id.*

Like the D.C. Circuit, the Second and Third Circuits have rejected attempts to require plaintiffs to present specific evidence of harassment or reprisal to trigger First Amendment scrutiny for disclosure laws. In *Local 1814*, the government sought to compel disclosure of union members who had authorized payroll deductions to support the union. The government argued that the union members had not established any "impairment of protected rights" because they made no

[3] Judge Wright wrote the opinion of the court striking down the disclosure requirement on non-First Amendment grounds, but the section of his opinion addressing First Amendment issues was not joined by a majority of judges.

"showing that disclosure of contributors' identities would lead to economic or physical harassment." 667 F.2d at 271. Relying on *Pollard* and *Shelton*, the Second Circuit rejected that argument and explained that "a factual record of past harassment is not the only situation in which courts have upheld a First Amendment right of non-disclosure," because the "underlying inquiry must *always* be whether a compelling governmental interest justifies any governmental action." *Id*. at 271-72 (emphasis added). The Second Circuit applied the same analysis in *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015), involving a challenge to the government's collection of telephone metadata. In concluding that the associational plaintiffs had standing, the court recognized that "[w]hen the government collects appellants' metadata, appellants' members' interests in keeping their associations and contacts private are implicated, and any potential 'chilling effect' *is created at that point.*" *Id.* at 802-03 (emphasis added); *see also Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 119-20 (3d Cir. 1987) (rejecting disclosure requirement where the government had no "legitimate interest" at stake even though "the record contains no evidence" that the requirement would "chill … associational activities").

In short, court after court has rejected the argument, urged by the Attorney General here, that the First Amendment imposes no limit on the government's ability to compel disclosure of organizational affiliations unless the plaintiff can

introduce "objective evidence" that the specific disclosure would lead to threats or harassment. The government should have to put forward a compelling interest in order to assemble, and publish, a database of organizational affiliations; it should not be allowed, as the Attorney General would have it, to compile an electronic dossier on the affiliations of anyone who cannot show they have faced threats or harassment due to the government's data collection.

2. The Court Should Not Read This Court's Prior Decisions To Impose Such A Threshold Requirement, Or Should Seek To Reconsider Those Cases *En Banc*

In support of its contrary argument, the Attorney General relies heavily on this Court's decisions in *Center for Competitive Politics* and *Americans for Prosperity Foundation*. But the Court should read those decisions narrowly to avoid creating a conflict with the long line of Supreme Court decisions rejecting a threshold factual inquiry into "chill" before applying First Amendment scrutiny.

Both *Center for Competitive Politics* and *Americans for Prosperity Foundation* involved the same Schedule B disclosure requirement at issue in this case. In *Center for Competitive Politics*, this Court correctly recognized that "the chilling *risk* inherent in compelled disclosure triggers exacting scrutiny—'the strict test established by *NAACP v. Alabama*'—and that, presented with a challenge to a disclosure requirement, we must examine and balance the plaintiff's First Amendment injury against the government's interest." 784 F.3d at 1313-14

(quoting *Buckley*, 424 U.S. at 66; citations omitted). But in discussing the plaintiff's First Amendment injury, the Court suggested that compelled disclosure is not itself a First Amendment injury, and that the plaintiff had not introduced evidence, at the preliminary injunction stage, that its donors would experience "threats, harassment, or other potentially chilling conduct" as a result of the disclosure at issue. *Id.* at 1314, 1316. The Court did not end its decision there, however, as it would have if proving threats or harassment were truly a perquisite to any First Amendment scrutiny. Instead, the Court identified the government's asserted interests, and concluded that, based on the limited evidence presented in that case, they were sufficient to justify the disclosure requirement. *Id.* at 1317.

This Court should not read *Center for Competitive Politics* as imposing a threshold factual chilling inquiry prior to the application of any First Amendment scrutiny. Despite some language in the opinion suggesting such an inquiry, the Court's analysis followed the exacting scrutiny consistently applied by the Supreme Court and other courts of appeal. Indeed, the Court emphasized that it was "[e]ngaging in the same balancing that the *Buckley* Court undertook." *Id.* at 1316. As described above, the Supreme Court in *Buckley* balanced the government's asserted interests against the *potential* for First Amendment chill, even though there was no record evidence of any actual harassment. 424 U.S. at 68. Having expressed fealty to *Buckley*, the Court's decision should not be read to

impose a threshold factual "chilling" inquiry that would directly conflict with *Buckley*.

This Court's decision at the preliminary injunction stage of the instant case simply reiterated the analysis from *Center for Competitive Politics* and, relying on a limited preliminary-injunction record, accepted the Court's conclusion in *Center for Competitive Politics* that the Schedule B disclosure requirement likely was facially valid. As to AFPF's as-applied challenge, the Court concluded that AFPF had not yet introduced sufficient evidence that their members suffered particular First Amendment harms that would justify an exemption from disclosing their Schedule B. 809 F.3d at 540-41. But the Court did not address whether, in analyzing a given compelled disclosure requirement, the plaintiff is required to make a preliminary factual showing of threats or harassment. Further, because both of these decisions were at the preliminary injunction phase, and hence did not include full factual development of the Attorney General's interests or the chilling effects from, among other things, the Attorney General's repeated public disclosures, those cases do not preclude AFPF's facial or as-applied challenges here. *See* AFPF Br. 63-67.

This Court should therefore clarify that there is no threshold factual inquiry into the chilling effect of a disclosure requirement before imposing First Amendment scrutiny. To the contrary, prior Circuit decisions are consistent with

the "exacting scrutiny" that the Supreme Court and other courts of appeal have applied to *all* compelled disclosure requirements. *See, e.g.*, *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 536-38 (9th Cir. 2015) (en banc); *Yamada v. Snipes*, 786 F.3d 1182, 1196-97 (9th Cir. 2015). But to the extent *Center for Competitive Politics* and *Americans for Prosperity Foundation* are read to require such a threshold factual inquiry, this Court should call for en banc proceedings to eliminate a conflict with decades of Supreme Court precedent.

C. Courts May Consider Evidence Of Threats Or Harassment In Determining Whether Government Interests Are Sufficient To Compel Disclosure As Part Of A Balancing Test.

As the above discussion should make clear, evidence of threats or harassment resulting from disclosure requirements is *relevant* to the First Amendment inquiry. But it is not *necessary* to establish a First Amendment violation, contrary to the Attorney General's assertions.

First, evidence of threats or harassment are relevant if the government's interests are sufficient to justify a generally-applicable compelled-disclosure requirement, but a specific organization brings an as-applied challenge. Thus, in *Buckley*, after concluding that the government's interests justified the disclosure requirement as a whole, the Court separately considered whether minor and independent parties could introduce evidence showing that their contributors suffered particular First Amendment harm warranting an exception from the

generally-applicable requirement. 424 U.S. at 69-72. The Court then applied that exception in *Brown*. 459 U.S. at 89. And in *Doe No. 1*, the Court held that the government's interests were sufficient to justify the disclosure requirement as a whole, but left open the possibility that a particular group must be exempted from the disclosure requirement based on particularly acute First Amendment concerns. 561 U.S. at 201-02; *see also id.* at 205-211 (Alito, J., concurring).

Second, evidence of widespread harassment and reprisal from compelled disclosure would be relevant, even if not necessary, in a facial challenge to a compelled disclosure requirement. For instance, while the Supreme Court in *Shelton* invalidated the requirement that all teachers disclose their organizational affiliations without any evidence of threats or harassment, evidence that teachers *were* routinely harassed or threatened based on their disclosures would certainly have strengthened their case.

The Attorney General asserts (at 26) that the relevant evidence in those scenarios must be evidence of threats or harassment caused by the *specific* public disclosure requirement at issue. That is incorrect. As the *Buckley* Court recognized, "unduly strict requirements of proof"—such a "[a] strict requirement that chill and harassment be directly attributable to the specific disclosure" at issue—may substantially under-protect First Amendment rights. 424 U.S. at 74. Thus, if there is evidence of "past or present harassment of members due to their

associational ties, or of harassment directed against the organization itself," courts may reasonably infer that compelling disclosure of associational information will lead to threats and harassment. *Id.*

The Attorney General suggests (at 27-30) that, under *Buckley*, courts should only apply this flexible approach to establishing First Amendment chill for "minor" or "new" parties. But that argument is both contrary to precedent and deeply problematic. As discussed above, p. 16, *supra*, the court in *Pollard* did not apply such a narrow evidentiary approach to the compelled disclosure of Republican Party donors—hardly a "minor" or "new" party, even in 1960s Arkansas. *See* 283 F. Supp. 2d at 258. More fundamentally, the Attorney General provides no guidance for how a court should decide, outside the context of electoral politics, whether a party is "new" or "minor."

Courts should therefore be able to take such background evidence into account when assessing the chilling effect of a disclosure requirement.

* * * * *

In short, although evidence that a particular public disclosure requirement will lead to threats or harassment will always bolster a First Amendment challenge, that does not mean, as the Attorney General suggests, that absent "objective evidence" of "threats, harassment, or reprisal," there are *no* First Amendment interests at stake. The government may not collect and distribute its citizens'

organizational affiliations simply because it wants to. Such a rule would not only conflict with a long line of Supreme Court precedent, but would also give governments an unprecedented ability to monitor and record their citizens' organizational activities.

II. The First Amendment Burden From Compelled Disclosure Of Donor Identity Exists Despite Government Pledges Of Confidentiality.

The Attorney General argues that the First Amendment burden imposed by the compelled disclosure of private donor information is minimal because his office has promised to keep that information confidential. But such a pledge does not eliminate the substantial chilling effect of overly broad disclosure laws, both because the disclosure to the government may itself deter the exercise of associational rights and because the government's confidentiality promises may prove illusory in practice.

A. Compelled Disclosure To the Government May Itself Exert A Substantial Chill On First Amendment Rights.

At the core of the First Amendment is the right for individuals to organize to engage in dissent, challenge the government, and hold the powerful to account. "Inviolability of privacy in group association may in many circumstances be indispensable" to preserving those rights, "particularly where a group espouses dissident beliefs." *Brown*, 459 U.S. at 91 (citation omitted); *accord Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 556-57 (1963)

(recognizing that "all legitimate organizations are the [b]eneficiaries" of privacy protections, but that they are "mo[st] essential" for organizations that espouse unpopular beliefs). Groups engaged in controversial expression may reasonably fear not only disclosure to the public, but also disclosure to *the government itself*. *See Shelton*, 364 U.S. at 486 (requiring teachers to disclose their affiliations violated their right of free association "[e]ven if there were no disclosure to the general public").

Indeed, when an organization litigates against or otherwise opposes government policies or public officials, as LDF periodically does, its members may have the most to fear from government retaliation. Only government officials can wield the State's authority to harass an association's members, interfere with their business interests, block access to government employment, and even threaten their freedom. Far from a hypothetical or abstract fear, American history is replete with examples of governments using their investigative and coercive powers to target unpopular groups, including the infiltration of anti-war groups and the targeting and monitoring of civil rights activists.[4] Even where the government

[4] *See generally* Church Committee Reports, Book II, *Intelligence Activities and the Rights of Americans*, at 211-24 (1976) *available at* http://www.aarclibrary.org/publib/church/reports/book2/html/ChurchB2_0114a.htm; *see also, e.g.*, ACLU, *Unleashed and Unaccountable: The FBI's Unchecked Abuse of Authority*, 41-43 (Sept. 2013), https://www.aclu.org/sites/default/files/assets /unleashed-and-unaccountable-fbi-report.pdf ("The FBI . . . targeted political advocacy organizations with renewed

does not actually misuse an organization's confidential disclosures to target opponents, the reasonable fear among donors and members that it *might* do so is enough to chill the exercise of speech and associational rights.

Courts have recognized the legitimacy of these concerns, and applied exacting scrutiny to compelled disclosure requirements without record evidence that the government will misuse the information it collects. For example, in *Shelton*, the Supreme Court explained that even if the teachers' information was not shared with the public or otherwise acted upon, "the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." 364 U.S. at 486. Similarly, in *Local 1814*, the Second Circuit held that a subpoena by a government commission to compel the disclosure of contributors to a union's political action committee would have an "inevitable" chilling effect on future donations, given the commission's regulatory authority over the union members. 667 F.2d at 272.

The chilling effect of disclosing sensitive associational information is not mitigated by the government's assurances of good faith. *Contra* AG Br. 35 n.5.

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vigor after 9/11, as demonstrated through ACLU FOIAs and confirmed by the 2010 Inspector General audit."); Jen Christensen, *FBI Tracked King's Every Move*, CNN (Dec. 29, 2008), http://www.cnn.com/2008/US/03/31/mlk.fbi.conspiracy; Beverly Gage, *What an Uncensored Letter to M.L.K. Reveals*, N. Y. TIMES (Nov. 11, 2014), https://www.nytimes.com/2014/11/16/magazine/what-an-uncensored-letter-to-mlk-reveals.html.

By collecting and aggregating confidential information about an organization's donors or members, the government creates a loaded gun that a future administrative might decide to fire. Any donor to an organization engaged in potentially controversial expression must consider the risk that future executive officials with access to donor lists may have less respect for the rule of law, and may consider that organization hostile to the administration's interests, subversive, or even "un-American."[5] Fear of that possibility, and the associated prospect of future retaliation, will likely deter membership and donations to the organization, and chill the exercise of First Amendment rights. *See Pollard*, 283 F. Supp. at 258.

B. The Risk of Unintentional Public Disclosure of Sensitive Data Held by the Government May Deter Donors From Associating With Controversial Organizations and Causes.

Government promises of confidentiality also will not eliminate the substantial chill from compelled disclosure of donor information because donors may reasonably consider those promises unreliable. Not only could a future administration or legislature decide to reverse a confidentiality policy, but the government might also fail to protect donor information. Indeed, the Court in

[5] *See* Sessions Nomination Hearing at 3, 42, 48, 51 (recounting testimony that Senator Jeff Sessions described the ACLU and the NAACP as "un-American, Communist-inspired organizations"); Scott Thistle, *LePage scolds civil rights icon John Lewis, calls for NAACP to apologize to white America*, PORTLAND PRESS HERALD (Jan. 17, 2017), http://www.pressherald.com/2017/01/17/lepage-advises-pingree-to-resign-over-inauguration-boycott/ (recounting remarks of Maine Governor Paul LePaige that the "NAACP should apologize to . . . white people").

Alabama recognized these sorts of inadvertent chilling effects: "[i]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action." 357 U.S. at 461 (emphasis added).

First, government officials may disclose donor or membership information inadvertently. Here, for example, *every* Schedule B was available for years online to anyone who recognized the State Registry's straightforward document-labeling scheme. AFPF Br. 21-22. And over 1,700 Schedule Bs were linked directly from the State Registry's website. *Id.* at 18-21. This case is not an isolated example. Both state and federal governments have repeatedly released highly sensitive information due to clerical errors and other employee mistakes.[6]

Second, government data is vulnerable to security breaches. Government data has regularly been the target of hackers, who have stolen highly confidential

[6] *See* A. Michael Froomkin, *Government Data Breaches*, 24 BERK. TECH. L. J. 1019, 1027 (2009) (noting that about 530 million government records containing personal data were exposed or mishandled between 2000 and 2008); Kristina Torres, *Georgia: "Clerical Error" in Data Breach Involving 6 Million Voters*, ATLANTA JOURNAL-CONSTITUTION (Nov. 18, 2015), http://www.ajc.com/news/state--regional-govt--politics/georgia-clerical-error-data-breach-involving-million-voters/pf3GlsIFyuF5ifgRYy5GAJ/ (describing massive data breach releasing private information of more than six million voters, and collecting examples of data breaches in other states).

government files.[7] Confidential donor and membership information from controversial organizations could be a particularly inviting target for politically motivated cyber-attacks. As recent events have demonstrated, such attacks can lead to public disclosures of an organization's private information with the purpose and effect of undermining its expressive activities. *See, e.g.*, Max Fisher, *Russian Hackers Find Ready Bullhorns in the Media*, N.Y. TIMES, Jan. 8, 2017, at A7; Eric Lipton et al., *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES, Dec. 13, 2016, at A1.

Regardless of whether a release is the result of negligence or a security breach, once confidential information enters the public domain, there is no effective way to claw it back. Nor can its publication or further dissemination be lawfully enjoined. *See Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." (quotation marks omitted)). As a result, organizations and their members would have no effective remedy for the violation of their First

[7] *See* Comm. on Oversight and Gov't Reform, 114th Cong., *The OPM Data Breach: How the Government Jeopardized our National Security for More than a Generation*, (Sept. 7, 2016), https://oversight.house.gov/wp-content/uploads/2016/09/The-OPM-Data-Breach-How-the-Government-Jeopardized-Our-National-Security-for-More-than-a-Generation.pdf; Michelle Alvarez, *Government Data Woes: 2016 Compromised Records Surpass Total for Last Three Years Combined*, SECURITYINTELLIGENCE (Aug. 10, 2016), https://securityintelligence.com/ government-data-woes-2016-compromised-records-surpass-total-for-last-three-years-combined .

Amendment right to privacy; the possibility of an as-applied challenge to the public disclosure of donor information *after-the-fact* is meaningless. *See Doe No. 1*, 561 U.S. at 203 (Alito, J., concurring) ("The possibility of prevailing in an as-applied challenge provides adequate protection for First Amendment rights only if … speakers can obtain the exemption sufficiently far in advance to avoid chilling protected speech[.]"). For this reason as well, the Attorney General's contention that organizations must put forward objective evidence that their donors or members would face retaliation from the disclosure of their donations or membership would significantly under-protect First Amendment rights.

CONCLUSION

This Court should hold that the government is required to identify a compelling reason that is narrowly tailored to any requirement that an organization disclose the identity of its members and donors. The Court should also hold that the Attorney General has failed that requirement in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, Brian T. Burgess, counsel for the NAACP Legal Defense and Education Fund, Inc., hereby certifies pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32-1(e) that the Brief for *Amicus Curiae* complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a). According to the word count of Word for Windows, the word-processing system used to prepare the brief, the brief contains 6,980 words.

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CERTIFICATE OF SERVICE

Nos. 16-55727, 16-55786

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 27, 2017.

I certify that all participants in the above-referenced cases are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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