Nos. 19-251 & 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION AND THOMAS MORE LAW CENTER, *Petitioners*,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal aid organization, exempt under IRC section 501(c)(3). *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. These *amici* challenged New York's demand that each group file an unredacted Schedule B. *See* Citizens United v. Schneiderman, 882 F.3d 274 (2d Cir. 2018). Additionally, these *amici* have filed numerous *amicus* briefs in this and other related cases, including:

- AFPF v. Becerra, Nos. 16-55727 & 16-55786, 9th Cir., Brief *Amicus Curiae* in Support of Plaintiff-Appellee and Affirmance (Jan. 27, 2017);
- AFPF v. Becerra, Nos. 16-55727 & 16-55786, 9th Cir., Brief *Amicus Curiae* in Support of Petition for Rehearing *En Banc* (Oct. 5, 2018); and
- AFPF v. Becerra, Nos. 19-251 & 19-255, U.S. Supreme Court, Brief *Amicus Curiae* in Support of Petitioners (Sept. 25, 2019).

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[1] It is hereby certified that counsel for all parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Petitioners First Amendment challenge to California's compelled disclosure of the names, addresses, and contributions of their largest contributors invoked associational rights and anonymity principles. The Ninth Circuit understood this Court's landmark decision in NAACP v. Alabama, to have no application unless Petitioners suffered the exact type of harassment and retaliation suffered by NAACP members. The Ninth Circuit ignored the harassment suffered by Petitioners, ignored all the similarities between the two cases, and confined the NAACP decision to its facts. The First Amendment and Due Process Clause of the Fourteenth Amendment provide strong textual support for anonymous advocacy and anonymous publishing, including mailings, and since the Framers utilized anonymous speech in founding our Republic, the anonymity of today's political activists should be likewise respected.

The interest balancing test adopted by the Ninth Circuit allowed that court to elevate its will over the constitutional text in an area where the People already did the interest balancing in adopting their Constitution.

Federal law shields donor information while providing a method for state officials to obtain a nonprofit's unredacted Schedule B – a federal tax return. California attempts both to circumvent federal secrecy statutes, and condition the exercise of a constitutional right on yielding a federal protection — a demand which itself may violate federal law.

ARGUMENT

I. THE CIRCUIT COURT'S OPINION MISAPPLIES THE RULE ESTABLISHED BY THIS COURT IN NAACP V. ALABAMA.

A. The NAACP Decision Protects Associational Anonymity, Not Just the NAACP.

Sixty-three years ago, in what is widely viewed as a landmark decision, this Court unanimously protected the list of members of and contributors to a nonprofit organization, the NAACP, from the prying eyes of a state Attorney General. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). In an opinion written by Justice John Marshall Harlan II, this Court rejected Alabama's demand that the NAACP turn over its membership and donor list to a State official as a condition of doing business in the State and concluded that such a condition violated the Due Process clause of the Fourteenth Amendment.

The Ninth Circuit refused to apply the rule of anonymity laid down in NAACP, viewing the anonymity protection as one which could be readily overcome by a government assertion of a need for the information. That is not the nature of the anonymity principle laid down in NAACP. Consider how the NAACP Court described the associational freedom in the strongest of terms.

- "Effective advocacy of both public and private points of view, particularly **controversial**

ones, is undeniably **enhanced by group association**, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *Id.* at 460 (emphasis added).

- "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the '**liberty**' assured by the **Due Process Clause** of the Fourteenth Amendment, which embraces freedom of speech." *Id.* (emphasis added).

- "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that **abridgment** of such rights, even though unintended, may inevitably **follow** from varied forms of **governmental action**." *Id.* at 461 (emphasis added).

- "**[C]ompelled 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 [prior cases] were thought likely to produce upon the particular constitutional rights there involved." *Id.* (emphasis added).

- "**Compelled disclosure** of membership in an organization engaged in advocacy of particular beliefs is of the same order [as requiring adherents of particular religious faiths or

> political parties to **wear armbands**.]" *Id*. at 462.

Justice Harlan wrapped up his observations about the threat that compelled disclosure presents to controversial organizations with a rousing defense of the role of voluntary associations in our Constitutional Republic:

> 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**. [*Id*. at 462 (emphasis added).]

The Ninth Circuit seemed to believe that AFPF[2] could not assert anonymity protection unless it could show that in the past its members and donors had suffered the same type of harassment and retaliation previously suffered by the members and donors of NAACP. To be sure, there were occasions in Justice Harlan's opinion where he focused attention on the record of harassment (and worse) that had been suffered by NAACP members as supporting the need to protect its membership and donor list, including the following:

> We think that the production order ... must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom

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[2] For ease of reference, these *amici* refer to the AFPF and Thomas More cases jointly as "AFPF."

> of association. Petitioner has made an uncontroverted showing that on **past occasions** revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that **compelled disclosure** of petitioner's Alabama membership is **likely to affect adversely** the ability of petitioner and its members to pursue their **collective effort** to foster beliefs which they admittedly have the right to advocate, in that it **may induce members to withdraw** from the Association and dissuade others from joining it because of **fear of exposure** of their beliefs shown through their associations and of the consequences of this exposure. [*Id.* at 462-63 (emphasis added).]

First, it should be noted that AFPF did make a strong showing of harassment and threats, but it was dismissed with a wave of the Ninth Circuit's collective hand as not showing disclosure would "'**actually** and **meaningfully** deter contributors.'"[3] AFPF at 1014. Yet those same facts were viewed quite differently by District Court Judge Real, who heard the evidence presented during a bench trial and found the threat substantial:

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[3] Contrast that test to the NAACP test: whether disclosure "**may** induce members to withdraw."

> [A]lthough the Attorney General correctly points out that such abuses are not as violent or pervasive as those encountered in *NAACP v. Alabama* or other cases from that era, **this Court is not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members**. [AFPF v. Harris, 182 F. Supp. 3d 1049, 1056 (C.D.CA. 2016) (emphasis added).]

Second, the Ninth Circuit's effort to confine the rule of NAACP to the precise facts of that earlier case is similar to the argument made by some opponents of the Second Amendment that District of Columbia v. Heller, 554 U.S. 570 (2008) should be read to protect only the right of an American to own one handgun which must be kept in the home. If constitutional rulings are narrowly confined to their facts, then the principles articulated in this Court's decisions can be ignored at will by the lower courts. If adopted, that approach will require this Court to vastly increase its docket so that every factual permutation of every constitutional principle can be litigated and resolved only by this Court.

B. The Facts of AFPF Are Remarkably Similar to the Facts of NAACP.

In truth, each of Justice Harlan's statements of constitutional principle set out in Subsection I.A, *supra*, that applied to protect NAACP members and donors also should be applied to protect Petitioners. Indeed, the key facts of the NAACP case are quite similar to the AFPF case:

In NAACP, an Alabama statute required a foreign corporation to provide donor and member information before qualifying to do business. *See* NAACP at 464. In AFPF, a California rule requires foreign and domestic nonprofit corporations to reveal donor information before being allowed to send mail into California to solicit contributions. *See* AFPF at 1004.

In NAACP, Alabama sought the list of "members" and "agents" of the Association not for public disclosure, but for Alabama's use in "adequate preparation for the hearing" on a demurrer submitted by the NAACP. NAACP at 453. In AFPF, despite the previous negligent public dissemination of information about many donors, the Attorney General assures nonprofits that its filings will not be made public "except in very limited circumstances." AFPF at 1004.

To obscure the similarities between the cases as to harassment suffered by members and donors, the Ninth Circuit used a rather deceptive approach. Rather than looking directly to the facts set out in the NAACP decision, the Ninth Circuit relied on the Second Circuit's opinion in Citizens United v. Schneiderman, 882 F.3d 374 (2018), which described the facts in the NAACP case as follows:

> In *NAACP*, the Court was presented . . . with "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed those members to economic reprisal, loss of employment, [and] threat of physical coercion," and it was well known at the time that civil rights activists in

> Alabama and elsewhere had been **beaten** and/or **killed**. [AFPF at 1014, n.5 (emphasis added).]

A review of the NAACP decision shows that neither "beaten" nor "killed" appear in the text. Inclusion of those claims of extreme violence first helped the Second Circuit, and now helped the Ninth Circuit, find the nonprofit's claims of harassment insufficient when compared to the fabricated facts read into NAACP. In fact, the Schneiderman decision then went on to place a distinctly modern "woke" spin on the facts of NAACP.

> NAACP members **rightly feared** violent retaliation from **white supremacists** for their membership in an organization then actively fighting to overthrow Jim Crow. *Id*. Ample evidence of past retaliation and threats had been presented to the Court. Requiring the NAACP to turn over its member list to **a state government that would very likely make that information available to violent white supremacist organizations**, the Court concluded, would reasonably **prevent at least some of those members** from engaging in further speech and/or association. *Id*. at 462-63. Such chilling of expression is repugnant to the First Amendment. It can only be justified when the state's interest outweighs the harm to expression and association interests, as Alabama's did not. *Id*. at 463-66. [Schneiderman at 381 (emphasis added).]

In cloaking the rule of the NAACP case in the modern terminology of "white supremacy" — again using words that appear nowhere in the NAACP decision — the Second Circuit, and now the Ninth Circuit, found it much easier to conclude that the NAACP decision had created a narrow rule designed to protect only civil rights organizations threatened by violent "white supremacist" organizations suffering "beatings" and "killings."

On the other hand, where convenient, the Ninth Circuit disregarded Schneiderman. The Second Circuit statement quoted above indicates that under the NAACP decision, all that would be required is that the threats would "prevent **at least some** of those members" from continuing their association. Schneiderman at 381. But the Ninth Circuit refused to protect AFPF even though it found "the plaintiffs' evidence shows that ***some* individuals** who have or would support the plaintiffs *may* be deterred from contributing..." AFPF at 1014 (bold added).

C. The NAACP Decision Should Not Be Read to Require Every Nonprofit to Show Harassment and Retaliation.

To be sure, some of this Court's decisions have focused on the degree of harm that would be suffered by those whose identities were revealed by compelled disclosure.[4] However, the constitutional principle of

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[4] *See, e.g.*, campaign finance cases Buckley v. Valeo, 424 U.S. 1 (1976); Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982). *See* section I.D., *infra*.

associational anonymity should protect Americans even if they could not demonstrate to a judicial tribunal the full nature and extent of the threat of retaliation they fear. The principle of non-disclosure applies with or without such a showing. In 1995, Justice Thomas presented a lengthy review of the view of the Framers about anonymous political action, and there was no indication that they believed that anonymity only applied when harm could be shown:

> There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of "Publius," are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution. Of course, the simple fact that the Framers engaged in certain conduct does not necessarily prove that they forbade its prohibition by the government. See *post*, at 373 (Scalia, J., dissenting). In this case, however, the historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the "freedom of the press." [McIntyre v. Ohio Elections Commission, 514 U.S. 334, 360-61 (1995) (Thomas, J., concurring).]

To be sure, Justice Thomas's analysis was grounded in freedom of the press, but those nonprofits which publish their positions in letters and mail them to California with requests for contributions are

triggering the press freedom as much as associational freedom. Madison, Hamilton, and Jay were not required to demonstrate that harm would have come to them before publishing the Federalist Papers anonymously. The same is true for many of the illustrations Justice Thomas provides in his McIntyre concurrence. This case provides the opportunity for this Court to breathe new life into its NAACP landmark case, and to show that it applies without the need to show specific harm, and applies regardless of race-based considerations as to the parties involved.

D. The Reasons to Disregard the Associational Rights Protected by NAACP v. Alabama in Campaign Finance Cases Are Not Present Here.

Two decades after NAACP v. Alabama, this Court found that despite that decision, the need for public disclosure of donors to federal elections would generally override the constitutional protections. *See* Buckley v. Valeo at 64 (1976). In Buckley, this Court took pains to explain that a different rule applied to elections, where there was a vital need to provide "the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." *Id*. at 66-67. Even in that special case of elections — where the perceived need for disclosure completely overtook anonymity principles — it allowed for cases where certain minor parties could be exempted from those requirements. *Id*. at 72. The standard of harassment set in Buckley, where anonymity was completely supplanted by the

perceived need for plenary disclosure, is quite different from any standard of harassment that California may contends the NAACP decision created — where associational anonymity is the rule — not disclosure.[5]

E. This Court Should Follow Justice Thomas's Lead in His Robust Protection of Associational Rights, and Not Rely on Doe v. Reed.

Associational rights were given short shrift by this Court in Doe v. Reed, 561 U.S. 186 (2010), in striking down a challenge to the Washington Public Records Act.[6] There, a Washington State referendum challenged a state law giving certain benefits to same-sex couples, leading to a hotly contested battle. This Court elected to treat the challenge to disclosure of those who signed the petition for that referendum as a facial challenge, and refused to protect petition signers generally on the theory that public disclosure of their identities was substantially related to preserving the integrity of the electoral process. The rationale for the decision is complicated by the fact that there were five concurring opinions. Four of the Justices in the eight-person majority are no longer on the Court, and a fresh look at the issue needs to be taken — especially due to the change in the political climate over the past 11 years.

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[5] In making this argument, these *amici* are not indicating agreement with the Buckley Court's decision on disclosure.

[6] *Amicus* Citizens United filed an amicus brief in Doe v. Reed (March 4, 2010).

Justice Thomas's dissent focused on the reason for associational freedom under the First Amendment, and concluded:

> **compelled disclosure** of signed referendum and initiative petition under the Washington Public Records Act (PRA) ... **severely burdens** those rights and **chills** citizen **participation in the referendum process**. Given those burdens, I would hold that Washington's decision to subject all referendum petitions to public disclosure is unconstitutional because there will always be a less restrictive means by which Washington can vindicate its stated interest in preserving the integrity of its referendum process. [*Id*. at 228-29 (emphasis added).]

Justice Thomas distinguished cases involving elections "because '[r]eferenda are held on issues, not candidates for public office,' the 'risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.'" *Id*. at 233 (citation omitted).

Justice Thomas rejected the argument that disclosure could occasionally have a benefit: "We should not abandon those principles merely because Washington and its *amici* can point to a mere eight instances of initiative-related fraud...." *Id*. Here, Petitioner AFPF has explained that the Attorney General of California has almost never actually used the unredacted Schedules B that he claims to be essential to policing charitable fraud. AFPF Pet. Br.

at 13-14. These *amici* urge that such a tiny government "benefit" must not be seen to override First Amendment protected anonymity. As Justice Thomas concluded in Doe: "If anything, these meager figures reinforce the conclusion that the risks of fraud or corruption in the initiative and referendum process are remote and thereby undermine Washington's claim that those two interests should be considered compelling for purposes of strict scrutiny." Doe v. Reed at 234.

Lastly, Justice Thomas explained why restricting the First Amendment associational protection to those who have made a specific showing of harm would present: "[s]ignificant practical problems." *Id*. at 241. No donor to a nonprofit organization should be compelled to guess whether the current "cancel culture" will target a particular organization, and then target donors to that particular organization. Such a rule would not prevent the chilling effect on those wanting to make contributions to like-minded organizations.

> the state of technology today creates **at least *some* probability** that signers of every referendum will be subjected to **threats, harassment, or reprisals** if their personal information is disclosed. "'[T]he advent of the Internet' enables" rapid dissemination of "'the information needed' to" threaten or harass every referendum signer.... "Thus, 'disclosure permits citizens ... to react to the speech of [their political opponents] in a proper' — or undeniably improper — 'way' long before a

> plaintiff could prevail on an as-applied challenge." [*Id*. at 242-43 (bold added).]

What may have been described as "*some* probability" in 2010 has now become a virtual certainty — at least for conservative and constitutionally minded organizations. *See generally* Alan Dershowitz, Cancel Culture: The Latest Attack on Free Speech and Due Process (Hot Books: 2020); Andy Ngo, Unmasked: Inside Antifa's Radical Plan to Destroy Democracy (Center Street: 2021).[7]

Even if the Court were not to reconsider Doe v. Reed, it should not be applied here, where there is no "public disclosure" justification. This case presents this Court with the opportunity to breathe new life into the anonymity principle.

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[7] In his dissent from denial of a Petition for Writ of Certiorari in Delaware Strong Families v. Matthew Denn, Attorney General of Delaware, 136 S.Ct. 2376 (2016), Justice Thomas urged "it is time for the Court to reconsider whether a State's interest in an informed electorate can ever justify the disclosure of otherwise anonymous donor rolls." *Id*. at 2377.

II. THE NINTH CIRCUIT'S EXCLUSIVE FOCUS ON INTEREST BALANCING CAUSED IT TO IGNORE THE FIRST AMENDMENT ANONYMITY PRINCIPLES.

A. The Ninth Circuit's Opinion Focused on the Application of an Interest Balancing Test.

The issues presented to this Court by Petitioners focus on whether the Ninth Circuit chose the correct interest balancing test. AFPF asserts that "While the Court's compelled-disclosure decisions have used various formulations to describe the constitutional test, that test has always remained in substance a form of either strict or at the very least 'exacting scrutiny.'" AFPF Pet. Br. at 23. Thomas More argued that strict scrutiny should apply, but argued that California's demand for unredacted Schedules B "is unconstitutional under either standard of scrutiny." TMLC Pet. Br. at 33. Both petitioners primarily challenge the Ninth Circuit's opinion based on its choice and application of an interest balancing test. These *amici* urge the Court to focus on "text, history and tradition" to reach a proper understanding of First Amendment protections.

The Ninth Circuit refused to apply strict scrutiny to resolve its challenge to the donor disclosure requirement, choosing rather to apply exacting scrutiny. Indeed, that threshold choice of test, as it often does in such challenges, became outcome determinative. Here, the Ninth Circuit barely mentioned strict scrutiny in its opinion, to say nothing

of evaluating its use, other than asserting that this Court's decision in Citizens United v. FEC, 558 U.S. 310 (2010) precluded its use:

> To the extent the plaintiffs ask us to apply the kind of "narrow tailoring" traditionally required in the context of **strict scrutiny**, or to require the state to choose the least restrictive means of accomplishing its purposes, they are mistaken. [AFPF v. Becerra, 903 F.3d 1000, 1008 (9th Cir.) (emphasis added).]

That was it. Exacting scrutiny was to be applied based on perceived controlling or persuasive precedents. The circuit court's opinion contains not one shred of analysis of the First Amendment's text, what government evil it was designed to prevent, its historical context, or the early tradition as to how it was understood. Along the way, the Ninth Circuit rejected every factual finding made by the district court[8] after a hearing, declaring that California easily cleared that bar of exacting scrutiny. AFPF was a pure "interest balancing" decision, applying malleable terms that were invented by judges without common law antecedents or objective meaning, as summarized below.

1. Plaintiff's challenge was based on the First Amendment's right to free association "by deterring individuals from making contributions." *Id*. at 1004.

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[8] *See* AFPF Pet. Br. at 16.

2. The California Attorney General's Schedule B requirement "survives exacting scrutiny as applied to the plaintiffs because it is **substantially related to an important state interest** in policing charitable fraud." *Id*. (emphasis added).

3. The District Court's factual findings made at the conclusion of a bench trial were all in error, and its observations of the witnesses' testimony were all faulty, including that the Attorney General: (a) had failed to prove that the need for the donor information was substantially related to an important governmental interest; (b) had no need for the information, having access to it from other sources; (c) did not actually use the information; and (d) had not adequately safeguarded the information. The District Court's finding that those associated with plaintiff had suffered harassment and threats, were also in error. *Id*. at 1007.

4. The Court found a "**substantial relation**" between the disclosure requirement and the governmental interest — refusing to use either **narrow tailoring** or the **least restrictive means** test. The district court's "**no 'more burdensome than necessary**'" test was deemed too strict. *Id*. at 1008, 1011 (emphasis added).

5. Disclosure serves a **compelling law enforcement interest** to determine if a charity is actually engaging in a charitable purpose, or violating California law. *Id*. at 1009.

6. The risk of inadvertent public disclosure was small, and nothing involving the Internet is perfect. *Id*. at 1018-19.

Based on that mechanistic interest balancing analysis, well-established First Amendment principles of anonymity were disregarded, allowing donor disclosure to be mandated. There must be a better way to evaluate constitutional challenges.

B. Judicial Interest Balancing Allows Judges to Elevate Their Will over Constitutional Text.

Judicial interest balancing has become so commonplace in assessing constitutional challenges that it lulls one into the false sense that the Constitution is being faithfully applied through use of such tests. However, increasingly, this Court has been expressing its dissatisfaction with interest balancing in a variety of contexts.

At oral argument in District of Columbia v. Heller, 554 U.S. 570 (2008), Chief Justice Roberts questioned the Solicitor General's contention that the Court should use intermediate scrutiny rather than strict scrutiny for considering encroachments on Second Amendment protected rights:

> [T]hese various phrases under the **different standards** that are proposed, "compelling interest," "significant interest," "narrowly tailored," **none of them appear in the Constitution**.... Isn't it enough to determine

> the scope of the existing right that the amendment refers to ... and determine ... how this restriction and the scope of this right looks in relation to [it].... I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of **baggage that the First Amendment picked up**. [Transcript of Oral Argument, p. 44, District of Columbia v. Heller, No. 07-290 (Mar. 18, 2008) (emphasis added).]

In questioning why one of these atextual balancing tests had to be chosen to understand the scope of the Second Amendment, Justice Roberts implicitly questioned whether an interest balancing test is the best way for the Court to decide a constitutional challenge under the First Amendment as well. Finally, a U.S. Supreme Court Justice had the temerity to point out that the Emperor had no clothes.

The court's opinion in Heller expanded on Justice Roberts' theme, revealing the weaknesses of interest balancing. Justice Scalia correctly described these tests as leading to a "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id*. at 634 (emphasis added). In using the term "judge-empowering," Justice Scalia exposed why modern judges love interest balancing — such tests allow them

to substitute their own will[9] for the original public meaning[10] of the words selected by the Framers. It empowers judges to reassess the importance of the constitutional protection. Yet, as Justice Scalia explained: "[t]he very enumeration of the right takes **out of the hands of government** — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id*. (bold added). Thus, the judicial interest balancing used by the Ninth Circuit allowed that court to avoid a search for the meaning of the text. But interest balancing is completely unnecessary because, "Like the First [Amendment, the Second] ... is the very *product* of an interest balancing **by the people....**" *Id*. at 635 (bold added). It is also dangerous, as it allows judges to decide cases based on what interests they think are most important.

A decade ago, then-Judge Kavanaugh identified the proper method of constitutional analysis as a search for what then-Judge Kavanaugh termed the

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[9] As Alexander Hamilton cautioned: "The courts must declare the sense of the law" and not "be disposed exercise WILL instead of JUDGMENT." A. Hamilton, Federalist No. 78, G. Carey & J. McClellan, The Federalist at 405 (Liberty Fund: 2001).

[10] "We have long recognized that the meaning of the Constitution 'must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions ... in the several states.'" McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) (Thomas, J., concurring in the judgment). *See also generally* A. Scalia, "Originalism: The Lesser Evil," 57 U. CIN. L. REV. 849 (1989).

"text, history, and tradition"[11] of the constitutional provision. These *amici* urge the Court to use this case to rid the First Amendment of the "baggage" referred to by Chief Justice Roberts, and adopt a search for the "original public meaning" of the text. There is not a shred of this type of analysis in the Ninth Circuit's opinion.

In his treatise on American Constitutional Law, Professor Lawrence Tribe revisited the:

> recurring debate in first amendment jurisprudence ... whether first amendment rights are "absolute" in the sense that government may "abridge" them at all, or whether the first amendment requires the "balancing" of competing interests in the sense that free speech values and the government's competing justifications must be isolated and weighed in each case. [L. Tribe, American Constitutional Law, §12-2, p. 792 (2d ed. 1988).]

Professor Tribe further observed:

> The "absolutists" may very well have been right ... that their approach was better calculated to protect freedoms of expression.... If the judicial branch is to protect dissenters from a majority's tyranny, it cannot be satisfied with a process of review that requires

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[11] *See* Heller v. District of Columbia, 670 F.3d 1244, 1271 (2011) (Kavanaugh, J., concurring).

> a court to assess after each incident a myriad of facts, to guess at the risks created by expressive conduct, and assign a specific value to the hard-to-measure worth of particular instances of free expression. [*Id.* at 793.]

Although Professor Tribe seems to favor both absolutists and interest balancing, he recognizes that the "absolutists" offer a surer foundation for First Amendment freedoms:

> [C]ategorical rules, by drawing clear lines, are usually less open to manipulation because they leave less room for the prejudices of the factfinder.... Categorical rules thus tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties. The balancing approach is contrastingly a slippery slope; once an issue is seen as a matter of degree, first amendment protections become especially reliant on the sympathetic administration of the law. [*Id.* at 793-94.]

These balancing tests have invaded, for example, the free exercise of religion[12] and the freedom of

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[12] *See, e.g.,* Sherbert v. Verner, 374 U.S. 398 (1963). (The compelling interest test, as applied to the free exercise guarantee standing alone, was rejected in Employment Division v. Smith, 494 U.S. 872 (1990).)

speech.[13] By the beginning of the 21st century, this Court's constitutional jurisprudence was steeped in balancing formulas, sociological studies, economic models, and other nonconstitutional sources. *See, e.g.,* McConnell v. FEC, 540 U.S. 93 (2003); *see also* Citizens United at 332 ("[The] inquiry into the facial validity of the statute was facilitated by the extensive record, which was 'over 100,000 pages' long...."). This interest-balancing approach allows judges to disregard the constitutional rights of citizens if the government persuasively asserts that it "needs" greater power over its citizens. This approach must end.

C. Interest Balancing Tests Call into Question the Court's Authority to Undertake Judicial Review.

If the Courts are not in a search for the original public meaning of the Constitution to apply, it raises the question: what is the source of their authority to resolve constitutional cases? The very foundation for judicial review of a statute, federal or state, under the U.S. Constitution, is that "courts, as well other departments, are bound by that instrument." Marbury v. Madison, 5 U.S. 137, 180 (1803). Thus, in exercising its "province and duty ... to say what the law is" (*id.* at 177), the judiciary must be careful not to adopt rules of interpretation that allow judges to stray from the constitutional text, and thus substitute its own will for that of the people, who alone have the sovereign power to lay down the binding rules upon those authorized to

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[13] *See, e.g.,* Buckley v. Valeo, 424 U.S. 1 (1976).

govern. *See id.* at 176-78. Yet, that is precisely what courts have done with interest-balancing standards of review in First Amendment cases.

In the exercise of their sovereignty, the people of the United States have laid down the principled rule for the First Amendment that "Congress shall make no law." U.S. Constitution, Amendment I. In the exercise of their respective powers, it is not for any branch of government to place countervailing government interests over enumerated rights, whether compelling, substantial, or otherwise. Indeed, if a governmental interest is so compelling, then the only way for those who support that interest to impose it on their fellow citizens is by following the amendment process of Article V of the U.S. Constitution. If this super-majoritarian process may be bypassed by the judicial fiat of five justices of the United States Supreme Court, then the "written constitution[] [is an] absurd attempt[], on the part of the people, to limit a power, in its own nature illimitable." Marbury at 177.

Strict scrutiny and exacting scrutiny are judicially created tests, finding no predicate in the constitutional text. Instead, these tests share a common historical antecedent in Korematsu v. United States, 323 U.S. 214 (1944), where this Court applied "the most rigid scrutiny" (*id.* at 216) to reach a decision which "was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — 'has no place in law under the Constitution.'" Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

III. CALIFORNIA CANNOT CONDITION CHARITIES' EXERCISE OF FIRST AMENDMENT RIGHTS ON THEIR WAIVER OF FEDERAL TAX RETURN PROTECTIONS.

The Ninth Circuit's decision explained that "[t]he IRS and the California Attorney General both make certain filings of tax-exempt organizations publicly available but exclude Schedule B information from public inspection. *See* 26 U.S.C. § 6104; Cal Gov't Code § 12590; Cal. Code Regs. tit. 11, § 310." AFPF at 1005. Despite the Ninth Circuit's recognition of one aspect of federal law applicable to the Schedule B, it failed to fully recognize another aspect particularly applicable that could have affected its conclusions.

Congress provided not only for protection of certain confidential information, but also provided a procedure for state law enforcement agencies such as Respondent to request the confidential information from the IRS if certain requirements are met. Regardless of whether that particular procedure comports with the Fourth Amendment, Respondent's demand for the charities to turn over the confidential Schedule B forces charities to waive the procedural protections established by Congress in exchange for the "privilege" to exercise their First Amendment rights in the state of California.

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

The IRS Form 990 is a federal tax return. Tax exempt organizations that file them with the IRS are generally required to make a copy publicly available upon request. However, the specific tax return information required by the Attorney General — confidential donor information at issue in this case — is the exception to the federal rule requiring public disclosure.[14] Indeed, the IRS Form 990 Schedule B "Schedule of Contributors"[15] 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

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[14] 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, "Exempt Organization Public Disclosure and Availability Requirements," https://www.irs.gov/charities-non-profits/exempt-organization-public-disclosure-and-availability-requirements.

[15] This Schedule B form is required by federal law to be filed with the IRS by many 501(c)(3) nonprofit organizations that file IRS Forms 990, 990-EZ, or 990-PF.

state: "the names and addresses of contributors aren't required to be made available for public inspection."[16] 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 mandated filing an unredacted Schedule B, until demands began several years ago by the Attorney General of California and the Attorney General of New York.[17] Contrary to the letter and spirit of the statutory scheme enacted by Congress in the Internal Revenue Code, these demands seek to circumvent federal law.

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

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 —

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[16] *See* https://www.irs.gov/pub/irs-pdf/f990ezb.pdf at 5.

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

including to state officials. Under federal law, state officials may have limited access to such tax returns, but only in particular cases through formal requests made to the IRS, 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 taxpayers to provide these federal tax returns to state officials and penalize 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 from public charities what 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 valid law-enforcement purpose, no Attorney General may obtain such information directly from the IRS, either under IRC § 6103 or under IRC § 6104.

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 donor information for all nonprofit under § 6103. Nor would the Schedule B information be available by resort to IRC § 6104, despite the fact that § 6104 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 also such information is beyond the reach of the states — except for an investigation for cause.[18]

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

Clearly, then, the Form 990 Schedule B information (setting forth the names and addresses of contributors) not only is not required to be publicly disclosed by the exempt organizations, but also is required to be kept confidential by the IRS. Indeed, IRC § 6103 underscores the fact that return information is confidential.

The intent of Congress in developing its statutory scheme to protect confidential donor information is expressly revealed by two IRC sections. IRC § 6104(b) governs disclosure of Form 990 information by the government:

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[18] 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 Treasury. *See* IRC § 6104(c)(2)(D). In the absence of a showing of appropriate cause, there is no authority for the IRS to disclose donor information to State officials.

> 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).]

And IRC § 6104(d) 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 that the Attorney General 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. The Attorney General's demand for confidential donor information violates the carefully constructed statutory scheme set forth in the Internal Revenue Code.

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

The Attorney General's action appears to also 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 fall within the prohibition of the statute. Certainly, it would be easy for a federal prosecutor to argue that the Attorney General's approval of a charity's application, which is required as a precondition to the exercise of the First Amendment right to engage in charitable solicitations in California, constitutes an

"item of material value." By holding out its permission in exchange for an organization's return information, the Attorney General's actions appear to fit squarely within that statute's prohibition.

It is not an overstatement to view the demands of the Attorney General as a form of government extortion — conditioning state permission to solicit funds (the lifeblood of any organization) upon "voluntary" disclosure of federally protected confidential donor information. In so doing, the Attorney General is violating the protections for such return information crafted by Congress in enacting IRC § 6103 and, moreover, appears to be in specific violation of IRC § 7213(a)(4).

E. Charities Cannot Be Forced to Waive Federal Protections in Order to Engage in First Amendment Activity.

When Congress provided procedures for state law enforcement to have access to confidential federal tax information, it struck a balance between the need for law enforcement and the right of confidentiality in that information. The Congressional scheme requires some reason for state law enforcement to make the request, but the California Attorney General's demand for Schedule B directly from the charities it requires to register forces them to make a choice: forfeit the protections in tax law for theirs and their donors' information, or forfeit their First Amendment freedoms. This is not a choice that the California Attorney General should be allowed to impose on charities.

CONCLUSION

These *amici* urge the Court to reverse and remand with instructions to enter a permanent injunction against enforcement of the Attorney General's policy and regulations requiring filing of unredacted Schedules B.

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