No. 15-152

In the Supreme Court of the United States

Center for Competitive Politics,
Petitioner,

v.

Kamala D. Harris,
in her official capacity as Attorney General of California,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AND COMPETITIVE ENTERPRISE INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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September 1, 2015

QUESTIONS PRESENTED

This brief addresses the two questions raised by Petitioner:

1. Whether a state official's demand for all significant donors to a nonprofit organization, as a precondition to engaging in constitutionally-protected speech, constitutes a First Amendment injury;

2. Whether the "exacting scrutiny" standard applied in compelled disclosure cases permits state officers to demand donor information based upon generalized "law enforcement" interests, without making any specific showing of need.

Additionally, it suggests a further question:

3. Whether a state official's demand for a nonprofit organization's records of all significant donors without any opportunity for precompliance review—and where such demand is properly construed as an administrative subpoena under state law—is facially invalid under the Fourth Amendment and this Court's precedent in *Los Angeles v. Patel*.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because private association is an essential right of citizenship that must be protected against governmental intrusion. Indeed, the Cato Institute is named for the anonymously written *Cato's Letters*.

The Competitive Enterprise Institute (CEI), is a 501(c)(3) nonprofit, public interest organization dedicated to advancing free-market solutions to regulatory issues. It was founded in 1984 and is headquartered in Washington. CEI depends for its existence on contributions from private donors, many of whom choose to remain confidential. CEI's involvement in a number of controversial issues over the years, such as Affordable Care Act litigation, labor regulation, and global warming, has resulted in several attempts by outsiders to obtain the identities of CEI donors and to subject them to harassment campaigns.

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[1] Rule 37 statement: All parties were given timely notice of intent to file and written communications from Petitioner's and Respondent's counsel consenting to this filing have been submitted to the Clerk. Further, *amici* state that no part of this brief was authored by any party's counsel, and that no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

1. The Ninth Circuit misapplied the evaluative rubric used in First Amendment compelled-disclosure cases. This Court has long recognized that exacting scrutiny should be applied to novel facial challenges to disclosure schemes. If a disclosure scheme survives a facial challenge, then "as-applied challenges would be available if a group could show a reasonable probability that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 98 (2003); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). The Ninth Circuit took that rule and turned it on its head by employing the as-applied exception to a novel facial challenge. The lower court also failed to distinguish between the legitimacy of the government's purported interests and the relationship of those interests to disclosure—unconstitutionally applying rational-basis review where exacting scrutiny is demanded.

2. The Ninth Circuit's opinion should also be re-evaluated in light of this Court's decision in *Los Angeles v. Patel*, 135 S. Ct. 2443 (2015). Like the ordinance at issue in *Patel*, there is no opportunity here for pre-compliance review by the California Registry of Charitable Trusts. The California attorney general's repeated and forceful demands put petitioners and those similarly situated into the same type of choice now proscribed by *Patel*. Additionally, the attorney general asserts an investigatory interest—not merely a recordkeeping-compliance interest—thus augmenting the privacy harm to individuals providing confidential records to third parties.

ARGUMENT

I. THE NINTH CIRCUIT FAILED TO GIVE THE CALIFORNIA ATTORNEY GENERAL'S ACTIONS THE SCRUTINY THIS COURT'S PRECEDENTS DEMAND

Preserving a wide boundary for the freedom of private association is essential to the proper "breathing space" that "First Amendment freedoms need . . . to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Accordingly, "government may regulate in the area only with narrow specificity." *Id.* Alexander Hamilton, James Madison, and John Jay famously hid their names in the *Federalist* under the nom de plume *Publius*. Their Anti-Federalist opponents likewise wrote under the names Cato, Brutus, and Federal Farmer. *See generally* Alexander Hamilton et al., *The Federalist Papers* (1788); Herbert J. Storing, ed., *The Complete Anti-Federalist*, vols. 1–7 (1981).[2]

Anonymous speech has had enormous impact on society, including such tracts as *Common Sense* (originally published anonymously) and *Cato's Letters*, and the right to speak anonymously is fully protected by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the con-

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[2] Also, the revolutionary James Otis was "a frequent contributor" to the *Boston Gazette*, "both in his own name and anonymously" while litigating *Paxton*'s *Case*, which "breathed into this nation the breath of life." *See* Josiah Quincy, Jr., *Report of Cases Argued and Adjudged In the Superior Court of the Judicature of the Province of Massachusetts Bay Between 1761 and 1772* (1865), App. I at 488; Charles Francis Adams, ed., *The Works of John Adams* (1854), vol. 10 at.276.

tent of a publication, is an aspect of the freedom of speech protected by the First Amendment."); *see also*, *Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("Freedoms such as [anonymous speech] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."). In its paradigmatic ruling on anonymous association, this Court recognized that when governments demand disclosure, they might be doing so for nefarious reasons. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."); *see also Citizens United*, 558 U.S. at 367 (The First Amendment right to private association protects individuals from "reprisals from either Government officials or private parties." (quoting *McConnell*, 540 U.S. at 198; *Buckley*, 424 U.S. at 74)).

In keeping with that tradition, this Court has carved out space for the requisite "breathing room" from state intrusion by requiring exacting scrutiny in First Amendment challenges to "compelled disclosure" regimes. *Buckley*, 424 U.S. at 64. The Ninth Circuit failed to apply this jurisprudence, unconstitutionally diminishing the right to private association. It turned exacting scrutiny on its head by employing an (inapplicable) exception to that rule to reach its conclusion. The as-applied exception to exacting scrutiny—which only kicks in if a disclosure requirement survives facial challenge—thus swallowed the rule, leading to the exact evil that an unbroken line of cas-

es from *NAACP v. Alabama* to *Citizens United* sought to prevent. Moreover, by collapsing the distinction between the *importance* of the asserted interest and the *nexus* between that interest and disclosure, the Ninth Circuit gave undue weight to the attorney general's assertions, greatly lowering the degree of "importance" required for state interests in First Amendment cases. Finally, the lower court failed to analyze the substantiality of the nexus between disclosure and the government's asserted interest.

A. The Ninth Circuit Illegitimately Treated a Novel, Facial Challenge as an As-Applied Challenge to a Previously Upheld Statute

The Ninth Circuit, contrary to this Court's clear precedents and reviewing the district court's determinations of law *de novo*, employed the as-applied "threats, harassment, or reprisals" standard to address a novel, facial First Amendment challenge. *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1311-14, 1317 (9th Cir. 2015). In cases where a statute or government policy has already survived facial challenges, "as-applied challenges would be available if a group could show a 'reasonable probability' that disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 198; *Buckley*, 424 U.S. at 74). While facially validated schemes should enjoy a presumption of constitutionality, courts should not be allowed to shift the burden to First Amendment plaintiffs of first impression. Accordingly, the lower court improperly converted what is supposed to be heightened review into the equivalent of rational basis review.

Construing the exacting scrutiny standard as it did, the Ninth Circuit converted a rule by which the *government* must prove its substantial interests into one where *plaintiffs* must prove harm as a matter of first impression. When properly construed, the distinction between novel facial challenges and as-applied challenges to facial regimes makes sense. When construed as the lower court did, however, heightened scrutiny is eviscerated, leading to exactly the evils that the *NAACP* line of cases meant to prevent—including the compelled disclosure of the principal donors of the California NAACP itself.

This Court has applied exacting scrutiny in "compelled disclosure" cases "[s]ince *NAACP v. Alabama*." *Buckely*, 424 U.S. at 64. Exacting scrutiny requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United,* 558 U.S. at 366-67 (quoting *McConnell*, 540 U.S. at 231-32; *Buckley*, 424 U.S. at 64, 66). Moreover, the burden is on "the Government to prove that the restriction" is constitutional. *Citizens United*, 558 U.S. at 340. Additionally, "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations." *Buckley*, 424 U.S. at 66.

While properly construing the Center for Competitive Politics (CCP) challenge as facial, the Ninth Circuit nonetheless applied exacting scrutiny to CCP's claims—as if the challenge were as-applied. In so doing, the court misconstrued *Buckley* as addressing a facial challenge, rather than *both* facial *and* as-applied challenges. *Buckley*, 424 U.S. at 60 ("Unlike the limitations on contributions and expendi-

tures . . . the disclosure requirements of the [Federal Election Campaign] Act are not challenged by appellants as per se unconstitutional restrictions on the exercise of First Amendment freedoms of speech and association."); *id.* at 66-68 (performing facial analysis); *Center for Competitive Politics*, 784 F.3d at 1315 ("[T]he *Buckley* Court rejected a facial challenge.").

Contrary to the Ninth Circuit's reading, *Buckley v. Valeo* first addressed the facial validity of the disclosure requirements of the Federal Election Campaign Act. The *Buckley* Court noted that the government interests were "sufficiently important" and that the "disclosure requirements, as a general matter, directly serve substantial governmental interests." *Buckley*, 424 U.S. at 66-68. The Court also noted that disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. Only after making this determination of facial validity, did the Court "turn now" to the contention that "the balance tips against disclosure when it is required of contributors to certain parties and candidates . . . insofar as they apply to contributions to minor parties and independent candidates." *Id* at 68-69.

Only in its as-applied analysis did the *Buckley* Court demand a "[r]equisite [f]actual [s]howing" from plaintiffs. *Id.* at 69. The Court has continued to recognize and uphold this distinction between facial and subsequent as-applied challenges. *See Citizens United*, 558 U.S. at 367 ("The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. . . . Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could

show a 'reasonable probability' that disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.'"); *McConnell*, 540 U.S. at 198; *see also NAACP*, 357 U.S. at 466 (finding "state scrutiny of membership lists" to be unconstitutional).

Having made that initial error and assuming that facial challenges require a showing of harm beyond the compulsory disclosure itself, the Ninth Circuit proceeded to employ the as-applied "threats, harassment, and reprisals" exception carved out in *Buckley*. Claiming to "engage[] in the same balancing that the *Buckley* Court undertook," the lower court found "no evidence to suggest that their significant donors would experience threats harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirement." *Center for Competitive Politics*, 784 F.3d at 1315-16. Accordingly, CCP failed to demonstrate any "actual burden" on "it or its supporter's First Amendment rights." *Id.* at 1316. The Ninth Circuit curiously "le[ft] open the possibility" that CCP may succeed on an as-applied challenge under the "threats, harassments, and reprisals" rule by showing specific facts—the exact rule that it had just purported to apply. *Id.* at 1317.

As *NAACP v. Alabama* made clear, disclosure itself is an injury when considering a facial challenge. *NAACP v. Alabama*, 357 U.S. at 449; s*ee also Citizens United*, 558 U.S. at 367; *Buckley*, 424 U.S. at 68; *Gibson v. Florida Legislative Committee*, 372 U.S. 539, 543-45 (1963); *Button*, 371 U.S. at 431; *Talley*, 362 U.S. at 64-65; *Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960); *Bates*, 361 U.S. at 522-25. Contrary to the Ninth Circuit's reasoning that "the compelled disclo-

sure itself [does not] constitute[] such an injury," 784 F.3d. at 1314, this Court has "repeatedly found that compelled disclosure, in and of itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 68 (citing generally *Gibson*, *Button*, *Shelton*, *Bates*, and *NAACP v. Alabama*). Specifically, the *Buckley Court* properly recognized that "it is undoubtedly true that the public disclosure of contributions . . . will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68.

By discounting the harm of blanket compulsory-disclosure schemes that this Court has recognized since *NAACP v. Alabama*, the Ninth Circuit tipped the scales in favor of the attorney general's asserted interest. Moreover, by using the as-applied test on a facial challenge, the Ninth Circuit failed to properly consider the harm of disclosure to *all other* nonprofit organizations. That list includes organizations such as Save California, an anti-gay advocacy group; the Chalcedon Foundation, a group that historically has advocated capital punishment for gays; and, of course, *the NAACP itself*, which, under the attorney general's scheme, is now required to disclose all of its principal donors to the state of California. *See* Files of the California Registry of Charitable Trusts, http://rct.doj.ca.gov/Verification/Web/Search.aspx?facility=Y (updated ad hoc); California Franchise Tax Board, Exempt Organizations List (last updated June 15, 2015), https://www.ftb.ca.gov/businesses/Exempt_organizations/Entity_list.shtml (listing tax-exempt organizations registered in California). In short, the breadth of the Ninth Circuit's ruling is staggering.

B. The Ninth Circuit Collapsed the Distinction between "Sufficiently Important Interests" and "Substantial Nexus" and Thus Failed to Properly Scrutinize the Attorney General's Asserted Interest

The Ninth Circuit collapsed a clear distinction between the importance of the asserted government interest in compulsory disclosure and the substantiality of the nexus between compulsory disclosure and the asserted interest. Exacting scrutiny requires "a substantial relation between the disclosure requirement *and* a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67 (citations omitted) (emphasis added. In collapsing the distinction, the lower court essentially applied rational-basis review to the state's asserted interests. Yet since *Buckley*, this Court has clarified that nexus analysis is not to be considered under mere rational-basis analysis, but requires examination of "tenuous[ness]" between discourse and interests. *Buckley v. American Constitutional Law Foundation,* 525 U.S. 182, 201-04 (1999) (quotations and citations omitted) ("*ACLF*").

The Ninth Circuit's analysis of the government interest is terse:

> Like the *Buckley* Court, we reject this argument, especially in the context of a facial challenge. The Attorney General has provided justifications for employing a disclosure requirement instead of issuing subpoenas. She argues that having immediate access to Form 990 Schedule B increases her investigative efficiency, and that reviewing significant donor information can flag suspicious activity. The reasons that the Attorney General has assert-

> ed for the disclosure requirement, unlike those the City of Seattle put forth in Acorn, are not "wholly without rationality." *See Buckley*, 424 U.S. at 83. Faced with the Attorney General's "unrebutted arguments that only modest burdens attend the disclosure of a typical [Form 990 Schedule B]," we reject CCP's "broad challenge," *John Doe No. 1*, 561 U.S. at 201. We conclude that the disclosure requirement bears a "substantial relation" to a "sufficiently important" government interest. See *Citizens United*, 558 U.S. at 366 (internal citations omitted).

Center for Competitive Politics, 784 F.3d at 1317. But the court should not have applied *Buckley*'s "wholly without rationality" standard to the attorney general's asserted interests. *Id.* In using that language, the *Buckley* Court was considering the "substantial nexus" of specific monetary thresholds—but only after it had analyzed the facial *and as-applied* constitutionality of the disclosure requirements themselves and, more pointedly, the government's asserted interests. *Compare Buckley*, 424 U.S. at 82-83 (examining whether "the monetary thresholds in the record-keeping and reporting provisions lack a substantial nexus with the claimed governmental interests."), with *id.* at 66-74 (considering facial and as-applied challenges to disclosure requirements in light of the asserted government interests).

Rational-basis review is entirely inappropriate when weighing the attorney general's asserted interests here. Like most issues examined on this perfunctory level, the asserted interests are likely constitutional. This Court, however, 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. Yet merely accepting "some legitimate governmental interest" is precisely what the Ninth Circuit did when it failed to distinguish between the importance of the asserted interests and how well disclosure accomplishes those ends. "Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Id.* Exacting scrutiny requires the showing of a "sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67 (quotations and citations omitted). Even if that doesn't rise to the level of strict scrutiny, it's certainly more than rational-basis review!

Contrary to the magnitude of the important interests identified in *Buckley*, such as "provid[ing] the electorate with information" and "exposing large contributions and expenditures to the light of publicity," 424 U.S. at 66-67, the attorney general's scheme allows her to "increase[] her investigative efficiency" by avoiding "issuing subpoenas." *Center for Competitive Politics*, 784 F.3d, at 1311, 1317. Yet the "disclosure would not be public . . . . ; [t]he attorney general keeps Form 990 Schedule B confidential," so the public is not helped in a way recognized by *Buckley*. Further, even if the disclosure would indeed increase investigatory efficiency, that's not enough, by itself, to justify the chill on speech and associational rights. As this Court held in *NAACP*, the "exclusive purpose" of the Alabama disclosure rule—to help "determine whether petitioner was conducting . . . business in violation" of Alabama law—was not enough to over-

come the "deterrent effect on the free enjoyment of the right to associate." 357 U.S. at 464-66.

Finally, in propagating her disclosure scheme, the attorney general doesn't even avoid the apparent inconvenience of issuing a subpoena; she merely avoids the accountability for one. An order for production by the attorney general is an administrative subpoena under California law. *See infra,* Part II; Cal. Gov't Code §§ 12588, 12589 (2015). Accordingly, the attorney general's asserted interests are insufficient.

C. There Is No "Substantial Nexus" between the Mandated Disclosures and the Attorney General's Asserted Interests

The disclosure requirement does not bear a substantial-enough relationship to the interest that the attorney general has asserted in the disclosure. *Center for Competitive Politics*, 784 F.3d, at 1317. In response to this argument, the Ninth Circuit noted that "[t]he Attorney General has provided justifications for employing a disclosure requirement instead of issuing subpoenas[,]" because "having immediate access to Form 990 Schedule B increases her investigative efficiency, and that reviewing significant donor information can flag suspicious activity." *Id.* Other than taking the attorney general at her word, the lower court offered no reasons for why immediate access to Form 990 is substantially related to the investigative goals. Although the Ninth Circuit purported to apply rational-basis review per *Buckley*, that test has since been clarified in *ACLF*. In *ACLF*, the Court applied "exacting scrutiny" to disclosure requirements and found them "no more than tenuously related to the substantial interests disclosure serves." 525 U.S. 182, 201, 204 (citations omitted).

California law requires narrower, unobjectionable disclosures that provide better avenues for the attorney general's asserted investigatory purpose. As *amicus* Charlie M. Watkins pointed out below:

> The names and addresses of large donors, by itself or in combination with other information in IRS Form 990 and its other schedules, does not enable the Attorney General to ascertain, "often without conducting an audit" or otherwise, whether a charity has violated any of the cited laws, or any other laws. The donor information may provide a clue, but, with respect to officers, directors, or key employees, more important clues are openly reported elsewhere on Form 990—in Part VII and Schedule J, where compensation of officers, directors, and key employees is reported; and in Schedule L, where non-employment transactions with officers, directors, and other key employees are reported. . . . Thus, the donor information on Schedule B doesn't help California ensure that charities are operating in compliance with its laws.

Brief of *Amicus Curiae* Charles M. Watkins in Support of Appellant Center for Competitive Politics, Inc., Supporting Reversal of the District Court's Refusal to Grant the Requested Injunction at 6, *Center for Competitive Politics*, 784 F.3d 1307; Plaintiff-Appellant's Reply Brief at 21-24, *Center for Competitive Politics*, 784 F.3d 1307.

The attorney general can conduct an audit of 501(c)(3) entities if she is suspicious of their conduct. With much more restrictive means available to accomplish her ends—and with the nexus between

Schedule B disclosure and the attorney general's investigatory purpose being so tenuous—the Ninth Circuit's decision falls fart short of the "substantial nexus" test clarified in *ACLF* and continuing through *Citizens United*. *See, e.g.*, *ACLF*, 525 U.S. at 201-04.

Accordingly, this case is again similar to *NAACP v. Alabama* in that "[w]ithout intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's" principal donors "has a substantial bearing on . . . them." 357 U.S. at 464.

II. THE NINTH CIRCUIT'S DECISION SHOULD BE REVIEWED IN LIGHT OF *LOS ANGELES V. PATEL*

In *Los Angeles v. Patel* this Court held that administrative searches that fail to provide the opportunity for precompliance review are facially unreasonable. *Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) ("[I]n order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."). The attorney general's asserted scheme affords no opportunity for precompliance review within the meaning of *Patel*.

The California attorney general's demand for an unredacted Form 990 from a 501(c)(3) organization pursuant to her role as the administrator of the Review of Charitable Trusts is, under California Law, an administrative subpoena. "[P]ursuant to [the attorney general's] role as the chief regulator of charitable organizations in the state . . . . [She] may require any agent, trustee, fiduciary, beneficiary, insti-

tution, association, or corporation, or other person to appear and to produce records." *See Center for Competitive Politics v. Harris*, No. 2:14–cv–00636, 2014 WL 2002244, at *6 (E.D. Cal. May 13, 2014) (quoting and citing Cal. Gov't Code §§ 12588, 12589 (2015); Defendant Kamala D. Harris's Opposition to Plaintiff's Motion for Preliminary Injunction at 10, *Center for Competitive Politics*, 2014 WL 2002244). Under Cal. Gov't Code § 12589, an order of the kind issued by the attorney general "shall have the same force and effect as a subpoena."

Like the hotel managers in *Patel*, CCP's "managers" are put to the "kind of choice" that they cannot "reasonably" be forced to make: They must choose between protecting their donors' Fourth Amendment privacy rights and First Amendment rights to private association and continuing to operate as a 501(c)(3) in the state of California while facing personal liability. *See Patel*, 135 S. Ct. at 2452-53; Petition for a Writ of Certiorari at 6-7, *Center for Competitive Politics v. Harris*, No. 15-152 (2015).

In *Patel*, the city ordinance was rendered unconstitutional by the fact that precompliance view was entirely unavailable: "While the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that §41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid." *Id.* at 2452. Similarly, here the attorney general "does not even attempt to argue that" §§ 12588-89 "afford[]" CCP "any opportunity whatsoever for precompliance review." Accordingly, the attorney general's actions must also be facially invalid.

In *Patel*, the city justified the recordkeeping ordinance as a way of "deter[ring] criminals from operating on the hotels' premises." *Patel*, 135 S. Ct. at 2452. Here, the attorney general wants to "increase[] her investigative efficiency" in that "reviewing significant donor information can flag suspicious activity." 784, F.3d at 1317. If deterring actual criminal activity was an insufficient justification in *Patel*, it is hard to see how facilitating investigative efficiency is a more compelling interest. Moreover, in *Patel* the Court avoided the question of whether the city's "principal purpose instead is to facilitate criminal investigation," *Patel*, 135 S. Ct. at 2452 n.2, because the asserted purpose was deemed insufficient.

Nevertheless, the attorney general's scheme assumes that private donor information, retained as a business record with the charitable entity, may be demanded as a matter of investigatory course. There is "no reason why this minimal requirement [of precompliance review before a neutral decisionmaker] is inapplicable here." *Patel*, 135 S. Ct. at 2452.

CONCLUSION

If this Court lets the Ninth Circuit's opinion stand, then nonprofit organizations seeking to operate in one of the largest, richest, and most politically active states would be subject to blanket disclosure requirements, chilling the freedom of speech and the freedom of association. *Buckley*, 424 U.S. at 68 (per curiam) ("[I]t is undoubtedly true that the public disclosure of contributions . . . will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation."); *NAACP v. Alabama*, 357

U.S. at 462 ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."). The decision directly bears on the ability of minority and dissident groups—including the NAACP itself!—to organize in confidence and to monetize their educational activity.

Amici urge the Court to issue a writ of certiorari to address the questions presented and correct the misapplication of its precedents by the Ninth Circuit.

Respectfully submitted,

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September 1, 2015