IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSTITUTE FOR FREE SPEECH Plaintiff-Appellant, v. XAVIER BECERRA, in his Official Capacity as Attorney General of California, Defendant-Appellant.	C.A. No. 17-17403

PLAINTIFF-APPELLANT'S OPPOSITION TO DEFENDANT-APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

On June 8th, 2018, Appellee, the Attorney General of California ("Attorney General" or "State") filed a motion for summary affirmance "[b]ecause this appeal is clearly controlled by precedent." Mot. for Summ. Aff. ("Mot.") at 8. Appellant Institute for Free Speech ("Institute" or "IFS") reiterates that "[t]o the extent that the district court's ruling was necessitated…swift review by a higher authority is called for," Opening Br. at 2, and that "[n]o party nor this Court would benefit from consideration" of this case "by another three-judge panel bound by" *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015) ("*CCP*"). Pet. for Int. Hr'g *En Banc* ("Pet.") at 1.

Nonetheless, summary affirmance is inappropriate at this stage of the appeal. In this Circuit, motions to affirm are granted "only where it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to

need further argument." *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (citations and quotation marks omitted).

1. This Court's opinion in *CCP* ought to be overturned. As the Institute explained in its opening brief on appeal and its petition for initial hearing *en banc*, that opinion "violates six decades of U.S. Supreme Court precedent regarding the First Amendment harm inherent in the compelled disclosure of a group's supporters, goes against forty years of precedent explaining the exacting scrutiny analysis, and contains an obvious misreading of this Court's own precedent in *Acorn Investments v. City of Seattle*," 887 F.2d 219 (9th Cir. 1989). Opening Br. at 29. Accordingly, because "*CCP* is binding precedent, which can only be revisited by an en banc court or the Supreme Court," the Institute has sought initial hearing of its appeal *en banc*. Mot. at 10 (citing *Palmer v. Sanderson*, 9 F.3d 1433 (9th Cir. 1993)). As of this filing, Appellees have not responded to IFS's petition, nor has the Court taken any action upon it.

2. Until this Court determines whether or not it will hear this case *en banc*, where it will be empowered to reverse *CCP* and restore this Court's previous understanding of the First Amendment, summary affirmance is premature. Because the *en banc* petition in this case specifically asks this Court to change the present state of the law, summary affirmance will add nothing to the discussion and will waste judicial resources. The better course is to await a definitive statement of the

binding law in this case, and to determine whether summary disposition is appropriate only at that point.

3. Should, however, a panel of this Court affirm before the Institute's *en banc* petition has received its due consideration, the Institute requests that this Court stay the mandate until the Institute's petition has been acted upon. As the Attorney General has conceded, this Court can do so. A "panel can grant summary disposition and stay its mandate until the petition for initial hearing en banc is resolved." Mot. at 11, n.5. That outcome would be less efficient than awaiting an *en banc* determination, but would still serve the interests of justice and judicial economy.

CONCLUSION

For the foregoing reasons, the Attorney General's motion for summary affirmance should be denied.

Respectfully submitted,

s/Allen Dickerson

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Dated: June 18, 2018

Attorneys for Appellant

9th Circuit Case Number(s) 17-17403

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