No. 17-17403

In the
United States Court of Appeals for the Ninth Circuit

INSTITUTE FOR FREE SPEECH,
Plaintiff-Appellant,
v.
XAVIER BECERRA,
in his official capacity as the Attorney General of California,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California

Brief *Amicus Curiae* of Free Speech Defense and Education Fund and Free Speech Coalition in Support of Plaintiff-Appellant and Reversal

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DISCLOSURE STATEMENT

The *amici curiae* herein, Free Speech Defense and Education Fund, Inc., and Free Speech Coalition, Inc., through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1, 29(c).

These *amici curiae* are non-stock, nonprofit corporations, neither of which has any parent company, and no person or entity owns them or any part of them. The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, Jeremiah L. Morgan, Robert J. Olson, and William J. Olson of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615.

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INTEREST OF *AMICI CURIAE*

Free Speech Defense and Education Fund, Inc., and Free Speech Coalition, Inc., are nonprofit organizations, exempt from federal income tax under §§ 501(c)(3) and 501(c)(4) of the Internal Revenue Code ("IRC"), respectively. Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. Their interest also includes protecting the constitutional rights of their donors.[1] These *amici* have also filed *amicus* briefs in the U.S. Courts of Appeals for the Second[2] and Ninth[3] Circuits involving similar issues.

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[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] *See* Citizens United v. Schneiderman, U.S.C.A. 2nd Cir., No. 16-3310, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al*. (Jan. 13, 2017).

[3] *See* AFPF v. Harris, U.S.C.A. 9th Cir., Nos. 15-55446 & 15-55911, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al*. (January 21, 2016); *see also* AFPF v. Becerra, U.S.C.A. 9th Cir., Nos. 16-55727 & 16-55786, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al*. (Jan. 27, 2017).

ARGUMENT

I. THE ATTORNEY GENERAL'S DEMAND THAT DONOR NAMES BE DISCLOSED TO HIM AS A CONDITION PRECEDENT TO ENGAGING IN FIRST AMENDMENT ACTIVITIES VIOLATES THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE.

Plaintiff-Appellant have stated the issue to be whether the California Attorney General's Schedule B disclosure program is a violation of the "freedom of association protected by the … First Amendment…." Aplt. Brief at 3. Restated in the governing language of the First Amendment, the issue is whether the program violates "the right of the people peaceably to assemble."

A. The Text and Context of the Right of the People Peaceably to Assemble.

It has long been fashionable for litigants and judges to understand and apply the First Amendment as if it were a smorgasbord of rights from which to pick and choose as the occasion may require. Indeed, the First Amendment oftentimes is invoked as if it were a composite list of generic rights, indistinguishable from one another. Thus, instead of speech, press, assembly, and petition, they are all bundled together as "First Amendment freedoms," or "freedom of expression," or just "free speech." Having disregarded the actual words of the Amendment, courts are set free to make whatever rules suit their

fancy. As Justice Black wrote in dissent in Griswold v. Connecticut, 381 U.S. 479 (1965), "First Amendment freedoms … have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used." *Id.* at 509.

In America's early history, Chief Justice Taney set the standard:

> In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added…. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning…. [Holmes v. Jennison, 39 U.S. 540, 570-71 (1840).]

Just as Justice Black has written, the language of the First Amendment is simple: "Congress shall make no law … abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." And just as Justice Charles Evans Hughes wrote 16 years later: "The right of peaceable assembly is a right **cognate** to those of free speech and free press and is equally fundamental":

> The very idea of a government, republican in form, implies a right on the part of its **citizens** to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

[DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (quoting U.S. v. Cruikshank, 92 U.S. 542, 552 (1876). *See also* Hague v. CIO, 307 U.S. 496, 513 (1939).]

B. The Right of Assembly Belongs to the People, Not to a State's Attorney General.

By its explicit and plain language, the First Amendment right "codifies a 'right of the people,'" thereby securing to the People as a whole the individual right to peaceably assemble. *See generally* District of Columbia v. Heller, 554 U.S. 570, 579-80 (2008). The term — "the People" — "unambiguously refers to all members of the political community, not to an unspecified subset" of the People, and certainly not to any civil government official. *Id.* at 580. So it is the People "acting collectively," who exercise individually the right to peaceably assemble, not the Attorney General of California. It is the People who have the right to determine with whom they would associate and on what terms. It is the People's decision, not the Attorney General's, to set the terms of their affiliation with one another. It is the People's decision to place conditions, if any, limiting or expanding the body of citizens associating together for a common cause. It is the People who do the inviting, and set the conditions of the assembly, including who and how some of the participants are identified.

Pre-dating the First Amendment, the People of the United States exercised their inherent authority to reconstitute the colonial governments and to forge a new civil order. They did so, retaining, however, their right to peaceably assemble and to petition the government for redress of grievances, lest the new civil order that they had created fail to secure to the people their God-given rights to life, liberty, and the pursuit of happiness. As a member of the House of Representatives of the first Congress, James Madison introduced a federal bill of rights that included a provision that read: "The people shall not be restrained from peaceably assembling and consulting for their common good." *See* Sources of Our Liberties at 422 (R. Perry & J. Cooper, eds., rev. ed., ABA Found.: 1978). After a series of amendments and votes, the provision was modified to its present form, reading "the right of the people peaceably to assemble," without tying the right to any particular purpose. Thus, the Supreme Court has, since United States v. Cruikshank, 92 U.S. 542 (1876), ruled that the right to assemble included the right to assemble for "any lawful purpose," with the only qualifier that the assembly be a peaceable one. *See* Hague at 519. Indeed, in Hague, the assembly at issue related to a labor dispute. *Id.* at 512-13.

It is, then, for the people to decide the subject matter and viewpoint to be expressed by any people's assembly. Additionally, it is for the people to decide whether to disclose the names of any of their donor-publishers. *See* McIntyre v. Ohio Election Commission, 514 U.S. 334, 341-43 (1995). Not so in California, however, where the Attorney General enforces a state statute requiring any soliciting nonprofit charitable organization to register with the State and, as a member of the State's Registry of Charitable Trusts, disclose the names of its major donor-publishers. *See* Aplt. Brief at 9-12. The Attorney General justifies this forced disclosure as necessary to enable him to "conduct[] an audit, whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons or illegal or unfair business practices" (*id.* at 12), even though none of these matters relate to the physical peace and, hence, the only constitutionally permissible limit on the right of the people to assemble. *Id.* at 12. The Attorney General's justification, then, directly conflicts with the assembly guarantee, limiting the Attorney General to protecting the physical peace of the community in which the solicitation activity is taking place. *See* DeJonge at 258-59; Hague at 504-05. Quite the opposite, the Attorney General's desire to collect major donors' names on unredacted Schedules B may be

improperly used for political purposes by a politically elected officeholder, and actually increase the risk of turning peaceable assemblies into unpeaceful ones. *See* Aplt. Br. at 18 and 25-26.

C. The Right of Peaceable Assembly Is Essential to a Free State.

At the heart of the right to assemble is the right of the people to self-government. The role of the government is to keep the physical peace, not to conduct or "curtail" membership drives, support or discourage appeals, or other communicative activities among the citizenry. Again, the DeJonge Court got it right: the government's constitutionally required role is to foster, not to proscribe, "peaceable political action." DeJonge at 365. To be sure, the government has authority to "deal[] with the abuse" of the "free speech, free press, and free assembly" rights, but it must preserve them "inviolate":

> in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. [*Id*. at 365.]

The Attorney General, however, would put the people of California in protective custody, insisting that the State's bureaucracy be armed with yet an additional paper record wrested from the charitable organizations subject to his control.

See AFPF v. Harris, 182 F. Supp. 3d 1049, 1059 (C.D. CA. 2016) ("The Attorney General does not review Schedule Bs upon collection and virtually never uses them to investigate wrongdoing.").

II. THE COURT BELOW IGNORED THE VERY REAL RISK THAT THE PLAINTIFF AND SIMILAR GROUPS WILL BE TARGETED BY HIGHLY POLITICAL STATE ATTORNEYS GENERAL.

The court below assumed that disclosure presented no cause for concern for Plaintiffs' donors. In doing so, the court below apparently believed the only possible harm that could befall donors would occur only if the information was made public. To be sure, the court did admit in passing the possibility of "'reprisals from … Government officials,'" "government-sponsored hostility," and a history of "groups, who were 'unpopular, vilified and historically rejected by the government…." CCP v. Harris, 2017 U.S. Dist. LEXIS 180557, *15 (N.C. CA. 2017). However, the court apparently did not believe similar stories ever could occur in California in the present day; thus they were deemed wholly speculative. The court limited its analysis to "Plaintiff's arguments that 'the Attorney General's systems for preserving are not secure, and … its significant donors' names might be inadvertently accessed or released." *Id.* at *12. However, as the court pointed out, California regulation now requires that

"[d]onor information … shall be maintained as confidential by the Attorney General…." *Id.* at *4. Thus having refuted the only argument the Plaintiffs made about "'private … reprisals'" (*id.* at *15), the court contented itself with the fact that "confidentiality is now guaranteed by formal regulation," meaning "the Attorney General now is legally required by law as well as by practice to maintain the confidentiality of donor information." *Id.* at *18.

Yet it is no secret that nonprofit organizations are frequently the focus of ambitious politicians.[4] This generally occurs at the state level where legislators propose and identify some real or contrived abuse and then enact laws requiring more and more information from nonprofit organizations.[5] Politicians can make a name for themselves by vilifying nonprofit organizations under the guise of protecting the public. Those same politicians may not appreciate wealthy people

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[4] The mechanism for requiring information from nonprofit organizations is generally the state charitable solicitation statutes which exist in more than 40 states. And, as nonprofit organizations are dependent on voluntary contributions by donors, they are, as a group, concerned with their reputations, and therefore relatively easy targets for attack by politicians seeking to advance their own careers.

[5] As one commentator notes, "there is no guarantee that such disclosure policies (whether codified or not) will not change in the future…." "Court Reaffirms CA Attorney General's Demand for Donor List," Seyfarth Shaw, LLP (Jan. 13, 2016).

funding causes with which they disagree. Wholly ignored in the court's opinion is the real possibility that the current California Attorney General, persons who now work in his office, a future Attorney General, or future employees would misuse donor information.

There are only two states in the country that currently require an organization to file an unredacted Schedule B: California and New York. As it just so happens, those two states also have two of the most political attorneys general in the country, who apparently believe that they should use their public office to further their activist agendas.

As one commentator has put it, "[b]eyond the confines of Washington, D.C., the attorney general of the State of New York is, in some ways, the public official most feared by America's business community…."[6] New York Attorney General Eric Schneiderman, for example, holds a radical view of governmental power over nonprofits, based on the idea that they are little more than arms of the state — bestowed with tax-exempt status and public funding — and thus their boards of trustees are not really in charge.[7] Rather, this view holds that the

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[6] W. Olson, "Inspector Gotcha," *City Journal* (Summer 2015).

[7] F.A. Monti, "What Kind of Watchdog? The Role of the State Attorney General in Nonprofit Oversight," *Inside Philanthropy* (July 28, 2015).

public — represented by state attorneys general — should be able to tell nonprofits what to do and how to do it. Not only does AG Schneiderman claim unprecedented powers over nonprofits, but he has also wielded this power in political ways.

A 2015 op-ed claimed that "New York attorney general Eric Schneiderman has zealously used his office to pursue cases favored by left-wing activists."[8] True to that characterization, in October of 2016 — soon after he endorsed Hillary Clinton for President, and a year before he sued President Trump challenging immigration enforcement[9] — AG Schneiderman ordered the Donald J. Trump Foundation to cease all fundraising in New York state, based on allegations that the nonprofit had failed to register with the state before conducting charitable solicitations.[10] The AG's office called this mere failure to register — without at the time possessing any additional allegations of impropriety — "'a continuing fraud upon the people of New York.'" *Id*. In December of 2016, President-elect Trump announced that he would shut down

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[8] "Inspector Gotcha."

[9] D. Morgan, "16 attorneys general to fight Trump's immigration and travel ban," *CBS News* (Jan. 30, 2017).

[10] D. Fahrenthold, "Trump Foundation ordered to stop fundraising by N.Y. attorney general's office," *The Washington Post* (Oct. 3, 2016).

his foundation to avoid any conflict of interest, but AG Schneiderman wanted to keep the matter alive, claiming that the foundation could not be shuttered "while it is currently under investigation."[11] Then, in June of 2017, AG Schneiderman announced that he was "looking into" the Eric Trump Foundation, based on reports that it had paid money to Trump golf courses for hosting events.[12]

Likewise, California attorneys general, at least in recent years, have been highly political. During her Senate campaign, AG Harris initiated what could hardly be described as an anything-but-politically motivated raid on the residence of an individual who conducted an undercover investigation of Planned Parenthood's selling of baby parts in 2015. During the same period, AG Harris's campaign website encouraged supporters "'to take a stand and join Kamala in defending Planned Parenthood.'"[13] Moreover, Planned Parenthood

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[11] D. Choi, "Trump's charitable solicitation says it's shutting down, but an ongoing investigation in New York may complicate that," *Business Insider* (Nov. 20, 2017); *see also* "Schneiderman says Trump cannot dismantle his charity in the midst of probe," *Crain's* (Dec. 27, 2016).

[12] K. Watson, "New York attorney general 'looking into' Eric Trump Foundation," *CBS News* (June 10, 2017).

[13] P. St. John, "Kamala Harris' support for Planned Parenthood draws fire after raid on anti-abortion activist," *The Los Angeles Times* (Apr. 7, 2016).

and its friends reciprocated handsomely for this "protection" — having donated some $81,000 to her election campaign.[14]

Kamala D. Harris used her six years as the California attorney general to enhance her public reputation, allowing her to run for higher office. She began her term as a U.S. Senator in January of 2017, and reportedly is considering a run for the presidency.[15] On her way to Washington, she passed California's current Attorney General Xavier Becerra, who was returning to California from the House of Representatives after more than two decades as a Democratic Congressman from California, apparently deciding he would be more effective implementing his political agenda in his home state as attorney general.

Mr. Becerra's reputation for using his office to further his political agenda is similar to that of his predecessor. Only recently, AG Becerra has announced his intention to run for reelection, with a main plank of his campaign being "to continue to battle the Trump administration," seemingly no matter what the

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[14] C. Sullenger, "Planned Parenthood Donated $81,000 to Kamala Harris, Who Ransacked David Daleiden's Home," *LifeNews.com* (Apr. 7, 2016).

[15] D. Catanese, "The Inevitability of Kamala Harris," *U.S. News* (Dec. 1, 2017).

issue.[16] As of December 2017, California had filed 24 lawsuits against the Trump Administration on 17 different subjects,[17] 26 a month later,[18] and 28 two months after that.[19]

AG Becerra's ties to the abortion industry are well known,[20] as is his commitment to thwarting the federal government's ability to enforce the nation's immigration laws,[21] going so far as to threaten California businesses who dare to

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[16] P. McGreevy, "California's brand new Atty. Gen. Xavier Becerra announces he'll run for the post in 2018," *The Los Angeles Times* (Feb. 9, 2017).

[17] A. Hart, "From birth control to the border wall: 17 ways California sued the Trump administration in 2017," *The Sacramento Bee* (Dec. 11, 2017).

[18] R. Wilson, "Becerra becomes chief antagonist to Trump in California," *The Hill* (Jan. 25, 2018).

[19] J. Rainey, "Xavier Becerra, California's top lawyer, emerges as Trump nemesis," *NBC News* (Mar. 13, 2018).

[20] B. Adams, "Media silent on Planned Parenthood's ties to lawmakers behind pro-life activist charges," *The Washington Examiner* (Mar. 29, 2017).

[21] P. McGreevy, "For attorney general nominee Xavier Becerra, immigration is a personal issue," *The Los Angeles Times* (Jan. 18, 2017).

cooperate with federal authorities.[22] And, he has never come across a piece of anti-gun legislation he didn't like.[23]

Is it impossible to believe that a politician would be immune from the temptation to examine which wealthy persons are funding his political opponents and then devise a strategy to discourage that funding? And if a wealthy person knew that a politician with the resources and discretionary authority of a state attorney general had access to his giving practices, could he be "chilled" in the contributions he makes?

As the Ninth Circuit claimed 13 months before AG Becerra was sworn in as California Attorney General, "[w]e left open the possibility, however, that a future litigant might 'show a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals **from** either **Government officials** or private parties that would warrant relief on

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[22] K. Leach, "California attorney general threatens legal action if employers assist federal immigration raids," *The Washington Examiner* (Jan. 18, 2018).

[23] *See* "Xavier Becerra on Gun Control," On the Issues; *see also* J. Paulsen, "California's New AG Xavier Becerra is Hostile to Gun Rights, Due Process," The Truth About Guns (Dec. 2, 2016).

an as-applied challenge.'" AFPF v. Harris, 809 F.3d 536, 539 (9th Cir. 2015) (emphasis added).

Under the Harris/Becerra regime, the Ninth Circuit's words potentially could apply to basically any conservative-leaning group, including but not limited to those that are: pro-family, pro-border control, pro-gun, anti-abortion, and anti-illegal immigration, along with those that dispute California's "climate change" narrative, believe in private healthcare, lobby to protect the country from terrorism, are interested in curbing government waste, favor limiting or trimming entitlement programs, or believe in traditional marriage and that sex is an immutable characteristic.

In other words, particularly when it comes to a highly political and controversial AG[24] shown to be willing to use his position to attack his political opponents both in the government and in the private sectors — a facial challenge is the right approach. It was naive for the court below to claim that "the Attorney General has 'broad powers' … [t]o ensure that charitable status is not abused." CCP at *2. Rather, the court should realize the Attorney General has here used those broad powers to demand sensitive donor information which

[24] It is sometimes said that "AG" stands for "Aspiring Governor."

enables him to be the one to "abuse the charitable status" of any nonprofit that wishes to operate in California.

III. THE CALIFORNIA ATTORNEY GENERAL MAY NOT CONDITION CHARITABLE SOLICITATION REGISTRATION UPON DISCLOSURE OF CONFIDENTIAL DONOR INFORMATION.

The Attorney General's Motion to Dismiss stated, "[a]t issue here is the requirement that charitable organizations, **as a condition** of enjoying the benefits of tax-exempt status, annually submit a complete copy of Internal Revenue Service (IRS) Form 990, Schedule B, which lists the names and addresses of its major contributors." Attorney General's Motion to Dismiss ("A.G. Motion") at 1-2 (emphasis added). By conditioning the exercise of a constitutional right to solicit funds on the submission of protected unredacted tax return information, the Attorney General appears to have committed one or more violations of federal law and a federal crime. This Court should not sanction such an act.

A. IRS Form 990 Schedule B Is a Protected Federal Form.

Although the IRS Form 990 is a public information form, and exempt organizations which file them generally are required to make a copy publicly available upon request, the specific tax return information required by the Attorney General — confidential donor information at issue in this case — is the

exception to that rule.[25] Indeed, the IRS Form 990 Schedule B "Schedule of Contributors"[26] is robustly protected from disclosure outside the IRS. On this form, the nonprofit must submit to the IRS the "Name, address, and ZIP+4" of all "Contributors" over a certain threshold (generally those who contributed $5,000 or more in one fiscal year), their "Total contributions" for the year, and certain other information about the type of contribution.

As to nonprofit organizations other than private foundations or IRC section 527 political organizations, the General Instructions which accompany Schedule B state: "the names and addresses of contributors aren't required to be made available for public inspection."[27] For as many years as the filing of a Schedule B has been required by the IRS, no state with a charitable solicitation law requiring registration and reporting required an unredacted Schedule B, until changes in policy made recently by the Attorneys General of California and New

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[25] The IRS Form 990 Schedule B donor information is expressly exempted from the federal requirement that organizations must provide their IRS Forms 990 for public inspection. *See, e.g.*, IRS, "Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors' Identities Not Subject to Disclosure."

[26] This Schedule B form is required by federal law to be filed with the IRS by many nonprofit organizations that file IRS Form 990, 990-EZ, or 990-PF.

[27] *See* IRS Schedule of Contributors, https://www.irs.gov/pub/irs-pdf/f990ezb.pdf at 5.

York.[28] Contrary to the letter and spirit of the statutory scheme enacted by Congress in the Internal Revenue Code, California's requirement appears to violate federal law.

B. Federal Law Prohibits the Disclosure of Schedule B Donor Information Except as Lawfully Authorized.

The Internal Revenue Code establishes strict rules in IRC § 6103, protecting "returns" and tax "return information" (defined in IRC § 6103(b)(2) and (3)) from disclosure. IRC § 6103's statutory scheme has broad proscriptions against disclosing federal tax returns and tax return information, and specifically lists the circumstances under which such disclosure is permissible. IRC § 7213 prescribes harsh penalties for "willful[]" violation of IRC § 6103, which is a felony. Incoming IRS employees are trained to protect such tax return information from public disclosure — including to state officials. By law, state officials may have only very limited access to such tax returns, not on demand, but by making requests to the IRS, and providing sufficient justification for law enforcement purposes. *See* IRC § 6104(c)(2). There is no provision of federal law which sanctions the demands of the Attorney General to exempt

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[28] *See* Citizens United v. Schneiderman, U.S.C.A. 2nd Cir., No. 16-3310, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al*. (January 13, 2017).

organizations to provide these protected federal returns to state officials, penalizing those who choose to keep their donor information confidential.

These *amici* submit that the Attorney General is attempting an end-run around the strictures of IRC § 6103 by demanding tax return information indirectly from all public charities, when the Attorney General is not entitled to obtain directly from the IRS. A public charity's Form 990 Schedule B information constitutes a "return" under IRC § 6103(b)(1), and donors' identities and addresses constitute tax "return information" under IRC § 6103(b)(2). Such tax return information was required, collected, and filed for federal purposes, not to comply with any state requirement. And, in the absence of an actual, specific, and valid law-enforcement purpose, no Attorney General may obtain such information from the IRS, either under IRC § 6103 or under IRC § 6104.

Moreover, the Attorney General has not attempted to avail himself of access to these forms through the IRS — and for good reason. He would not be able to obtain this donor information under § 6103. Nor would the Schedule B information be available by resort to IRC § 6104, despite the fact that that section requires mandatory disclosure of certain tax items — including Form 990 information — because **§ 6104 expressly exempts Schedule B donor**

information from the reach of the statute. Not only is confidential donor information exempted from the provision requiring public disclosure of recent Forms 990, but such information is also beyond the reach of the States — except possibly for an investigation for cause.[29]

C. The Federal Statutory Scheme Protects the Records the Attorney General Demands.

Congress developed a comprehensive statutory scheme to protect confidential donor information set out in the Internal Revenue Code. IRC § 6104(b) governs disclosure of Form 990 information by the government:

> The information required to be furnished by sections 6033, 6034, and 6058, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe. **Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization** or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527) which is required to furnish such information.... [26 U.S.C. § 6104(b) (emphasis added).]

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[29] The Internal Revenue Code authorizes the California Attorney General to **request** the Schedules B from the IRS, but only pursuant to a specific investigation for cause, **subject to the approval** of the United States Secretary of the Treasury. *See* IRC § 6104(c)(2)(D). Absent such cause, there is no authority for the IRS to disclose donor information to State officials.

Although information about contributors in the hands of the IRS is protected by § 6104, the IRS has never been required or authorized to require donor information from nonprofit organizations filed on the IRS Form 990, and Congress is considering legislation to prohibit the IRS from continuing to do so.[30]

IRC § 6104(d) also governs disclosure of Form 990 information by the exempt organization itself:

> In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, paragraph (1) shall **not require the disclosure** of the **name or address of any contributor** to the organization. In the case of an organization described in section 501(d), paragraph (1) shall not require the disclosure of the copies referred to in section 6031(b) with respect to such organization. [26 U.S.C. § 6104(d)(3)(A) (emphasis added).]

It is in the face of those very clear provisions of the Internal Revenue Code and the statutory scheme they establish that the Attorney General has devised a method of circumventing the federal statutes by demanding the confidential information from the tax-exempt organizations themselves, as a prerequisite to conducting charitable solicitations in the State of California. This should not be allowed.

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[30] *See* H.R. 4916, "Preventing IRS Abuse and Protecting Free Speech Act."

D. The Attorney General's Demand Also Appears to Violate IRC § 7213(a)(4).

The Attorney General's requirement also appears to violate § 7213(a)(4) of the IRC, as the statute provides:

> It shall be unlawful for any person willfully **to offer** any **item of material value** in exchange for any **return** or return information (as defined in section 6103(b)) **and to receive** as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a **felony** punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution. [26 U.S.C. § 7213(a)(4) (emphasis added).]

Although no judicial decision on point has been identified, the actions of the Attorney General appear to violate § 7213. The Attorney General's approval of a charity's application, which is required to exercise the constitutional right[31] to solicit contributions in California, constitutes an "item of material value." By conditioning its permission in exchange for an organization's protected return information, the Attorney General's actions appear to fit squarely within that statute's prohibition.

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[31] *See* Riley v. National Federation of the Blind, 487 U.S. 781, 789 (1988) ("Our prior cases teach that the solicitation of charitable contributions is protected speech.…").

It is not an overstatement to view the demands of the Attorney General as a form of extortion — by conditioning permission to solicit funds (the lifeblood of any nonprofit organization and a constitutional right) upon "voluntary" disclosure of protected confidential federal tax return donor information. In so doing, the Attorney General is violating not only the protections for such return information crafted by Congress in enacting IRC § 6103, but also violating IRC § 7213(a)(4).

IV. CASES SANCTIONING COMPELLED REPORTING OF LARGE DONORS WITH RESPECT TO FEDERAL ELECTIONS DO NOT GOVERN COMPELLED REPORTING OF LARGE DONORS TO NONPROFIT ORGANIZATIONS.

The district court rejected the appellant's First Amendment claim, agreeing with the appellee that "there is a significant constitutional distinction between [i] requiring the reporting of funds that may be used to finance speech and [ii] the direct regulation of speech itself." Center for Competitive Politics v. Harris 2017 U.S. Dist. LEXIS 180557, *21 (E.D. CA.). In support of this distinction — which was intended to support the notion that compelled disclosure is not really as serious as regulating speech — the court contrasted two lines of U.S. Supreme Court cases. The court seemed to understand there were different lines of cases that should be applied in different circumstances and would reach

different results. However, in this case, the court improperly relied on election law cases. For the proposition that the government may require the reporting of funds used to finance speech, the court cited three cases: John Doe 1 v. Reed, 561 U.S. 186, 201-02 (2010); Citizens United v. FEC, 558 U.S. 310, 366-71 (2010); and Buckley v. Valeo, 424 U.S. 1 (1976). Unlike the present case, all of these cases approving disclosure were in the context of elections and campaign finance. As demonstrated below, these cases do not control here.

For the proposition that the government has no authority to regulate speech itself, the court cited two cases: Riley at 788-802, and McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 345-47, 357 (1995). The Riley case was not an election law case, much more like the CCP case, and in the McIntyre case, the Supreme Court clearly refused to apply campaign finance disclosure principles even in an election context not involving candidates, but involving pamphleteering.

Campaign finance cases are different from charitable solicitation cases in that they trigger a particular governmental interest thought compelling by the courts: preserving the reputation of government in the minds of the people through compelled disclosure, to avoid actual corruption or the appearance

thereof.[32] *See* Buckley at 26. That unique governmental interest is not present with respect to fundraising by charitable organizations, and campaign finance and election law cases should never be considered to be authority for compelling disclosure by nonprofit organizations outside that context. Not only is there no election involved in IFS' fundraising, there could not be, as organizations exempt from federal income taxation under IRC § 501(c)(3) are already prohibited from electioneering by federal law.

In one of the cases relied on by the district court, the Supreme Court refused to apply even the more lenient disclosure principles that operate in the campaign finance area to Mrs. McIntyre's handbills issued in the context of an election — but one that **did not** involve candidates.

> [C]omments [about disclosure requirements] concerned contributions to the candidate … or his responsible agent. They had no reference to the kind of independent activity pursued by Mrs. McIntyre. Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the **appearance of corruption that has no application to this case**…. Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests

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[32] In truth, this "corruption or the appearance thereof" rationale presents a weak "exception" to the freedoms of speech and press, as the purpose of these First Amendment liberties was to allow the people to criticize their government freely and without restriction, not to restrict debate to ensure that the government is well thought of by the people.

> on **different and less powerful state interests**.... In **candidate elections**, the Government can identify a **compelling** state interest in avoiding the **corruption** that might result from campaign expenditures. [McIntyre at 354, 356 (emphasis added).]

Thus, the Supreme Court made clear that courts must be clear which line of cases they are invoking. Disclosure may be required by the unique compelling state interest that is said to apply with respect to campaign finance, but that state interest does not support disclosure outside of the campaign and election area.

The district court relied heavily on prior decisions of this Court which badly confused these considerations, leading it to make that same mistake. This Court's previous decision in CCP v. Harris inappropriately applied campaign finance law to the area of charitable solicitation. *See* discussion in Petition for Initial Hearing *En Banc* at 11-12. And the Ninth Circuit's decision in AFPF in part relied on cases drawn from the world of campaign finance disclosure law which are wholly irrelevant here.[33] AFPF v. Harris, 809 F.3d 536, 540-41 (9th Cir. 2015). These errors provide a sufficient reason for this Court to reach a conclusion different from the prior panels. Thus, the Petition for Initial Hearing

[33] *See* the panel's references to Brown v. Socialist Workers, 459 U.S. 87 (1982), Chula Vista v. Norris, 782 F.3d 520 (9th Cir. 2015) (a ballot measure case decided by application of campaign finance authorities), and Human Life of Washington v. Brumsickle, 624 F.3d 990 (9th Cir. 2010).

En Banc should be granted to enable this Court to correct mistakes made in CCP and AFPF.

CONCLUSION

For the foregoing reasons, the Petition for Initial Hearing *En Banc* should be granted and the decision of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al*. in Support of Plaintiff-Appellant and Reversal complies with the word limitation set forth by Fed. R. App. P. 29(a)(5) because this brief contains 5,995 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point CG Times.

/s/ Herbert W. Titus

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Dated: March 16, 2018

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.*, in Support of Plaintiff-Appellant and Reversal, was made, this 16th day of March 2018, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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