No. 15-152

IN THE

Supreme Court of the United States

CENTER FOR COMPETITIVE POLITICS,
Petitioner,

v.

KAMALA D. HARRIS,
ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS, CIVITAS INSTITUTE, FREEDOM FOUNDATION OF MINNESOTA, NATIONAL TAXPAYERS UNION FOUNDATION, AND ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Buckeye Institute for Public Policy Solutions is an Ohio-based nonprofit research and educational organization dedicated to supporting public policies that advance liberty, individual rights, limited government, and a strong economy. Among other current initiatives, Buckeye is launching an Economic Research Center that will provide research and analysis to citizens in all 50 states on a spectrum of policy issues, including taxation, budget, energy, and health care.

Buckeye has a substantial interest in the important question presented in this case, namely, whether a State may demand an unredacted list of all significant donors to a nonprofit organization without making a specific showing of need. As Buckeye seeks to expand its operations in California, the Ninth Circuit's decision presents a significant barrier. Under that holding, Buckeye must either forego fundraising from California's residents or disclose the names and addresses of its significant donors. Either choice will inflict irreparable harm upon Buckeye's and its supporters' freedom to associate.

The Civitas Institute is a North-Carolina based nonprofit corporation organized for the purpose of

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[1] All parties consented in writing to the filing of this brief more than 10 days prior to its due date. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

conducting research, sponsoring education activities, and upholding the constitutional and legal rights of North Carolinians. In 2015, Civitas founded the Center for Law and Freedom, a public interest law firm that represents North Carolinians in administrative agency actions, constitutional litigation, and transparency lawsuits. Civitas has published a number of articles on free speech and nonprofit donations on its website, NCCivitas.org, and seeks to maintain fundamental constitutional protections for the free speech of charitable donors.

The Freedom Foundation of Minnesota (FFM) is an independent, nonprofit § 501(c)(3) educational and research organization that advocates for individual rights, personal responsibility, economic freedom, and limited government. Because of its commitment to preserving the rights of Minnesotans, FFM has opposed repeated attempts in Minnesota to require charitable donor disclosure. FFM is concerned that the California Attorney General's disclosure requirement, if upheld, will embolden other states to pursue similar requirements.

National Taxpayers Union Foundation (NTUF) is a nonprofit, non-partisan § 501(c)(3) educational and research organization dedicated to informing Americans about the effects of taxes, government spending, and regulations. For over 40 years, NTUF has been empowering citizens to engage in the critical policy debates of our time—and hold elected officials accountable—through difference-making data, analysis, and commentary. NTUF has members in all 50 states and is concerned that the California Attorney General's disclosure requirements will lead to a chilling effect on the First

Amendment rights of donors and pave the way for other states to enact comparable regulations.

Alliance Defending Freedom (ADF) is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, ADF has played a role, either directly or indirectly, in many cases before this Court, including: *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts. ADF has a substantial interest in this case because it engages in charitable fundraising in all 50 states. If the California Attorney General's disclosure requirement is upheld, ADF will face the Hobson's choice of either ceasing fundraising efforts in California or disclosing its major donors.

SUMMARY OF THE ARGUMENT

California's Attorney General recently announced that charities and tax-exempt organizations cannot fundraise from California residents unless they first file an unredacted Form 990 Schedule B—*i.e.*, a list containing the names and addresses of their significant donors. The regulation on which the Attorney General relies has been in force for over a decade but has not previously been

interpreted to require this information. *See* Cal. Code Regs. tit. 11, § 301 (2005). The Attorney General now claims, however, that these disclosures are necessary to aid her general interest in "investigative efficiency."

The Ninth Circuit's holding that the Attorney General's actions do not impose a First Amendment injury conflicts with this Court's consistent recognition that compelled disclosure chills the freedom to associate. That chilling effect is of particular concern to *amici*. Indeed, retaliation against public interest groups like the Center for Competitive Politics (CCP), *amici*, and the donors that support them is an increasingly common occurrence. Today's technology, moreover, exacerbates the speed and impact of such harassment. The Ninth Circuit's conclusion that compelled disclosure will not discourage potential donors from associating with these organizations is wrong, and contrary to authority in other circuits. This Court should grant the writ to clarify the circumstances in which a party's First Amendment freedom to associate is impermissibly abridged by state action.

This case likewise implicates a split of authority regarding the standard for evaluating associational privacy claims. Government actions compelling disclosure of members or donors must satisfy "exacting scrutiny," but this Court has described that standard in conflicting terms, equating it with strict scrutiny in some instances, and with intermediate scrutiny in others. Not surprisingly, then, the circuits also are of different minds in applying this "exacting scrutiny" standard. The Ninth Circuit's decision exacerbates that confusion by effectively

discarding *any* requirement that the government interest bear a meaningful relationship to the compelled disclosure.

Under the Ninth Circuit's holding, the tens of thousands of charities and exempt organizations that fundraise from any of California's nearly 40 million residents will have to choose between continuing those efforts and disclosing all of their significant donors. This ruling undeniably makes donating to these organizations less attractive, chilling the organizations' and their donors' First Amendment freedom to associate. And this issue is not isolated to California: Florida and New York also recently began demanding unredacted donor lists, and several other states have statutes or regulations that—like California's—may be "reinterpreted" to require such information.

The chilling effects of the decision below, if left to stand, cannot be undone later. This Court should intervene now.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING THAT COMPELLED DISCLOSURE DOES NOT OFFEND THE FIRST AMENDMENT CONTRAVENES THIS COURT'S PRECEDENT AND EXACERBATES A CIRCUIT CONFLICT.

The Ninth Circuit held that the Attorney General's actions do not implicate CCP's First Amendment right of association. *See* Pet. App. 12a ("CCP has not shown any 'actual burden' on its freedom of association"). This holding is legally and factually wrong. It also exacerbates a significant

conflict among the courts of appeals regarding the showing necessary to trigger associational privacy rights.

A. The Ninth Circuit's holding contravenes this Court's settled precedent establishing a right to associational privacy.

"[N]o case," the Ninth Circuit held below, "has ever held or implied that a disclosure requirement in and of itself constitutes a First Amendment injury." Pet. App. 17a-18a. That statement ignores "a half century of [this Court's] case law, which firmly establishes that individuals have a right to privacy of belief and association," both in the disclosure context and beyond. *Doe v. Reed*, 561 U.S. 186, 207 (2010) (Alito, J., concurring).

1. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) (alterations and citation omitted); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("*NAACP*"). Indeed, there is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 462. Our American political system has thus long celebrated the role of anonymous speech as "a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Although this "respected tradition of anonymity" is "most famously embodied in the Federalist Papers," which were published under the pseudonym "Publius," it extends across the speech spectrum. *Id.* at 343 & n.6. "[I]t is

immaterial whether the beliefs sought to be advanced … pertain to political, economic, religious or cultural matters." *NAACP*, 357 U.S. at 460.

For these reasons, this Court repeatedly has recognized that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982); *see, e.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960) ("to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association"); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (noting that "compelled disclosure imposes" "significant encroachments on First Amendment rights"); *NAACP*, 357 U.S. at 466 ("disclosure of membership lists is likely to have" a "deterrent effect on the free enjoyment of the right to associate"). Indeed, laws requiring organizations to disclose their members or donors are "of the same order" as a requirement that "adherents of particular religious faiths or political parties wear identifying arm-bands." *NAACP*, 357 U.S. at 462; *see also Buckley*, 424 U.S. at 66 ("Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably."). Both types of actions "ma[k]e group membership less attractive" and interfere with "the group's ability to express its message." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 69 (2006).

These principles apply irrespective of a group's or individual's viewpoint. "[T]he Constitution protects expression and association without regard … to the

truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 444-45 (1963) ("*Button*"). Thus, while the value of anonymity may be heightened where "a group espouses dissident beliefs" such that its members may fear threats or reprisal, "all legitimate organizations are the beneficiaries of these protections." *NAACP*, 357 U.S. at 462; *Gibson*, 372 U.S. at 556-57.

2. The Ninth Circuit sought to distinguish this Court's unbroken line of authority by confining these holdings to situations involving groups whose members had "experienced violence or serious threats of violence" based on their association with the group. Pet. App. 9a; *see also, e.g.*, *NAACP*, 357 U.S. at 462-63. That narrow reading of this Court's cases is flawed in multiple respects.

First, this Court's decisions make clear that "mandatory reporting [of donors] undeniably impedes protected First Amendment activity," no matter the group involved. *McIntyre*, 514 U.S. at 355; *see also Shelton*, 364 U.S. at 485-86 ("to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association"). Accordingly, this Court has invalidated disclosure laws even where there was "not even a hint that [the individual challenging the law] feared 'threats, harassment, or reprisals.'" *McIntyre*, 514 U.S. at 379 (Scalia, J., dissenting); *see Talley v. California*, 362 U.S. 60, 69 (1960) (Clark, J., dissenting) (noting that "record [was] barren of any claim, much less proof, that …. Talley or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion or other manifestations of public

hostility'" by identifying the handbill with his name); *see also Pollard v. Roberts*, 393 U.S. 14 (1968) (summarily affirming decision invalidating disclosure requirements notwithstanding lack of evidence of reprisal).

To be sure, *Talley*, involved restrictions on "anonymous pamphleteering," where the First Amendment harm of disclosing the handbill's author was "certain." Pet. App. 18a & n.8. But the First Amendment harm that the Attorney General's actions will impose here is far more "certain" than it was in *Talley* or *McIntyre*. After all, the ordinances at issue in those cases required only disclosure of the individual or entity making the statement; they did not go further, as the Attorney General does here, to also require disclosure of every significant *donor* supporting those speakers. *See McIntyre*, 514 U.S. at 338 n.3; *Talley*, 362 U.S. at 60 (Clark, J., dissenting). If a requirement that CCP identify itself as the author of a pamphlet violates the First Amendment, certainly a requirement that it disclose all of its significant donors fares no better.

Second, the Constitution's protections extend to "*all* legitimate organizations"—not just those that are unpopular. *Gibson*, 372 U.S. at 556 (emphasis added); *see Button*, 371 U.S. at 444-45. The Ninth Circuit's suggestion that associational privacy applies only to views that are so disfavored that they provoke public threats is not only incorrect, but also would lead to "the perverse result that members of an American Nazi political party may have greater rights to political privacy under the First Amendment than members of the National Rifle Association." Jon Riches, *The Victims of "Dark*

Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving, at 20 (Aug. 5, 2015), *available at* https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/8/12/Dark%20Money%20Flipbook.pdf. Both this Court's cases and common sense say otherwise.

Indeed, whatever their political, religious, or cultural beliefs, "many people doubtless would prefer not to have their political party affiliations [and other associational ties] disclosed publicly or subjected to the possibility of disclosure." *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968). "Disclosure or threat of disclosure may well tend to discourage both membership and contributions thus producing financial and political injury to the party affected." *Id.*; *see also Rumsfeld*, 547 U.S. at 69.

B. Compelled disclosure will have an immediate and significant chilling effect on CCP and other public interest groups.

The Ninth Circuit's holding that CCP and its donors will not be injured is also factually wrong. There is ample evidence that compelled disclosure of donors to think tanks and other § 501(c)(3) organizations has a chilling effect on those organizations' and donors' First Amendment rights.

1. Public interest organizations often face retaliation and harassment because of the views they espouse. On August 15, 2012, Floyd Corkins shot a security guard at the Family Research Council (FRC), a conservative think tank based in

Washington, D.C. Corkins intended "to kill as many people as possible" at the FRC because he disagreed with its views on same-sex marriage. Carol Cratty & Michael Pearson, *DC Shooter Wanted to Kill As Many As Possible, Prosecutors Say* (Feb. 7, 2013), *available at* http://www.cnn.com/2013/02/06/justice/dc-family-research-council-shooting/. According to police investigators, Corkins planned to kill employees of other conservative organizations as well. *FRC Suspect May Have Targeted Traditional Values Coalition, Group Says* (Aug. 19, 2012), *available at* http://www.huffingtonpost.com/2012/08/18/frc-suspect-may-have-targ_n_1800872.html.

Regrettably, this sort of violence is not uncommon. In November 2011, protesters attacked and harassed attendees of a forum hosted by Americans for Prosperity Foundation, a think tank that advocates for economic freedom. Clare O'Connor, *Occupy The Koch Brothers: Violence, Injuries, And Arrests At DC Protest* (Nov. 5, 2011), *available at* http://www.forbes.com/sites/clareoconnor/2011/11/05/occupy-the-kochs-violent-clashes-injuries-and-arrests-at-protest-against-corporate-greed/. Several people were hurt, including two elderly attendees who were shoved down a set of stairs as they attempted to escape the escalating chaos. *Id.*

"The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to pre-empt citizens' exercise of their First Amendment rights." *Citizens United v. FEC*, 558 U.S. 310, 482 (2010) (Thomas, J., dissenting) (emphasis deleted). For instance, before the 2008 Presidential election,

Accountable America, a "'newly formed nonprofit group,'" "'planned to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions.'" *Id.* (quoting Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES, Aug. 8, 2008, at A15). The group's leader, "who described his effort as 'going for the jugular,' detailed the group's plan to send a warning letter alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure and watchdog groups digging through their lives." *Id.* at 482-83 (some internal quotation marks omitted).

Wisconsin's "John Doe" investigations provide yet another troubling example of the harassment individuals have faced based on the views espoused by organizations they support. "Initially a probe into the activities of Governor Walker and his staff, the ['John Doe'] investigation expanded to reach nonprofits nationwide that made independent political expenditures in Wisconsin, including the League of American Voters, Americans for Prosperity, and the Republican Governors Association." Riches, *supra*, at 3. The raids targeted individuals associated with those organizations, some of whom were awakened in the middle of the night by "loud pounding at the door," floodlights illuminating their homes, and police with guns drawn. David French, NATIONAL REVIEW, *Wisconsin's Shame: "I Thought It Was a Home Invasion*" (May 4, 2015). These individuals were then forced to watch in silence as investigators rifled through their homes, seeking an astonishingly broad range of documents and information, all because

they supported certain organizations. *Id.* The Wisconsin Supreme Court recently put an end to these unconstitutional investigations, concluding that they were based on a legal theory "unsupported in either reason or law" and that the citizens investigated "were wholly innocent of any wrongdoing." *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 211-12 (Wis. 2015).

2. In the face of these and similar threats, compelled disclosure makes donating to CCP and other public interest organizations "less attractive," interfering with each "group's ability to express its message." *Rumsfeld*, 547 U.S. at 69.

In fact, Buckeye has experienced this chilling effect firsthand. In 2013, shortly after the Ohio General Assembly relied on Buckeye's arguments in rejecting Medicaid expansion, Buckeye learned that it would be audited by the Cincinnati office of the IRS. The audit notification came on the heels of widespread allegations of wrongdoing by that IRS office. *See, e.g.*, Gregory Korte, *Cincinnati IRS agents first raised Tea Party issues*, USA TODAY (June 11, 2013), *available at* http://www.usatoday.com/story/news/politics/2013/06/11/how-irs-tea-party-targeting-started/2411515/.
These reports of IRS misconduct caused Buckeye's donors to fear that the Buckeye audit was politically motivated retaliation. Several donors inquired about the threshold of giving that would cause them to appear on Schedule B, and expressed concern that such forced disclosure would subject them to retaliatory audits themselves. Numerous donors thus opted to make small, anonymous, cash donations—foregoing a donation receipt—to avoid

any potential retribution based on their contributions. Regardless whether these concerns were ultimately founded, the potential for disclosure hampered Buckeye's and its donors' freedom to associate.

Modern technology has only increased the force of disclosure-driven chilling effects. After all, once donors' names and addresses become public, "anyone with access to a computer could compile a wealth of information about [them], including":

> the names of their spouses and neighbors, their telephone numbers, directions to their homes, pictures of their homes, information about their homes …, information about any motor vehicles that they own, any court case in which they were parties, any information posted on a social networking site, and newspaper articles in which their names appeared (including such things as wedding announcements, obituaries, and articles in local papers about their children's school and athletic activities).

Doe, 561 U.S. at 208 (Alito, J., concurring).

What is more, because modern technology "allows mass movements to arise instantaneously and virally," "[a]ny individual or donor supporting virtually any cause is only a few clicks away from being discovered and targeted" for harassment. Nick Dranias, *In Defense of Private Civic Engagement: Why the Assault on "Dark Money" Threatens Free Speech – and How to Stop the Assault* at 16 (Apr. 2015), *available at* https://www.heartland.org/sites/default/files/03-13-

15_dranias_-_civic_engagement.pdf. In fact, such harassment has already occurred, and in California no less. After California published the names and addresses of individuals who had supported Proposition 8, a ballot initiative that amended California's constitution to define marriage as between a man and a woman, opponents of the measure "compiled this information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters." *Citizens United*, 558 U.S. at 481 (Thomas, J., dissenting); *see also Doe*, 561 U.S. at 208 (Alito, J., concurring) (describing similar efforts in Washington). Some individuals lost their jobs; others faced death threats—all because they supported Proposition 8. *See Citizens United*, 558 U.S. at 481-82 (Thomas, J., dissenting).

In short, the "deterrent effect" that disclosure of membership and donor lists will have on "the free enjoyment of the right to associate" is even more significant in today's internet age than it was when this Court decided cases like *NAACP*, *Shelton*, and *Talley*. *See NAACP*, 357 U.S. at 466.

3. The Ninth Circuit's reliance on the Attorney General's blithe promise of confidentiality fails to alleviate these concerns. *See* Pet. App. 18a. As an initial matter, it is far from clear that anything more than the Attorney General's informal say-so prevents her from publicizing donor information. Unlike federal law, California law imposes no civil or criminal sanctions for disclosing this purportedly confidential information. *Compare* 26 U.S.C. §§ 7213(a)(1)-(2); 7213A(a)(2); 7213A(b)(1); 7216; 7431. And even these federal prohibitions are not

sufficient to protect against public disclosure in all cases. *See Nat'l Org. for Marriage, Inc. v. United States*, 24 F. Supp. 3d 518, 520-21 (E.D. Va. 2014) (National Organization for Marriage's unredacted Schedule B was published by the Huffington Post after the IRS released it to the Human Rights Campaign). If criminal and civil penalties are not always adequate, certainly the Attorney General's bare assurances are hardly enough to offset the dramatic chilling effect of California's disclosure law.

In fact, the Attorney General's actions belie her promises. California law *requires* public disclosure of a charity's periodic reports. Cal. Gov't Code § 12590; Cal. Code Regs., tit. 11, § 310. The Attorney General may exempt part of a report from this requirement through rule or regulation, but she has not done so here, meaning that the reports "shall be open to public inspection." Cal. Gov't Code. § 12590.

California's Public Records Act, moreover, likely would require the Attorney General's Office to provide the donor disclosures in response to a public records request. *See* Cal. Gov't Code § 6250, *et seq*. The Ninth Circuit suggested that federal law may prohibit such disclosure. Pet. App. 19a n.9. But if, as the Attorney General contends, federal law "applies only to the IRS and does not prevent state officials from demanding and receiving the same information directly from an exempt organization," ECF 17-1 at 34, then those same statutes cannot prevent the Attorney General from disclosing that information.

In any event, disclosure to the Attorney General's office alone is sufficient to trigger a chilling effect. After all, donors to think tanks and other

public interest groups reasonably may fear reprisal not only from the public but also from state officials, including the Attorney General herself. *See Doe*, 561 U.S. at 200. Groups like CCP and *amici* routinely take positions opposing either direct action by a state's attorney general or state laws that the Attorney General's office is bound to uphold and defend. *Compare, e.g.*, Brief of 11 States as *Amici Curiae*, *Florida v. Dep't of Health & Human Servs.*, 132 S. Ct. 2566 (2012) (No. 11-400) (arguing in favor of Medicaid expansion), *with* Brief of *Amici Curiae* Center for Constitutional Jurisprudence, *et al.*, *Florida*, 132 S. Ct. 2566 (No. 11-400) (taking opposite position). The chilling effect of requiring these organizations to disclose their donor records in these instances is thus "readily apparent." *In re First Nat'l Bank*, 701 F.2d 115, 118 (10th Cir. 1983) (finding obvious chilling effect where IRS sought membership records of tax protester group).

C. By holding that CCP has not demonstrated a cognizable First Amendment injury, the Ninth Circuit exacerbated a conflict among the courts of appeals.

The Ninth Circuit's holding that CCP did not demonstrate a cognizable First Amendment injury exacerbates a split among the circuits as to whether and how much evidence of retaliation and harassment is required to trigger constitutional protection.

Consistent with *Shelton*, *Talley*, and *McIntyre*, several courts of appeals have recognized that the government's mere collection of information about individuals' associations creates a chilling effect.

See, e.g., *ACLU v. Clapper*, 785 F.3d 787, 802-03 (2d Cir. 2015) ("any potential 'chilling effect' is created at th[e] point" where "the government collects [information revealing associational ties]"); *see also Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir. 1999) (assuming that compelled disclosure, without more, constitutes First Amendment injury); *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 119-20 (3d Cir. 1987) (holding that city could not require job applicants to disclose associational ties, despite lack of evidence that disclosure would actually chill associational activities). The Ninth Circuit's holding that CCP's rights are not burdened by the disclosure of its members conflicts with the decisions of these circuits.

The Ninth Circuit's decision also implicates another underlying issue dividing the courts of appeals, namely, what level of First Amendment injury a group must demonstrate to invoke its right to associational privacy. Some courts have required specific evidence of harassment on par with that demonstrated in *NAACP*. *See, e.g.*, *Jones v. Unknown Agents of Fed. Election Comm'n*, 613 F.2d 864, 877-78 (D.C. Cir. 1979) (allegations that individuals were "harassed and intimidated" insufficient to state constitutional claim); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295-96 (6th Cir. 1998) (evidence of public reprisal insufficient to establish First Amendment injury from disclosure to government). Others have found a chilling effect based on the assumption that membership may decline as a result of disclosure. *Master Printers of Am. v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984)

(concluding that organization that would lose members as a result of disclosure established "serious claim of infringement" on First Amendment rights, even though evidence fell short of that in *NAACP*); *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1221 (6th Cir. 1985) (same); *see also, e.g.*, *United States v. Citizens State Bank*, 612 F.2d 1091, 1093 (8th Cir. 1980). Still other courts have required something in between, such as a government entity's "undeniably broad powers of control" over the jobs of members of a group seeking privacy. *See Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of New York Harbor*, 667 F.2d 267, 272 (2d Cir. 1981).

This Court should grant the writ to clarify the appropriate standard for establishing a First Amendment injury in the compelled disclosure context.

II. THIS COURT'S REVIEW IS ALSO WARRANTED TO RESOLVE A CONFLICT REGARDING THE MEANING OF EXACTING SCRUTINY.

This case likewise provides an excellent vehicle for clarifying the meaning of the "exacting scrutiny" standard in associational privacy cases.

Although it sometimes has described the test as equivalent to strict scrutiny, this Court also has stated that the test applicable to associational privacy claims requires merely intermediate scrutiny. *Compare, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) ("[u]nder exacting scrutiny," the government action is permissible only if it "promotes a compelling interest and is the least

restrictive means to further the articulated interest"), *with Citizens United*, 558 U.S. at 366-67 ("'exacting scrutiny' … requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest"). As CCP explains, *see* Pet. 32-36, these disparate statements have generated significant confusion among the courts of appeals. *Compare, e.g.*, *Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) ("The strict or exacting scrutiny standard requires that a state must show the regulation in question is substantially related to a compelling government interest and is narrowly tailored to achieve that end."), *with Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 282 (4th Cir. 2013) (under "exacting scrutiny," the government must "show that the statute bears a 'substantial relation' to a 'sufficiently important' governmental interest"); *see also* Pet. 32-36 (collecting additional cases illustrating circuit split).

The Ninth Circuit's decision only exacerbates this confusion. The Ninth Circuit purported to apply a version of exacting scrutiny that requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." Pet. App. 8a (quoting *Citizens United*, 558 U.S. at 366-67). In reality, however, it required neither a "sufficiently important" state interest nor a "substantial relationship" between the disclosure and that interest. Instead, the Ninth Circuit held that this test is satisfied whenever the Attorney General provides some "not wholly irrational" reason for her demand. *See* Pet. App. 20a ("The reasons that the

Attorney General has asserted for the disclosure requirement … are not 'wholly without rationality.'").

This Court has "long … recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64. Even where the governmental interest is compelling, disclosure requirements that go "far beyond" the asserted governmental interest are improper. *See Shelton*, 364 U.S. at 489; *Talley*, 362 U.S. at 64; *McIntyre*, 514 U.S. at 357. In *Shelton*, for example, this Court invalidated a statute requiring public school teachers to disclose "without limitation every organization to which [they] ha[d] belonged or regularly contributed within the preceding five years." 364 U.S. at 480. Some of those associations may have been relevant to a state's "vital" interest in the fitness and competence of its teachers, but that did not justify a "completely unlimited" inquiry into "every conceivable kind of associational tie." *Id.* at 485, 487-88; *see also Talley*, 362 U.S. at 64 (ordinance that prohibited distribution of anonymous handbills could not be justified by concern with "fraud, false advertising and libel" because the ordinance was not "so limited"); *McIntyre*, 514 U.S. at 357 (state's interest in "preventing the misuse of anonymous election-related speech" does not justify "a prohibition of all uses of that speech").

Here, the Ninth Circuit discarded any semblance of a requirement that the compelled disclosure substantially relate to the asserted government interest. The Attorney General, keep in mind, has fulfilled her investigative functions for years using a

redacted Form 990 Schedule B, and she has never explained why that format is no longer sufficient. *See* Pet. 9; *see also* Pet. App. 6a. Moreover, many states have been able to fulfill their supervisory obligations without requiring foreign corporations to file Schedule B *at all*. *See, e.g.*, Illinois Form AG990-IL Filing Instructions ¶ 3 (directing charities to file "IRS form 990 (excluding Schedule B"); Michigan Renewal Solicitation Registration Form at 2 ("if you file Form 990 … do not provide a copy of Schedule B); *cf. Randall v. Sorrell*, 548 U.S. 230, 252-53 (2006) (plurality op.) (citing as a "danger sign[]" that "contribution limits are substantially lower than … comparable limits in other States," and concluding that "[w]e consequently must examine the record independently and carefully to determine whether [the] limits are 'closely drawn' to match the State's interests"). Yet based on the bare assertion that the Attorney General needs this information to aid her "investigative efficiency," and despite evidence of less restrictive means of accomplishing her purpose, the Ninth Circuit condoned the State's efforts to force CCP and other § 501(c)(3) organizations to either stop fundraising in California or disclose *all* of their significant donors. Pet. App. 20a.

The breadth of the Attorney General's actions cannot be overstated. More than 1.5 million tax exempt charities are organized under § 501(c)(3). *See* http://foundationcenter.org/getstarted/faqs/html/howmany.html. These organizations span nearly every industry, including education, health care, culture, religion, sports, foreign affairs, and the humanities. If these organizations wish to fundraise from any of California's nearly 40 million residents,

then they must disclose their significant donors. There is no question that such disclosures—which may well reveal "every associational tie" not only of California residents, but also of the countless residents of other states who contribute to nonprofits that fundraise in California—"impair … [the] right of free association." *Shelton*, 364 U.S. at 485-86.

On its own terms, then, the Ninth Circuit's decision has a substantial impact beyond California. On top of that, its reasoning is likely to influence other states. Like California, New York and Florida recently began demanding that organizations like CCP file an unredacted Schedule B before they can fundraise from residents of those states. *See Citizens United v. Schneiderman*, -- F. Supp. 3d --, 2015 WL 4509717, at *2 (S.D.N.Y. Jul. 27, 2015); *see also* Fla. Stat. § 496.401, *et seq*. (West 2014). The Southern District of New York recently upheld New York's disclosure requirement in a decision that relied heavily on the Ninth Circuit's reasoning in this case. *See Citizens United*, 2015 WL 4509717, at *3-13.

The Ninth Circuit's expansive reasoning may also embolden other states to shift their policies on reporting requirements for tax-exempt organizations. Indeed, several other states have similar laws that arguably could be "reinterpreted" (just as California's has been) to require unredacted donor information. *See* Pet. App. 5a n.1 (interpreting laws of Hawaii, Mississippi, and Kentucky to require unredacted Schedule B). And other states recently have considered enacting similar measures. *See* Matt Nese, *Three Primary Threats to 501(c)(3) Donor Privacy* (Jun. 16, 2015), *available at* http://www.campaignfreedom.org/2015/06/16/three-

primary-threats-to-501c3-donor-privacy/ (discussing legislative efforts in Arizona, Montana, and Texas).

* * *

If CCP and other organizations are required to disclose their donors now or stop fundraising in certain states, intervention by this Court later will not provide any "effective relief." *Cf. Doe v. Reed*, 697 F.3d 1235, 1240 (9th Cir. 2012) ("[O]nce a fact is widely available to the public, a court cannot grant any 'effective relief' to a person seeking to keep that fact a secret."). This Court should intervene now, before it is too late.

CONCLUSION

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

Respectfully submitted,

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