Nos. 16-55727 and 16-55786

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff - Appellee - Cross-Appellant,

v.

XAVIER BECERRA, Attorney General
of the State of California, in his Official Capacity,

Defendant - Appellant - Cross-Appellee.

On Appeal from the United States District Court
for the Central District of California, Los Angeles
Honorable Manuel L. Real, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF - APPELLEE AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST AND IDENTITY OF AMICUS CURIAE[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Plaintiff-Appellee and Cross-Appellant Americans for Prosperity Foundation.

PLF is a nonprofit, tax-exempt foundation that litigates important matters of the public interest. PLF defends limited government, individual liberty, and property rights in courts nationwide. Founded in 1973, PLF was the nation's first public interest foundation devoted to these constitutional rights. At that time, PLF expressed minority viewpoints compared to those held by much of American political, legal, and intellectual society. *See* Jefferson Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (2016).

PLF receives the majority of its support from individual donations, allowing it to represent the interests of tens of thousands of donors by engaging in nationwide strategic litigation in both state and federal courts. The free association of individual donors is critical to PLF's continued operation, and it owes these voluntary donors a duty to defend their constitutional right to confidentiality.

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[1] In accordance with Fed. R. App. P. 29(c)(5), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amicus Curiae, its members, or its counsel have made a monetary contribution to this brief's preparation or submission. All parties, through their attorneys, have consented to the filing of this brief.

In *Nat'l Ass'n for the Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958), the Supreme Court explained that "[i]nviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs." Pacific Legal Foundation submits this brief in defense of that privacy both as a private interest essential to its work and as one of the constitutional freedoms it fights to protect.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Freedom of speech is considered one of "the most cherished policies of our civilization." *Bridges v. California*, 314 U.S. 252, 260 (1941). During the nation's founding, public outcry over the lack of an explicit constitutional protection for speech (among other fundamental liberties) led to the ratification of the First Amendment. *N.Y. Times Co. v. United States*, 403 U.S. 713, 716 (1971). Moreover, the Supreme Court has consistently protected the right of speakers to remain anonymous, and their right to freely associate in order to speak collectively. A disclosure requirement on citizens who donate over $5,000 to California nonprofit organizations eliminates the right to remain anonymous, and thereby causes substantial damage to those individuals' right to freely associate and speak collectively.

The previous decisions of this Court in *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir.), *cert. denied*, 136 S. Ct. 480 (2015), and *Americans for Prosperity Found. v. Harris*, 809 F.3d 536 (9th Cir. 2015), represent a break with established Supreme Court First Amendment precedent in two important respects. First, they place the burden on would-be anonymous donors to show a "reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals when the government compels disclosure of their identity." *Americans for Prosperity*, 809 F.3d at 539. Second, by unjustly extending First Amendment precedent specific to campaigns and elections, this Court's decisions treat suspicionless monitoring of all nonprofit organizations as a compelling governmental interest.

Disclosure of donor identity to government represents a significant First Amendment injury. Individuals cherish privacy in speech and association because they fear retaliation from either government or the public at large, especially when the ideas they wish to express are unpopular. But which ideas are popular or unpopular change over time. Donors to current mainstream organizations might face retaliation for their association years or even decades later. Even where government seeks to protect private information, donors may also fear accidental disclosure through negligence or nefarious criminal activity.

Because disclosure represents such a significant harm, the burden is rightly placed on government to prove the compelling nature of their interests in disclosure. Outside of the electioneering and campaigning context, general investigatory interests are not compelling, and California has proffered no other interests here.

The disclosure requirement also has negative social impact. First, it leaves nonprofit organizations with an unreasonable choice—forego soliciting donations from the country's most populous state or violate the trust and privacy of their donors. Second, it has a "chilling effect" on donations due to donor awareness that their identity will be disclosed to the State of California. Third, it limits opportunities for associational speech by California citizens as nonprofit organizations forego soliciting donations in California. Lastly, it will open California—and the courts within its borders—to increased litigation. Nonprofit organizations and their donors will be forced to turn to the courts to prevent infringement of their First Amendment rights through incessant as-applied challenges. With the benefit of the record now established at trial below, this Court should reconsider its prior decisions, and find the disclosure requirement facially invalid under the First Amendment.

ARGUMENT

At the time the Constitution and First Amendment were ratified, anonymous speech was an essential component of social discussion. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995) (discussing the history of anonymous

speech in social discourse). Indeed, *Common Sense* was first published anonymously in the months before the Revolutionary War, and the *Federalist Papers* were penned under the nom de plume Publius. *Id.* The Supreme Court has accordingly recognized that the right to engage in anonymous speech is protected by the First Amendment. *Talley v. California*, 362 U.S. 60, 65 (1960).

Publius, however, was not one anonymous author, but three, writing through the aegis of a private, voluntary association. The Supreme Court has also recognized this right of voluntary association for the purposes of speech as a critical First Amendment protection. *See Patterson*, 357 U.S. at 460. In *Patterson*, the Supreme Court unambiguously stated that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. at 460. From this, a "long, unbroken line" of Supreme Court decisions firmly establish that privacy of association is protected by the First Amendment. *John Doe No. 1 v. Reed*, 561 U.S. 186, 240 (2010) (Thomas, J., concurring).

California's disclosure requirement creates a significant First Amendment injury by requiring nonprofit organizations to violate the privacy rights of their donors. This threat of disclosure creates additional harm by chilling protected First Amendment association. The First Amendment requires that government establish a

sufficiently compelling interest to justify the harm caused by disclosure, which California has failed to do.

I

GOVERNMENT MUST HAVE A COMPELLING INTEREST BEFORE MANDATING DISCLOSURE OF DONOR IDENTITY

The First Amendment is structured to protect against government action, not private retaliation. U.S. Const. amend. I. The Freedom of Speech encompassed within that amendment has been interpreted to cover not just speech, but also anonymous speech, and voluntary association for the purpose of collective speech. These limitations on government conduct have applied equally to state action for almost 100 years. *Gitlow v. People of the State of N.Y.*, 268 U.S. 652, 666 (1925). California's donor disclosure requirement removes donor anonymity, thus chilling both speech and association.

A. Disclosure to Government Is a First Amendment Injury

The Constitution guards against the harm caused by disclosure of donor identity to government. Government assurances that private information is not intended to be released removes some risk of harassment or retaliation, but this is not the only harm donors might reasonably fear. *See, e.g.*, Kim Dixon & Patrick Temple-West, *IRS Official Knew in 2011 of 'Tea Party' Targeting: Watchdog Report*, Reuters (May 12,

2013, 7:01 am) (discussing targeted scrutiny of conservative Tea Party nonprofit groups by the Internal Revenue Service over a period of several years).[2]

The threat of compelled disclosure to government creates First Amendment injuries to both donors and nonprofit organizations. In *Patterson*, the Supreme Court recognized that the initial right was one of freedom to lawfully—though privately—associate. 357 U.S. at 466. This right is infringed by the deterrent effect of the "initial exertion of state power" in seeking disclosure, even if the actual deterrence is caused by fear of later private community action. *Id.* at 462. Under a threat of compelled disclosure, individuals may choose to refrain from engaging in constitutionally protected speech or expression because they place a higher value on their anonymity. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

Because of this chilling effect, courts have previously identified the harm of disclosure even where the record contained "no evidence . . . that any individuals have as of yet been subjected to reprisals on account of the contributions in question." *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968). In *Pollard*, the Supreme Court summarily affirmed the district court ruling that it would be "naive not to recognize that the disclosure" of donors to government would lead to "potential economic or political reprisals of greater or lesser severity." *Id.* The court

[2] http://www.reuters.com/article/us-usa-tax-irs-teaparty-idUSBRE94A0FJ20130512

acknowledged that mere disclosure itself would be an injury, because "many people doubtless would prefer not to have their political party affiliations and their campaign contributions disclosed publicly or subjected to the possibility of disclosure." *Id.* Whether through fear of threat or mere personal preference, the court considered it likely that compulsory disclosure would discourage "both membership and contributions thus producing financial and political injury to the party affected." *Id.*

Because of the potential for a chilling impact on voluntary association, the Supreme Court has required states to "show[] a subordinating interest which is compelling" before upholding forced disclosure. *Bates v. City of Little Rock*, 361 U.S. 516 (1960). In *Bates*, the Court found that city officials could not compel disclosure of member lists for the local chapter of the NAACP without "so cogent an interest as to justify the substantial abridgment of association freedom which such disclosures will effect." *Id.* at 524. While the record contained evidence of both fear by the chapter's potential donors and harassment of identified members, the Court noted that the "repressive effect" existed "only after the exercise of governmental power had threatened to force disclosure of the members' names." *Id.* Accordingly, the threat identified by the Court was not retaliation, but "the threat of substantial government encroachment" upon a traditional aspect of individual freedom. *Id.*

B. Donors May Face Harassment Decades After Their Identity Is Disclosed

Requiring groups to establish a current threat of harassment ignores the reality that views may fall in and out of fashion. And while everything old may become new again in the world of ideas, privacy, once lost, is more difficult to recover. Individuals might associate with groups that are in vogue at the present time, yet face retaliation years later if those views become disfavored. History is, after all, "written by the victors." *Brewer v. Quarterman*, 550 U.S. 286, 296 (2007) (Roberts, C.J., dissenting).

For example, the Communist Party USA underwent two separate "red scare" retaliations, first in the early 1920s and again in the 1950s, with a period in the 1930s where it was "the dominant voice of the American left, a force in the labor movement, and a small but significant factor in mainstream politics . . . ." Harvey Klehr with John Earl Haynes, *The Communist Party of the United States and the Committees of Correspondence*, *in* THE COMMUNIST EXPERIENCE IN AMERICA: A POLITICAL AND SOCIAL HISTORY 127 (2010). During the 1950s red scare, individuals were blacklisted for Communist Party involvement many years after their support. *See* Kai Bird & Martin J. Sherwin, *American Prometheus: The Triumph and Tragedy of J. Robert Oppenheimer* (2005) (detailing 1954 hearings revoking J. Robert Oppenheimer's security clearance based on ties to the Communist Party during the 1930s).

More recently, during a 2007 nomination hearing to become ambassador to Belgium, Sam Fox was questioned about donations made years earlier to Swift Boat Veterans for Truth. Mary Ann Akers, *Kerry Puts GOP Donor On Defensive*, Wash. Post (Feb. 29, 2007). His interrogator was John Kerry, the subject of targeted ads by the Swift Boat Veterans in 2004. Following the denunciation, Sam Fox withdrew his name from consideration for the ambassadorship. *See* Jennifer Loven, *Bush Bypasses Congress and Names Fox to Post*, The Boston Globe (Apr. 5, 2007) (reporting that then-President Bush used the recess appointment power after questions over Fox's Swift Boat contributions derailed his nomination).[3]

Despite current government assurances, donors cannot be certain that future governmental actors will similarly maintain privacy. A current disclosure of donor identity represents the potential for accidental or intentional disclosure to others years later. *See* Eric Boehm, *IRS Audit Reveals Leaks of Taxpayers' Private Information*, Watchdog.org (Oct. 2, 2014) (audit discovers that Internal Revenue Service improperly disclosed personal information in response to Freedom of Information Act requests); *and* Lachlan Markay, *Federal Judge Orders IRS to Disclose WH Requests for Taxpayer Info*, The Wash. Free Beacon (Aug. 31, 2015) (describing lawsuit

[3] http://archive.boston.com/news/nation/washington/articles/2007/04/05/bush_bypasses_congress_and_names_fox_to_post/

probing whether the Internal Revenue Service intentionally disclosed private taxpayer information to the Obama administration).[4]

Regardless of government's best intentions, government compilation of individuals' personal information represents an attractive target for cybercriminals. *See* Jeffrey Stinson, *Cyberattacks on State Databases Escalate*, Stateline (Oct. 2, 2014) (detailing increasing number of state database attacks and breaches).[5] The potential for abuse of stolen information represents a threat that stretches years into the future. Farai Chideya, *Data Theft Today Poses Indefinite Threat of "Future Harm"*, The Intercept (June 12, 2015).[6]

C. General Investigatory Interests Are Not a Compelling Government Interest

The previous decisions in *Center for Competitive Politics* and *Americans for Prosperity* create a rule that improperly places the burden on nonprofits and donors to establish that restrictions on their speech and association will lead to actual harassment. But this is not where the burden should be placed on First Amendment claims. The "most exacting scrutiny" that the First Amendment demands for infringements of associational rights requires that the burden of justification lay with

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[4] http://watchdog.org/174747/irs-audit-information/

[5] http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/02/cyberattacks-on-state-databases-escalate

[6] https://theintercept.com/2015/06/12/data-breach-threat-of-future-harm/

the government, creating a presumption in favor of the speaker over the censor. On remand, California was incapable of establishing a compelling interest in disclosure, leaving the disclosure requirement open to even the most meager of as-applied challenges.

The Supreme Court has previously found sufficient compelling interest to force disclosure within the context of political party contributions and electioneering. Disclosure in the electioneering context "preserv[es] the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability." *Reed*, 561 U.S. at 197. But unlike the election cases, the State of California has not asserted any "interest in an informed electorate" to justify disclosure here. *Delaware Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from the denial of petition). Nor could it do so in a future as-applied challenge. By asserting that the information is solely for governmental use, the disclosure requirement cannot assist in "provid[ing] the electorate with information" about campaign fund sources, or foster government transparency and accountability. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976).

At best, California asserts a general investigatory interest in combating fraud, but the Supreme Court has refused to endorse suspicionless monitoring in other contexts. *See, e.g.*, *City of Los Angeles. v. Patel*, 135 S. Ct. 2443, 2450 (2015) (finding warrantless searches of hotel guest records facially unconstitutional under the Fourth

Amendment); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234 (1957) (a "sweeping and uncertain mandate" allowing legislative inquiry into whether a professor had engaged in subversive activity unconstitutionally violated "the right to engage in political expression and association").

Because the injury caused by disclosure of donor identity to government is so great, and because California has put forth no interest beyond a general investigatory interest, the disclosure requirement cannot withstand exacting scrutiny under the First Amendment under any circumstances, and should be found invalid.

II

THE DISCLOSURE REQUIREMENT WILL CHILL SPEECH AND ASSOCIATION RIGHTS FOR NONPROFIT ORGANIZATIONS AND THEIR MEMBERS NATIONWIDE

Donors rely on nonprofit entities for both political commentary and advocacy. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 340 (2003) (Thomas, J. dissenting), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). However, nonprofit organizations create "public value" effects far beyond their donor base. *See* Stuart C. Mendel, *How Nonprofit Organizations Create Public Value* (Cleveland State Univ. Urban Publications ed. 2013) (nonprofits contribute to the common good by encouraging a more engaged citizenry and strengthening inter-connections between individuals, helping society fulfill important societal goals,

and acting in a stewardship role for social resources). At the time of the Nation's founding, voluntary private organizations played key roles in the American Revolution and attempts to establish a republican government. Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000*, *in* THE NONPROFIT SECTOR 32, 35 (W.W. Powell & R. Steinberg eds., Yale University Press 2nd ed. 2006). By the mid-nineteenth century, private associations were widely embraced for both charitable aims and political influence. *Id.* at 36.

Allowing California to demand donor information from all nonprofit organizations who solicit funds within the state will have nationwide impacts. Forced disclosure will discourage voluntary donations both within and without the State of California. It will also negatively impact California citizens by potentially reducing the opportunities for California citizens to exercise their constitutional right of association. Nonprofits will be forced to resort to the courts with as-applied challenges to protect their donors' privacy rights and prevent chilling effects on association.

A. Forced Disclosure of Donor Information Chills Donations

Confidentiality is fundamental to the relationship between donors and nonprofit organizations. *See* Association of Fundraising Professionals, *The Donor Bill of Rights* ("VI. To be assured that information about their donation is handled with respect and

with confidentiality to the extent provided by law.").[7] Many potential donors have valid reasons to desire anonymity, and will not donate unless they can keep their donations confidential. Requiring disclosure of donor names and addresses interferes with First Amendment freedoms of religions, speech, and association.

For example, donors may desire to remain anonymous because of deeply held religious beliefs. In Judaism, "tzedakah" refers to a moral obligation to do that which is right and just, but is commonly used to signify charity. The twelfth-century philosopher Maimonides established eight degrees of "Tzedakah," with the second and third highest levels both requiring charity without revealing the identity of the giver. Joseph B. Meszler, *Gifts for the Poor: Moses Maimonides' Treatis on Tzedakah* xiv–xv (2003).[8] In the Talmud, a righteous man and anonymous benefactor named Mar Ukva goes so far as to hide in a giant oven to avoid being discovered, burning his own feet in the process. Sarah Barmak, *The Value of Giving to Others—Anonymously*, thestar.com (Nov. 22, 2013).[9]

In Islam, "sadaqah" urges voluntary giving, and should be given "in the name of God alone." Fatima Lambarraa & Gerhard Riener, *On the Norms of Charitable*

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[7] http://www.afpnet.org/ethics/enforcementDetail.cfm?ItemNumber=3359

[8] http://rabbimeszler.com/yahoo_site_admin/assets/docs/Gifts_for_the_Poor.27084324.pdf

[9] https://www.thestar.com/news/insight/2013/11/22/the_value_of_giving_to_others_anonymously.html

Giving in Islam: A Field Experiment 7 (June 2012).[10] Although anonymity is not required, the Qur'an expresses a clear preference for concealed acts of charity. Qur'an, *Surat Al-Baqarah* 2:271.

The Bhagavad Gita also discusses three levels of charitable giving in Hinduism, the highest being giving "without consideration of anything in return." Baghavad Gita 17:20. Hindu donors may thus choose anonymous giving to guarantee that their gift is not acknowledged, admired, or compensated. Barmak, *supra*.

And in Christianity, the gospel of Matthew extols that charity should be done in secret. During the Sermon on the Mount, Jesus taught that "when you give to the needy, do not announce it with trumpets," and "do not let your left hand know what your right hand is doing, so that your giving may be in secret." Matthew 6:2-4.

Even without deeply held religious motivations, donors may feel a moral or personal desire to maintain anonymity. Over the course of decades, Chuck Feeney donated nearly his entire amassed fortune—approaching $8 billion—with near-total secrecy. Jim Dwyer, *'James Bond of Philanthropy' Gives Away the Last of His Fortune*, N.Y. Times (Jan. 5, 2017).[11] For years his sizable donations all came with an explicit requirement—that beneficiaries not publicize his involvement. *Id.* His

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[10] http://ageconsearch.umn.edu/bitstream/126795/2/Lambarraa%2015073.pdf

[11] https://www.nytimes.com/2017/01/05/nyregion/james-bond-of-philanthropy-gives-away-the-last-of-his-fortune.html?_r=0

identity was only revealed when a business dispute forced the disclosure that his assets had been transferred to a philanthropic organization he had established. *Id.* That organization had been set up and operated out of Bermuda, in an attempt to avoid United States disclosure laws. Jim Dwyer, *Philanthropist Wants to Be Rid of His Last $1.5 Billion*, N.Y. Times (Aug. 7, 2012).[12]

Donations to organizations that advocate social and political views allow individuals to participate in local and national advocacy without personal involvement or exposure. While donors may desire anonymity of their association with such organizations to adhere to religious beliefs or simply to retain privacy, others unquestionably desire it to avoid retaliation and harassment. Jennifer Mueller, *The Unwilling Donor*, 90 Wash. L. Rev. 1783 (Dec. 2015). After all, "[a]nonymity is a shield from the tyranny of the majority." *McIntyre*, 514 U.S. at 357. Persecuted groups throughout history have "criticize[d] oppressive practices and laws either anonymously or not at all." *Talley*, 362 U.S. at 65.

Subsequent disclosure of names of supporters of Proposition 8 in California led to numerous instances of community harassment. Scott Eckern, Artistic Director of the California Musical Theater, resigned after pressure over his $1,000 donation to "Yes on 8." *Scott Eckern Releases Statement and Announces Resignation as Artistic*

[12] http://www.nytimes.com/2012/08/08/nyregion/a-billionaire-philanthropist-struggles-to-go-broke.html?_r=2

Director for California Musical Theatre, broadwayworld.com (Nov. 12, 2008).[13] Richard Raddon resigned as director of the Los Angeles Film Festival over his $1,500 donation through his church in support of Prop 8. Rachel Abramowitz, *Film Fest Director Resigns*, LA Times (Nov. 26, 2008).[14] Marjorie Christoffersen, a manager of the El Coyote restaurant in Los Angeles, found her workplace picketed and boycotted, with activists cussing at patrons, over her $100 donation to Yes on 8. Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, Wall St. Journal (Dec. 27, 2008).[15] She was forced to take a leave from work until the protests faded. *Id.*

It has therefore been rightly taken as axiomatic that disclosure requirements have a chilling effect on donations, especially to those organizations who advocate unpopular minority viewpoints. *Patterson*, 357 U.S. at 462. Identification requirements "extend beyond restrictions on time and place—they chill discussion itself." *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 628 (1976) (Brennan, J., concurring in part). Donors nationwide will reduce donations to nonprofit organizations that are subject to California's disclosure requirement.

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[13] http://www.broadwayworld.com/los-angeles/article/Scott-Eckern-Releases-Statement-and-Announces-Resignation-as-Artistic-Director-for-California-Musical-Theatre-20081112

[14] http://articles.latimes.com/2008/nov/26/entertainment/et-raddonresigns26

[15] http://www.wsj.com/articles/SB123033766467736451

B. The Disclosure Requirement Harms Nonprofit Organizations Nationwide

California's disclosure requirement leaves nonprofit organizations with a particularly unsavory choice: forego activity within the State of California, or disclose the identity of all donors who give over $5,000. This choice is made especially onerous because California's size and diversity make it one of the most active states for political speech. The Urban Institute, *Profiles of Individual Charitable Contributions by State, 2013* (Feb. 10, 2016).[16] In 2013, California donations represented 13.7% of charitable donations in the United States, representing over $27 billion. *Id.* Even the mere threat of potential disclosure can negatively impact donations, and could force some groups to cease all operations. *See* U.S. House of Representatives, *The Internal Tax Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress* i-ii (Dec. 23, 2014).

For any organization choosing to remain active in the State of California, the only way to avoid disclosure is litigation. Unquestionably, numerous organizations across the country will see sufficient value in maintaining donor privacy. By leaving the burden with the organization to show some likelihood of retaliation or harassment, the disclosure requirement is sure to "require substantial litigation over an extended

[16] http://www.urban.org/research/publication/profiles-individual-charitable-contributions-state-2013

time"—only to redraw the contours of a law that, on its face, always raises substantial First Amendment questions. *Citizens United*, 558 U.S. at 326. Requiring all organizations who solicit donations in California to resort to litigation to prevent California from "trenching on their protected First Amendment rights" will be burdensome for both nonprofits and the courts. *See Reed*, 561 U.S. at 246 (Thomas, J., dissenting).

CONCLUSION

The Freedom of Speech enshrined in the First Amendment encompasses speech, association, and anonymity. California's disclosure requirement removes anonymity, chilling both association and speech. This Court's previous holdings in *Center for Competitive Politics* and *Americans for Prosperity Foundation* broke from previous Supreme Court precedent by shifting the burden away from government and on to the speaker to establish evidence of harassment. This burden will chill donations, imperil socially valuable nonprofit organizations, and force nonprofits to choose between foregoing activity in the Nation's most populous state, violating donor confidentiality, or individually litigating as-applied challenges to California's disclosure requirement. This Court should accordingly revisit these previous decisions and find that

California's disclosure requirement is an unconstitutional infringement of protected First Amendment liberties on its face.

DATED: January 26, 2017.

Respectfully submitted,

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