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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, GOLDWATER INSTITUTE, MOUNTAIN STATES LEGAL FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, ATLANTIC LEGAL FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, and REASON FOUNDATION IN SUPPORT OF PETITIONER

TIMOTHY SANDEFUR, *Counsel of Record*
WENCONG FA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tsandefur@pacificlegal.org
E-mail: wfa@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Goldwater Institute, Mountain States Legal Foundation, Southeastern Legal Foundation, Atlantic Legal Foundation, Individual Rights Foundation, and Reason Foundation

QUESTION PRESENTED

This Court has long held that the First Amendment forbids states from intruding on the "[i]nviolability of privacy in group association" by forcing a nonprofit public interest law firm to divulge the names and addresses of its members and supporters. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). California officials required Petitioner, as a condition of engaging in protected speech, to divulge such confidential donor information, not because of any particular suspicion of malfeasance, but solely to enable the State to "efficien[tly]" monitor for possible wrongdoing. Does the organization bear the burden of proving that disclosure might result in retaliation against supporters, or does the State bear the burden of demonstrating a specific need for confidential donor information?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Rules

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation, Goldwater Institute, Mountain States Legal Foundation, Southeastern Legal Foundation, Atlantic Legal Foundation, Individual Rights Foundation, and Reason Foundation[1] respectfully submit this brief amicus curiae in support of Petitioner.

Amici are organizations that advocate and litigate in defense of the ideas of a free society, including limited constitutional government, private property rights, free enterprise, and other values that, although crucial, are often politically unpopular. Founded in 1973, Pacific Legal Foundation was the nation's first public interest legal foundation devoted to such issues. Southeastern was founded in 1976, Mountain States and Atlantic Legal Foundations in 1977, Reason in 1978, Goldwater Institute in 1988, and Individual Rights Foundation in 1993. Some Amici, including Pacific, Southeastern, Atlantic, and Mountain States Legal Foundations, engage exclusively in litigation, and have appeared on behalf of parties and as amici in this Court on numerous occasions. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

(2013) (Pacific); *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014) (Mountain States). Others, such as Goldwater and Reason, engage in litigation as well as policy research and analysis on issues that are, at times, highly controversial.

Together, these Amici represent the interests of hundreds of thousands of donors across the United States who exercise their First Amendment rights to support organizations that articulate and defend their beliefs in courthouses and legislatures nationwide. Not only is the question in this case critical to Amici's operations, but Amici owe their many supporters a duty to defend their constitutional right to confidentiality. As this Court declared in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." Amici submit this brief in defense of that privacy both as a private interest essential to their work and as one of the constitutional freedoms they are pledged to protect.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Since the nation's earliest days, the right to express one's views anonymously has been essential to public debate. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995). But in this case, the Ninth Circuit ruled that this deeply rooted right must give way, and that government officials may demand the names and addresses of a nonprofit public interest legal foundation's donors, not in response to any

particularized suspicion of wrongdoing, and not to promote any state interest in the electoral process—which Petitioner does not engage in—but merely to enable state officials to "efficien[tly]" monitor the organization's activities. *See Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015).

This Court should grant the petition for at least two reasons. First, the decision below conflicts directly with decisions of the Second, Eleventh, and Seventh Circuits, which faithfully apply this Court's ruling in *Patterson*, 357 U.S. at 462, and hold that such compelled disclosure violates the First Amendment. *See Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 802-03 (2d Cir. 2015) (disclosure of a member's affiliation with a nonprofit caused a First Amendment harm); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir. 1999) (disclosure of a company's stockholders violated the First Amendment); *Genusa v. City of Peoria*, 619 F.2d 1203, 1216-17 (7th Cir. 1980) (same).

Second, the decision below creates an unworkable legal rule that puts the burden of proof on speakers to demonstrate some specific risk of retaliation before courts will protect their First Amendment rights, instead of on the government to demonstrate that this burden on speech directly serves an important government interest. The Second, Eleventh, and Seventh Circuit decisions, by contrast, put the burden on the government to demonstrate some specific need for donor information before requiring its disclosure, so as to protect the "freedom to engage in association for the advancement of beliefs and ideas [that] is an inseparable aspect of [constitutionally protected] 'liberty.' " *Patterson*, 357 U.S. at 460.

The decision below brushed *Patterson* aside, reasoning that there was no evidence of a specific threat of retaliation against the petitioner's supporters in the event of disclosure. *Harris*, 784 F.3d at 1316. But that attempted distinction shifts the burden from the government to the petitioner, in direct contravention of controlling First Amendment precedent. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 584 n.6 (1983) (citing the "general principle[]" that "requir[es] the government to justify any burdens on First Amendment rights by showing that they are necessary to achieve a legitimate overriding governmental interest"). Worse, that burden-shifting erects an insurmountable hurdle, because the risk of potential retaliation for espousing or supporting unpopular viewpoints is often impossible to measure or prove.

The court below also sought to distinguish *Patterson* on the basis of precedents relating to *campaign-finance* laws, which involve state interests—such as "preserving the integrity of the electoral process" and "fostering government transparency," *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010)—absent in this case. Petitioner is a public interest law firm not involved in lobbying or electioneering. This case therefore involves "the State's 'informational' interest," a question *Doe* expressly reserved. *Id*.

Second, this case presents an issue of enormous practical importance. The need for a uniform rule on this issue is pressing given that many nonprofits—including Petitioner and most of the Amici here—operate in jurisdictions on both sides of the circuit split. If the decision below is allowed to stand,

California could force nonprofits nationwide to choose between forfeiting their First Amendment rights, and those of their members and donors, or waiving the right to engage in advocacy in the nation's most populous state.

REASONS FOR GRANTING THE PETITION

I

THE NINTH CIRCUIT'S DECISION TO SHIFT THE BURDEN OF PROOF ONTO THE PETITIONER CONFLICTS WITH DECISIONS OF THE SECOND, ELEVENTH, AND SEVENTH CIRCUITS AND CREATES AN UNWORKABLE RULE

This is the only case in which a federal court of appeals has ruled that a state may, consistent with the First Amendment, force an advocacy organization to divulge the names and addresses of its donors without requiring the state to demonstrate any particular suspicion of wrongdoing by the organization or its supporters. The Ninth Circuit rejected the argument that compulsory disclosure of this confidential information is itself a First Amendment injury, and held instead that the government can mandate such disclosure unless the organization in question proffers specific evidence that disclosure will "lead[] to private discrimination against those whose identities may be disclosed." *Harris*, 784 F.3d at 1314.

That holding conflicts with decisions of the Eleventh, Second, and Seventh Circuits. In *Lady J. Lingerie*, 176 F.3d at 1366-67, the Eleventh Circuit held that a municipal ordinance, which forced corporate applicants for business licenses to divulge

the names of their principal shareholders, violated the First Amendment. Like California's requirement in this case, that ordinance required the company to reveal the information, not to serve any particular investigative need, but simply to enable the government to "keep an eye" on the business's operations. *Id.* at 1366. The court did not ask the plaintiffs to provide any specific evidence of a risk of retaliation in the event of disclosure, but instead, in keeping with black-letter free speech jurisprudence, required the government to bear the burden of proof. It found that because "[c]ompelled disclosure . . . threatens to stymie the exercise of First Amendment freedoms," *id.*, the government bore the burden of demonstrating a sufficiently strong need for the information, and that mandatory disclosure was narrowly tailored to serve that need. As in this case, the government had no specific need, but just a general desire to monitor the company's internal workings. The court therefore found the requirement unconstitutional.

Similarly, in *Genusa*, the Seventh Circuit struck down a Peoria ordinance that required the disclosure of the names and addresses of corporate shareholders in adult bookstores. Citing *Patterson*, the court found this requirement unconstitutional. 619 F.2d at 1217 n.33. It did not require the plaintiffs to provide any specific evidence of potential retaliation. Instead, it found that the city's legitimate interest in ensuring that the business complied with ordinary zoning and nuisance laws was sufficiently assured by the information provided in the corporation's name, and to require the shareholders' identifying information also had "no purpose other than harassment," which was

"an unjustified prior restraint and an invasion of privacy." *Id.* at 1217.

In *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 802-03 (2d Cir. 2015), the Second Circuit invalidated the National Security Agency's telephone metadata collection program, which required private businesses to disclose certain information to the government. The court analyzed the First Amendment harms arising from disclosure in discussing whether the plaintiffs had standing, and held that the plaintiffs suffered an injury[2] because mandated disclosure affected their "interests in keeping their associations and contacts private" by exposing information that "can reveal civil, political, or religious affiliations." *Id.* at 794. Quoting *Patterson,* 357 U.S. at 462, the court concluded that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association." *Clapper*, 785 F.3d at 802. Like the Eleventh Circuit, the Second Circuit did not require the plaintiffs to provide any specific evidence of imminent retaliation against them.

This Court has always placed the burden on the government, not on the individual, to identify some specific need for the information in question before it can require disclosure. *Patterson*, for example, rejected Alabama's effort to force the NAACP to disclose the identities of its supporters in the state. 357 U.S. at 464.

---

[2] That the Second Circuit discussed the First Amendment injury in *Clapper* in its discussion on standing, instead of addressing the merits of the plaintiffs' First Amendment claims, makes little difference to its core holding that compelled disclosure is itself a First Amendment injury.

Alabama's justification for such disclosure requirements was actually more compelling than the vague "monitoring" justifications California asserts here: Alabama had specific reason to believe the NAACP was operating without a required state license, and it obtained a court order requiring the NAACP to disclose its supporters' identifying information. This Court ruled that the demand violated the First Amendment. Even if Alabama had not taken any specific action against the NAACP, mandatory disclosure had the potential to chill free expression. Noting that "abridgement of [speech] rights, *even though unintended, may* inevitably follow" from compelled disclosure, *id.* at 461 (emphasis added), the Court found that such requirements can "have the practical effect 'of discouraging' the exercise of constitutionally protected political rights," or a "deterrent effect upon such freedoms," or cause a "possible unconstitutional intimidation of the free exercise of the right to advocate." *Id.* Because "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as outright censorship, such a requirement must satisfy strict scrutiny. *Id.* at 462.

Patterson is only one of many cases to this effect. In *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968), this Court summarily affirmed the district court's ruling that the First Amendment did not allow Arkansas officials to force state Republican Party officials to divulge the identities of its donors, even though "there is *no evidence* of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions in question." *Id.* at 258 (emphasis

added). The district court considered it "naive" to ignore the fact that "disclosure of the identities of contributors" would "subject at least some of them to potential economic or political reprisals of greater or lesser severity," but even if no such threat existed, "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.* Compulsory disclosure "well may tend to discourage both membership and contributions thus producing financial and political injury to the party affected." *Id.*

In *Bates v. City of Little Rock,* 361 U.S. 516 (1960), the Court held that city officials could not require members of the NAACP's local branch to "furnish city officials with a list of the names of [its] members." *Id.* at 517. As the petitioner did in this case, the association provided the required financial information, but redacted the names, both out of a fear of "anti-NAACP climate in this state," but also because "*even aside from that possibility* . . . we . . . believe that the city has no right under the Constitution and laws of the United States . . . to demand the names and addresses of our members and contributors." *Id.* at 520 (emphasis added). This Court agreed. While there was plentiful evidence of a risk of retaliation, that was not the basis for the Court's decision. Rather, it held that the "[d]ecision in this case must finally turn" on "whether the [government] ha[s] demonstrated so cogent an interest in obtaining" the information "as to justify the substantial abridgment of associational freedom which such disclosures will effect." *Id.* at 524. The burden lay with the state to "show[] a subordinating interest which is compelling." *Id.*

Most like this case is *Shelton v. Tucker*, 364 U.S. 479 (1960), in which this Court struck down a California law forcing teachers to disclose the names of organizations of which they were members as a condition of being hired. The Court did not require the teachers to provide any specific evidence of a likelihood of retaliation, but found instead that "even though the governmental purpose be legitimate and substantial," requiring such disclosures "stifle[d] fundamental personal liberties," *id.* at 488, because "[p]ublic exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations," would intrude on First Amendment rights. *Id.* at 486-87. The Court made a point of noting that "*[e]ven if there were no disclosure to the general public*, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id.* at 486 (emphasis added). And the Court reiterated that the burden rested on the government—not on the objecting teachers. *Id.* at 489; *see also Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 555 (1963) (Government bears the burden of laying an "adequate foundation for its direct demands upon the officers and records of a wholly legitimate organization for disclosure of its membership.").

Here, however, the Ninth Circuit did the opposite, forcing the petitioner to provide evidence of threats of retaliation in order to demonstrate an "actual burden" on its First Amendment rights. *Harris*, 784 F.3d at 1316. This newly fashioned rule is wholly inconsistent with the standard of review that ordinarily applies to disclosure requirements like the one here: strict scrutiny. That standard places the burden on the

government, not the speaker, for two reasons. First, the Constitution requires courts to presume in favor of speech, and placing the burden on the government ensures that "the tie goes to the speaker, not the censor." *Federal Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007). Second, the long-standing legal principle forbidding suspicionless searches for the purposes of general monitoring requires the government to provide at least *some* specific reason for seeking information that citizens would prefer to keep confidential. *City of Los Angeles, Cal. v. Patel*, 135 S. Ct. 2443, 2451-56 (2015). The decision below, by contrast, allows the state simply to "condition a business license on the 'consent' of the licensee to . . . [suspicionless] searches." *Wyman v. James*, 400 U.S. 309, 331 (1971) (Douglas, J., dissenting).

Prospective speakers often cannot prove any specific risk of retaliation if their names and addresses are divulged, not because there is no such risk, but because it is hard to find and provide specific evidence to a court. A person might support a social or political position only to have it gradually become so disfavored that retaliation follows years afterward. *Cf. Brewer v. Quarterman*, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting) ("It is a familiar adage that history is written by the victors."). Typical First Amendment activities such as supporting a ballot initiative, opposing a candidate, or joining an advocacy organization have led to unanticipated retaliation long after the speech occurred. *See* below, Section II.

The Attorney General's desire to "increase[ ] her investigative efficiency" cannot justify compelling an organization to disclose the names and addresses of its

members. *Harris*, 784 F.3d at 1311. "[T]he Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *see also I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]hat a given law or procedure is efficient, convenient, and useful . . . will not save it if contrary to the Constitution."). The government's mere assertion of a benign motive cannot trump the First Amendment, which "expressly targets the operation of the laws—*i.e.*, the abridgement of speech—rather than merely the motives of those who enacted them." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015). The danger with laws like California's disclosure requirement is not just that it *is* being used for invidious purposes, but that it *can be*—or that potential supporters or donors might fear that it will be. This is just what "chilling effect" means. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 309 (1965) ("[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government.").

This Court has allowed states to mandate disclosure of names and addresses only in the context of electioneering activities, *see Doe*, 561 U.S. at 187 (petition signatures); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (campaign finance), and the decision below relied on those precedents to support its newly fashioned test requiring Petitioner to provide specific evidence of potential harassment to avoid the disclosure mandate. But electioneering cases involve different state interests that are not present in a case about non-electioneering organizations like Petitioner. *See* Jonathan Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements*

Suppress Speech and Limit Charitable Giving 8-9 (Goldwater Institute, Aug. 2015).[3]

While "preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability," *Doe*, 561 U.S. at 197, may be valid interests, requiring disclosure by groups not involved in elections cannot advance those interests. And *Doe* expressly declined to consider whether a state could require disclosure in order to "provid[e] information to the electorate about who supports the petition," *id.*, which is one interest behind the California disclosure requirement. Matea Gold & Tom Hamburger, *California Donor Disclosure Case Exposes How Nonprofit Groups Can Play in Politics*, The Wash. Post, Nov. 4, 2013.[4]

The concept of general, suspicionless monitoring of citizen behavior, via mandatory disclosure of information, is contrary to the basic principles of constitutional democracy. *Patel*, 135 S. Ct. at 2450.

---

[3] http://goldwaterinstitute.org/en/work/topics/constitutional-rights/free-speech/the-victims-of-dark-money-disclosure-how-governmen/.

[4] http://www.washingtonpost.com/politics/california-donor-disclosure-case-exposes-how-nonprofits-play-in-politics/2013/11/04/70e0b7ac-4246-11e3-a624-41d661b0bb78_story.html.

Even the party supporting the disclosure requirement in *Doe* disavowed this "informational" interest. *See Doe*, 561 U.S. at 207 (Alito, J., concurring) ("[T]he State's informational interest paints such a chilling picture of the role of government in our lives that . . . the Washington attorney general balked when confronted with the logical implication of such an argument, conceding that the State could not require petition signers to disclose their religion or ethnicity.").

Generalized monitoring would certainly increase "investigative efficiency," but would leave little room for individual freedom. *Cf. Sweezy v. New Hampshire*, 354 U.S. 234, 250-53 (1957) (giving state Attorney General "a sweeping and uncertain mandate" to investigate and question a college professor for subversive activities violated "the right to engage in political expression and association"). The Constitution's warrant requirement, its protections for security against unreasonable searches, its requirements for jury trial, and many other guarantees "were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley*, 405 U.S. at 656.

II

THE DECISION BELOW WILL HAVE FAR-REACHING IMPLICATIONS ACROSS THE COUNTRY

A. The Decision Below Threatens the Vital Principle of Donor Confidentiality, and Thus the Ability of Donors and Nonprofits To Engage in Free Speech

Confidentiality is the lifeblood of many nonprofit organizations. *See*, *e.g.*, Ted Hart, et al., *Nonprofit Internet Strategies: Best Practices for Marketing, Communications, and Fundraising Success* 64 (2005) ("It is extremely important to develop ethical rules and guidelines surrounding information and confidentiality. . . . [D]onors count on nonprofits to respect their privacy.").

It is also an important ethical principle for organizations whose donors entrust them with their money. As one leading textbook on fundraising for nonprofits observes, "[c]onfidentiality is indispensable to the trust relationship that must exist between a nonprofit organization and its constituents." Eugene R. Tempel, ed., *Hank Rosso's Achieving Excellence in Fund Raising* 440 (2d ed. 2003).

This Court has recognized that people have many valid reasons to desire anonymity when expressing their political and social views, or when supporting organizations that do so. Aside from fear of retaliation, people may simply wish "to preserve as much of [their] privacy as possible." *McIntyre*, 514 U.S. at 341-42. Their religious beliefs may require them to remain anonymous. *See, e.g.,* Virginia B. Morris & Brian D. Ingram, *Guide to Understanding Islamic Investing* 14 (2001) ("[M]any scholars urge Muslims to make [a] donation anonymously."); Joseph B. Meszler, trans., *Gifts for The Poor: Moses Maimonides' Treatise on Tzedakah* 73 (Marc Lee Raphael, ed., 2003) ("one who gives . . . to the poor and . . . the poor person does not know from whom he receives" engages in a highly elevated form of charity). Or donors may believe that disclosure of their identities would distract the public from the merits of the views they are advocating. That was one reason the authors of *The Federalist* chose to remain anonymous when advocating the adoption of the Constitution. *McIntyre*, 514 U.S. at 342. Whatever their reasons for wishing to remain confidential, that interest "outweighs any public interest in requiring disclosure as a condition of [speech]," at least until the state meets its burden under strict scrutiny of demonstrating a compelling need for that information. *Id.*

Mandatory disclosure deters people from exercising their First Amendment rights to support public advocacy organizations—a fact supported not just by empirical research, *see* Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007),[5] but also by recent experience.

Two years ago, news reports began detailing disturbing allegations that the Internal Revenue Service was targeting conservative nonprofit groups for extra scrutiny and burdensome audits. *See*, *e.g.*, David Ingram & Matt Spetalnick, *FBI Opens Criminal Probe of Tax Agency, Audit Cites Disarray*, Reuters (May 15, 2013).[6] After lengthy hearings, the House Committee on Oversight and Government Reform concluded that "from February 2010 until May 2012, the Internal Revenue Service systematically targeted conservative tax-exempt applicants for additional scrutiny and delay," with the consequence that "donors stopped giving to the groups . . . and some groups even stopped their operations." U.S. House of Representatives, *The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress* i-ii (Dec. 23, 2014).[7] Importantly, even if such targeting did not in fact occur, fear among donors that it was *likely* to occur almost certainly had the chilling effect of deterring them from participating

---

[5] https://www.ij.org/disclosure-costs.

[6] http://www.reuters.com/article/2013/05/15/us-usa-irs-id USBRE94E02J20130515.

[7] http://oversight.house.gov/wp-content/uploads/2014/12/ December-2014-IRS-Report.pdf.

in the democratic process by supporting advocacy groups of their choosing.

Other examples arise from the debate over Proposition 8, the California initiative that prohibited same-sex marriage. Supporters of the measure suffered vandalism, ostracism, and harassment. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 480-82 (2010) (Thomas, J., concurring in part and dissenting in part) (listing instances of retaliation against Prop. 8 supporters). Some suffered economic reprisals and harassment at their homes and workplaces. John R. Lott & Bradley Smith, *Donor Disclosure Has Its Downsides*, Wall St. J., Dec. 26, 2008.[8] Much of this harassment was facilitated by California's mandatory disclosure laws, which provide the public with the addresses and other identifying information of people who donate to political campaigns. *See* Thomas M. Messner, *The Price of Prop. 8*, Heritage Foundation Backgrounder No. 2328 (Oct. 22, 2009).[9] Opponents of the initiative even created websites that "combine[d] donor information with an interactive map, allowing activists to ascertain the identity, employer, amount of donation, and approximate location of certain Prop 8 supporters." *Id.* at 2.

Some supporters of disclosure requirements have acknowledged openly that their goal is to chill speech. The sponsor of a proposed federal bill mandating disclosure by nonprofit organizations proclaimed that "I think it's good when someone is trying to influence the government for their purposes, directly with ads

---

[8] http://www.wsj.com/articles/SB123025779370234773.

[9] http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf.

and everything else, it's good to have a deterrent effect." *See* Remarks of Sen. Chuck Schumer regarding the DISCLOSE ACT (Senate Rules and Administration Committee Hearing, July 17, 2012).[10]

B. Requiring Would-be Speakers To Prove the Risk of Retaliation Before Respecting Their Confidentiality Imposes on Them an Impossible Burden of Proof

The Ninth Circuit recognized that the risk of harassment can chill free expression, but declared that Petitioner had "produce[d] no evidence" to show that its donors "would experience threats, harassment, or other potentially chilling conduct as a result of . . . disclosure." *Harris*, 784 F.3d at 1316. But this Court has never put the burden of proof on a prospective speaker in a First Amendment case, and for good reason: such evidence is often difficult or impossible to provide.

Retaliation can take many forms, often subtle, and often long after the fact. It is frequently impossible to anticipate the risk or prove its existence. The infamous blacklisting of Communist Party members in the 1950s, for example, sometimes came many years after their alleged improprieties. Some people were blacklisted for having shown support for the Soviet Union a decade earlier, when it was a U.S. ally fighting the Nazis. *See*, *e.g.*, Kai Bird & Martin J. Sherwin, *American Prometheus: The Triumph and Tragedy of J. Robert Oppenheimer* (2005). To take a more recent example, in 2004, Swift Boat Veterans for Truth ran political ads against Senator John Kerry's

[10] https://www.youtube.com/watch?v=NHX_EGH0qbM.

presidential campaign. Mary Ann Akers, *Kerry Puts GOP Donor on the Defensive*, Wash. Post (Feb. 28, 2007).[11] More than two years later, Sam Fox, a donor to the group, was nominated to be ambassador to Belgium. During his confirmation hearing, Fox faced intense questioning from Senator Kerry, who asked Fox why he gave "such a large chunk of money to help Swift Boat," and accused Fox of supporting "personal destruction in politics." *Id.* Fox succumbed to the pressure and denounced the group he had supported, calling it "disgraceful." *Id.*

High-level officials are not the only ones ensnared by disclosure requirements. In 2011, Arizona citizen Dina Galassini opposed a municipal bond proposal by speaking against it at town hall meetings and sending emails to 23 friends and neighbors asking them to oppose it, too. *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2013 WL 5445483, at *2-7 (D. Ariz. Sept. 30, 2013). Town officials responded by sending Galassini a "cease and desist letter," claiming that she must register as a political committee. *Id.* Unwilling to subject her friends to persecution, and unable to afford attendant costs of thousands of dollars, Galassini cancelled the picket marches she had organized. *Id.*; *see also Riches*, *supra* at 20. It is unlikely that Galassini, Fox, or others could have provided specific evidence to prove the likelihood of retribution or ostracism at the time when they engaged in the speech, which later incurred that retaliation.

Specific evidence of retaliation should not be required for another reason: a chilling effect occurs if the government gives people good reason to fear

---

[11] http://www.washingtonpost.com/wp-dyn/content/article/2007/02/27/AR2007022701596.html.

retaliation, even if no *actual* retaliation occurs. A supporter or donor who knows his support for an advocacy organization will be made public is more likely to refrain from speaking than to investigate the actual likelihood of adverse consequences and submit admissible evidence of it to a court. The rule established below therefore begs the question. A "chilling effect" results from policies that *discourage* speech, not that actually *punish* it. As this Court has acknowledged, "the . . . danger . . . of self-censorship" is "a harm that can be realized even without an actual [persecution]." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Requiring overt evidence of likely punishment thus misses the point.

These considerations prove the wisdom of Justice Douglas's warning that government-mandated disclosure risks chilling speech. If government officials enjoy general power to require the divulging of confidential identifying information without any specific cause to suspect wrongdoing, "the press would be subjected to harassment that in practical effect might be as serious as censorship." *See United States v. Rumely*, 345 U.S. 41, 57 (1953) (Douglas, J., concurring). Even where no legal sanction is involved, "the potential restraint is equally severe. When the light of publicity may reach any student, any teacher, inquiry will be discouraged . . . . [H]arassment . . . will be minor in comparison with the menace of the shadow which government will cast." *Id.* In short, "[f]ear of criticism [causes] . . . [t]he subtle, imponderable pressures of the orthodox [to] lay hold." *Id.*

C. The Decision Below Reaches Far Beyond California and in Effect Requires All Nonprofits with Operations in California To Disclose Confidential Information Relating to Supporters and Operations in Other States

California's disclosure requirement has broad implications for First Amendment rights nationwide. Under the rule established by the court below, the state could require people in any state to divulge donations above $5,000 to Planned Parenthood, or membership dues to the NRA or Greenpeace, or to any similar group that operates in California. The resulting nationwide chilling effect is therefore extraordinary, and certain to stifle untold amounts of speech on critical issues at every level of government.

As the most populous state, California's size and diversity make it especially attractive to nonprofit organizations and one of the most active states for political speech. Colby Itkowitz, *Top Campaign Donors Mostly Live in California, New York*, Wash. Post, Sept. 2, 2014.[12] Because California is often seen as a bellwether state for social and political movements, it is often the target of efforts at reform and persuasion funded by donors in other states.

There is nothing nefarious about this; partisans in major political disputes have fought it out in pace-setting states since at least 1788, when New York's ratification of the Constitution was seen as critical to

---

[12] http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/09/02/top-campaign-donors-mostly-live-in-california-new-york/.

its success, and such out-of-state political figures as James Madison sought to influence that effort anonymously by co-authoring *The Federalist*. Likewise, anti-slavery activists such as Gerrit Smith and the Tappan Brothers devoted considerable money to influencing debates over slavery in states other than their own. Thomas G. Mitchell, *Anti-Slavery Politics in Antebellum and Civil War America* 13 (2007). In recent years, political controversies over public employee unions in Wisconsin or same-sex marriage in California were seen as important enough nationally that donors from other states devoted resources and energies to influencing those elections. Donors from every state contributed to the anti-Prop. 8 campaign; New Yorkers alone spent $2.8 million.[13] Many out-of-state entities supported Gov. Scott Walker's opponent in Wisconsin in 2014, due to his position on public employee union benefits. *See* Daniel Bice, *Union Bosses, Wealthy Donors Spend Big for Mary Burke, Scott Walker,* Milwaukee Journal-Sentinel, Oct. 26, 2014.[14]

Whatever the merits of California's post-Prop. 8 efforts to force disclosure of identifying information of campaign contributors—on the theory that voters should know "who's behind campaigns," Gold & Hamburger, *supra*—this case involves the even

---

[13] Their names, affiliations, and zip codes can be searched on a special website maintained by the L.A. Times, *Proposition 8: Who gave in the gay marriage battle?*, http://projects.latimes.com/prop8/.

[14] http://www.jsonline.com/watchdog/noquarter/union-bosses-wealthy-donors-spend-big-for-mary-burke-scott-walker-b99377685z1-280475452.html.

broader question of *non-political* groups devoted to policy analysis, research, litigation, and persuasion.

The extra-jurisdictional effect of the decision below conflicts with the First Amendment, which protects a person's right to associate and promote ideas in states other than one's residence. *Cf. Krislov v. Rednour*, 226 F.3d 851, 860-61 (7th Cir. 2000) (In-state residency requirement for signature gatherers "prevent[ed] the candidates from employing millions of potential advocates to carry their political message to the people of Illinois," a right "important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.") (citations omitted).

It also conflicts with the decisions of other states that, recognizing the importance of donor anonymity, protect the confidentiality of identifying donor information as a matter of state law. *See*, *e.g.*, *Cape Publications, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 823-24 (Ky. 2008); *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26 (2000), *rev'd on other grounds*, 261 Va. 350 (2001); *Berkeley v. Eisen*, 699 So. 2d 789, 791 (Fla. Dist. Ct. App. 1997); *Clerical-Technical Union of Michigan State Univ. v. Bd. of Trustees of Michigan State Univ.*, 190 Mich. App. 300, 302 (1991). Donors in those states rely on their state privacy requirements—which are effectively overridden by the California law if the organization in question does business in California.

As a result, an organization that wishes to preserve the confidentiality of donor information must refrain from engaging in First Amendment activities in California—a high price to pay for public policy

organizations that wish to do analysis, research, and advocacy in the nation's most populous state.

The decision below would be worthy of review even if it only intruded upon the First Amendment freedom of Californians. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2732 (2011) (granting review to "consider whether a California law imposing restrictions on violent video games comports with the First Amendment"). But the decision below reaches across the country, and the need for this Court's review is accordingly far greater.

CONCLUSION

Anonymous speech and association are "not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre*, 514 U.S. at 357. By allowing state officials to demand the names and addresses of donors of public advocacy groups—without any particularized suspicion of wrongdoing—the decision below creates a circuit conflict on a First Amendment matter of vital importance. If that is allowed to stand, it will have profound consequences on the associational privacy rights of nonprofit organizations nationwide.

The petition for certiorari should be *granted*.

DATED: August, 2015.

Respectfully submitted,

TIMOTHY SANDEFUR, *Counsel of Record*
WENCONG FA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tsandefur@pacificlegal.org
E-mail: wfa@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Goldwater Institute, Mountain States Legal Foundation, Southeastern Legal Foundation, Atlantic Legal Foundation, Individual Rights Foundation, and Reason Foundation