No. 15-152

In The Supreme Court of the United States

CENTER FOR COMPETITIVE POLITICS,

Petitioner,

v.

KAMALA D. HARRIS,
ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and by restoring constitutional limits on the power of government. As part of that mission, the Institute litigates free-speech cases nationwide in order to defend the free exchange of a wide array of ideas, including speech about political issues. The Institute exists due to the generosity of its donors, some of whom expect the Institute to protect their privacy from unnecessary disclosure. The Institute is filing this *amicus* brief in support of Petitioner because this case offers an important opportunity for the Court to address the government's aggressive intrusion into charitable solicitation and the courts' inappropriate and unjustified application of campaign-finance law to peaceful speech and association unrelated to an election.

SUMMARY OF THE ARGUMENT

Respondent Attorney General of California has commanded that a private organization turn over a

[1] No party counsel authored any of this brief, and no party, party counsel, or person other than *Amicus* or its counsel paid for brief preparation and submission. The parties consented to the filing of this brief, and counsel for *Amicus Curiae* timely notified counsel for the parties of the intention of *Amicus Curiae* to file this brief.

list of its supporters to the government as a condition of its engaging in charitable fundraising, an activity that this Court has repeatedly held is entitled to the highest level of First Amendment protection. There is no evidence or even suggestion that the organization, Petitioner Center for Competitive Politics (CCP), a 501(c)(3) charitable organization, has engaged in any illegal activity. Nor is there any evidence that this compelled disclosure is necessary for the Attorney General to enforce California's legitimate regulations of charities; indeed, with the exception of Florida and New York, no other state in the nation compels charities like CCP to turn this private information over to the government.[2] Instead, when other states want this information, they go through ordinary constitutional channels by seeking a warrant.

Despite the experience of the 47 states that successfully regulate charitable solicitation without demanding unfettered access to the private details of charities' associations with their donors, the Ninth Circuit upheld the Attorney General's sweeping intrusion into CCP's private association with its donors. In doing so, the Ninth Circuit ignored wide swaths of this Court's precedent, creating multiple conflicts with this Court and other circuits that merit this Court's review. First, in conflict with this Court's repeated recognition that compelled disclosure of one's private associations is necessarily chilling, the

[2] *See* Br. *Amicus Curia* Charles M. Watkins Supp. Appellant 7 n.2 (9th Cir. filed June 19, 2014).

Ninth Circuit held that such disclosure is chilling only if one can produce evidence that the disclosure will lead to harassment or reprisal. Second, in conflict with decisions of this Court and other circuits holding that burdens on charitable solicitation are subject to strict scrutiny, the Ninth Circuit reviewed those burdens with only intermediate scrutiny.

Beyond these conflicts with this Court's precedent, the Ninth Circuit's ruling also dangerously expands the scope of this Court's campaign-finance-disclosure jurisprudence beyond its traditional limits to encompass other protected speech. If left uncorrected, the Ninth Circuit's ruling threatens not only to chill people throughout that circuit from engaging in protected charitable association but also to stifle other areas of protected First Amendment activity.

ARGUMENT

The Ninth Circuit's decision here creates conflicts with and exacerbates confusion regarding two core doctrines of First Amendment jurisprudence. First, as explained in Section I, the decision conflicts with repeated admonitions by this Court that compelled disclosure of private associations necessarily chills those relationships. Second, as explained in Section II, the decision conflicts with the decisions of this Court and other circuits holding that burdens on charitable solicitation are subject to strict scrutiny. Because of this ruling, citizens in certain parts of the country now have lesser rights than those in other

parts. Finally, as explained in Section III, these two errors are the result of the Ninth Circuit's inappropriate and unjustified expansion of certain elements of this Court's campaign-finance jurisprudence into other areas of protected First Amendment activity. This Court should grant certiorari to resolve these conflicts and to clarify that campaign-finance decisions regarding contribution limits and disclosure have not reduced the protection afforded to charitable solicitations.

I. The Ninth Circuit's Ruling Conflicts with This Court's Repeated Recognition That Compelled Disclosure Is Necessarily Chilling.

For generations, this Court has vigorously protected the right of private association. A central theme of this line of precedent is the understanding that when government compels private citizens to disclose their private associations, those citizens will be chilled from associating. And the existence of this chilling effect, which this Court has taken as intuitively obvious, is supported by scholarly research.

The Ninth Circuit, however, ignored all of that, and instead held not only that CCP must affirmatively prove that its speech had been chilled, but that it must do so with evidence of previous harassment in order to obtain relief. Part A describes this Court's protection of expressive association in its compelled-disclosure precedent, which has long recognized the

per se harm of allowing government to intrude into private association. Part B describes how the Ninth Circuit's decision unjustifiably conflicts with this line of precedent. This Court should grant certiorari to resolve this conflict.

A. This Court Has Long Protected Private Association from Compelled Disclosure.

This Court has long recognized the constitutional importance of the right of expressive association. "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). It stems from the text of the First Amendment and protects individuals who join together in advocacy of a wide array of goals. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *see also Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 576 (1963) (Douglas, J., concurring) ("By the First Amendment we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into these precincts.").

For just as long, this Court has recognized that this right is fragile and relies in significant part on a concomitant right to privacy in one's expressive associations. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association. . . ." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). This

is because the consequences of exposing one's beliefs – whether unpopular or otherwise – may dissuade people from forming expressive associational relationships. *Id.* at 462-63. Thus, privacy, "the right to be let alone," protects people from being chilled in the exercise of their First Amendment rights. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

Because of the constitutional value of private association, this Court has long protected individuals and private organizations from compelled disclosure of their associations. This Court explicated the inherent chilling effect of compelled disclosure in its seminal decision of *NAACP v. Alabama ex rel. Patterson*. That case arose in the midst of the Civil Rights Movement, when Alabama's attorney general sought to enjoin the NAACP from conducting activities in the state for failing to comply with the state's business regulations. 357 U.S. at 451-52. As part of those proceedings, the government demanded a wide array of NAACP documents, including its membership list. *Id.* at 453. This Court rejected Alabama's attempt to compel disclosure of members, finding that such disclosure would chill constitutionally protected association. *Id.* at 460-66. The Court deemed it "apparent" that compelled disclosure of the NAACP's membership list would adversely affect the NAACP's constitutional activity because it would discourage people from participating with the NAACP. *Id.* at 462-63.

Since *Patterson*, this Court has continued to recognize that compelled disclosure chills constitutionally protected activity, even when those disclosures are made only to the government and not to the public at large. In *Shelton v. Tucker*, for example, this Court considered the constitutionality of an Arkansas law that required teachers at state-supported schools to identify the organizations to which they belonged or donated. 364 U.S. 479 (1960). This Court struck the law down, holding that "[e]ven if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id.* at 486.

Patterson and *Shelton* are merely two examples from the line of cases stretching back more than a half century that consistently protect the right of individuals and groups to resist government intrusion into their associations by treating compelled disclosure as a per se harm that can be overridden only by the most compelling government interests and narrowly tailored laws. *See also Gibson*, 372 U.S. 539 (holding unconstitutional a legislative-committee investigation demanding membership and donor lists); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (striking down an ordinance requiring the disclosure of membership and donors); *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234 (1957) (invalidating a state subpoena requiring a private individual to testify as to his organizational membership).

As these cases show, the notion that compelled disclosure is necessarily chilling is firmly established by precedent. As a result, it is no surprise that charities across the ideological spectrum with varying aims routinely maintain the privacy of their donors. A cursory search reveals that the American Red Cross,[3] Habitat for Humanity,[4] Doctors Without Borders,[5] The Federalist Society,[6] American Constitution Society,[7] Denver Zoo,[8] Smithsonian National Air & Space Museum,[9]

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[3] American Red Cross, 2014 Annual Report at 23, http://www.redcross.org/images/MEDIA_CustomProductCatalog/m44340081_2014AnnualReport.pdf (last visited Aug. 27, 2015).

[4] Habitat for Humanity International, Annual Report FY2014 at 42, http://www.habitat.org/sites/default/files/annual-report-2014.pdf (last visited Aug. 27, 2015).

[5] Doctors Without Borders, U.S. Annual Report 2013 at 37-39, 45, 55, http://www.doctorswithoutborders.org/sites/usa/files/attachments/msf_ar2013_final.pdf (last visited Aug. 27, 2015).

[6] The Federalist Society, 2014 Annual Report at 35-36, 38, http://www.fed-soc.org/library/doclib/20150622_2014AnnualReport.pdf (last visited Aug. 27, 2015).

[7] American Constitution Society, 2013-14 Biennial Report at 18-19, http://acslaw.org/sites/default/files/pdf/ACS-2013-2014-Biennial-Report.pdf (last visited Aug. 27, 2015).

[8] Denver Zoo, 2014 Annual Report at 18-20, http://denverzoo.org/downloads/2014_AnnualReport_DenverZoo.pdf (last visited Aug. 27, 2015).

[9] Smithsonian National Air and Space Museum, 2014 Annual Report, Donors, https://airandspace.si.edu/about/governance/annualreport2014/donors.cfm (last visited Aug. 27, 2015).

Special Olympics,[10] National 4-H Council,[11] and Make-A-Wish[12] all maintain the privacy of at least some of their donors. Moreover, it is clear that most of these donors have no particular concern that they will be subject to reprisal for their charitable contributions to humanitarian organizations or community zoos. Instead, it is overwhelmingly likely that most are motivated by some other desire, such as wanting to avoid being contacted by similar organizations seeking donations, preferring family to not prematurely discover how a will devises assets, maintaining a religious or philosophical objection to public charity,[13] or "merely by a desire to preserve as much of one's privacy as possible," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

Indeed, the common-sense intuition that mandatory disclosure chills protected association is backed up by empirical evidence. One recent study found that people are less likely to make contributions in other contexts if they know their personal information will be disclosed. Dick M. Carpenter II,

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[10] Special Olympics, 2014 Annual Report at 27, http://media.specialolympics.org/resources/reports/annual-reports/2014_AnnualReport-full.pdf (last visited Aug. 27, 2015).

[11] National 4-H Council, 2013 Annual Impact Report at 18-19, 23, http://www.4-h.org/About-4-H/Leadership/Annual-Report/2013-4-H-Annual-Report.dwn (last visited Aug. 27, 2015).

[12] Make-A-Wish, 2014 Annual Report, Donors, http://fy14annualreport.wish.org/donors/ (last visited Aug. 27, 2015).

[13] *See, e.g.*, *Matthew* 6:2 ("[W]hen you give to the needy, do not announce it with trumpets. . . .").

Mandatory Disclosure for Ballot-Initiative Campaigns, 13 Indep. Rev. 567, 575 (2009). When asked why, the reason most often given was a desire to keep their contribution private. *Id.* at 575-76. ("Responses such as 'Because I do not think it is anybody's business what I donate and who I give it to' and 'I would not want my name associated with any effort. I would like to remain anonymous' typified this group of responses."). In other words, compelled disclosure would chill the participants' association with political groups. *Id.*; *see also* Dick Carpenter & Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us About the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 Fordham Urb. L.J. 603, 623-31 (2012) (discussing the costs of compelled disclosure in non-candidate campaign efforts).

B. The Ninth Circuit's Decision Below Conflicts with This Precedent.

In conflict with this unbroken line of precedent and scholarly research, the Ninth Circuit below determined that the compelled disclosure of CCP's supporters was not chilling. The court wrote off this Court's compelled-disclosure decisions as predicated only upon the harm the NAACP faced during the Civil Rights Movement. *See* Pet'r's App. 9a-10a & n.3. But not only is that conclusion inconsistent with the facts of this Court's disclosure decisions, it is a distinction that this Court expressly rejected over 35 years ago.

While this Court's rulings on private expressive association have often related to the harassment the NAACP suffered during the Civil Rights Movement, this Court has never suggested that the protection afforded to private association was limited to the NAACP. Rather, this Court has looked to the circumstances of the demanded disclosure and the activity of the parties before it to determine when the Constitution prohibits that disclosure. For instance, this Court in *Shelton* focused not on the identity of the groups with which the petitioner associated, but rather on the "completely unlimited" scope of the statute that required Arkansas teachers "to disclose every single organization with which [they have] been associated over a five-year period." 364 U.S. at 485-89. Similarly, in *Sweezy*, this Court reversed the contempt conviction of a teacher who refused to disclose his private associations with suspected "subversive" organizations. 354 U.S. at 236-45. In doing so, a plurality of this Court noted that it could "not . . . conceive of any circumstance wherein a state interest would justify infringement of" the right of private political association. *Id.* at 251 (plurality opinion); *see also id.* at 265 (Frankfurter, J., concurring) (describing the "overwhelming" importance of the "inviolability of privacy belonging to a citizen's political loyalties").

Furthermore, this Court has already rejected the argument that the protections of the First Amendment are limited to the NAACP. In *NAACP v. Button*, the Court struck down a Virginia law prohibiting the

NAACP from soliciting clients, holding that the group's activities were expression and association protected by the Constitution. 371 U.S. 415, 428-29 (1963). This Court later extended that holding to the ACLU, rejecting the government's argument that the NAACP was somehow entitled to constitutional protection that others were not. *In re Primus*, 436 U.S. 412, 427-28 (1978). Instead of focusing on the identity of the plaintiff, the Court looked to the ACLU's activity – litigation as a form of political expression and association – and held that it was entitled to constitutional protection. *Id*.

In short, there was no valid justification for the Ninth Circuit to decline to apply this Court's on-point precedent regarding the per se chilling effect of compelled disclosure. Moreover, its refusal to do so, and its demand that groups wishing to maintain the privacy of their expressive associations produce evidence of violence and threats of the sort the NAACP suffered in the 1950s and 60s, will have profound negative consequences. Thankfully, few can provide the evidence necessary to meet that burden, but that does not mean that other individuals or groups go unharmed. There are many valid reasons people wish to keep their associations private, *see supra*, § I.A, and those people should be able to challenge laws compelling disclosure without showing a history of death threats. If allowed to stand, the decision below will have the effect of stifling protected activity and chilling people throughout the Ninth

Circuit from associating, depriving both themselves and society of the benefits of expressive association.

II. The Ninth Circuit Applied the Wrong Level of Scrutiny Because of the Multiplicity of Tests Called "Exacting Scrutiny."

In addition to its failure to recognize the chilling effect of compelled disclosure, the Ninth Circuit applied the wrong level of constitutional scrutiny. As explained below in Part A, this Court has held that burdens on charitable solicitation must be reviewed with strict scrutiny. But, as explained in Part B, the Ninth Circuit applied a different and much lower level of scrutiny, which this Court has, to date, applied exclusively to campaign-finance disclosure requirements. This error stems in part from the fact that this Court has at times used the same label – "exacting scrutiny" – to describe the two different tests. This Court should grant certiorari to resolve this ambiguity and to clarify that strict scrutiny remains the proper test for reviewing burdens on charitable solicitation.

A. Strict Scrutiny Applies to Burdens on Charitable Solicitation.

Charitable solicitation is protected First Amendment activity. The challenged regulation in this case burdens charitable solicitation – the Attorney General demands, as a condition of CCP's ability to solicit charitable contributions in California, that CCP

disclose to the government the identity of its donors. And, like all charitable groups organized under 26 U.S.C. § 501(c)(3), CCP cannot divert these charitable resources to partisan political activity. Thus, the most obviously relevant cases to call upon when analyzing California's requirement are those in which this Court has reviewed burdens on charitable solicitation.

When reviewing laws that burden charitable solicitation or require charities to disclose to the government facts about their private associations, this Court has consistently applied the very highest level of judicial scrutiny, upholding those burdens only if they are narrowly tailored to serve a compelling government interest. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988);[14] *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 961, 965 n.13 (1984); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Patterson*, 357 U.S. at 463-64. In some of these cases, the Court has referred to this standard as "exacting scrutiny," but it is clear that this standard is synonymous with what this Court has elsewhere called "strict scrutiny." *Compare Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656,

[14] Indeed, all nine justices in *Riley* applied strict scrutiny. *See* 487 U.S. at 796 (majority opinion); *id.* at 803 (Scalia, J., concurring in part and concurring in judgment); *id.* at 804 (Stevens, J., concurring in part and dissenting in part); *id.* at 810 (Rehnquist, C.J., dissenting) (reasoning that "the statute . . . satisf[ies] the constitutional requirement that it be narrowly tailored to serve the State's compelling interests").

1664 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest."), *with Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) ("[C]ontent-based restrictions on speech . . . can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." (internal quotation marks omitted)).

In accordance with this Court's precedent, lower courts outside the Ninth Circuit have also consistently applied strict scrutiny to burdens on charitable solicitation. For instance, the Fifth Circuit struck down a requirement that for-profit solicitors disclose certain information to the public after determining that the law did not satisfy strict scrutiny. *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 211-14 (5th Cir. 2011). Similarly, the Sixth Circuit applied strict scrutiny in preliminarily enjoining an ordinance banning charitable-donation bins. *Planet Aid v. City of St. Johns*, 782 F.3d 318, 330 (6th Cir. 2015). Indeed, even courts that have upheld burdens on charitable solicitation have done so only when those burdens survived strict scrutiny. *See Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 338-39 (4th Cir. 2005) (upholding, under strict scrutiny, a requirement that for-profit companies soliciting donations for charities by telephone explain that they are seeking donations

and disclose the charity on whose behalf they are fundraising).

B. The Ninth Circuit Applied Intermediate Scrutiny, in Conflict with This Precedent, Because of the Confusing and Conflicting Labels This Court Has Applied to its Tests.

In contrast with this Court's charitable-solicitation cases, which demand that burdens on charitable solicitation be reviewed with strict scrutiny, the Ninth Circuit applied a much lower standard of review. Rather than requiring that California demonstrate that its policy was narrowly tailored to serve a compelling government interest, the Ninth Circuit instead held that California could satisfy its constitutional burden merely by showing "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," Pet'r's App. 8a (internal quotation marks omitted), a test that this Court has elsewhere described as intermediate scrutiny, *see, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.").

The Ninth Circuit's error stems in part from the fact that this Court has, in different contexts, described both of these tests – strict and intermediate scrutiny – using the phrase "exacting scrutiny." As noted earlier, in the context of charitable solicitations,

"exacting scrutiny" has been used synonymously with strict scrutiny. *Compare Williams-Yulee*, 135 S. Ct. at 1664 ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest."), *with id.* at 1666 ("This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny."). By contrast, in the realm of campaign-finance disclosure, this Court has used "exacting scrutiny" synonymously with "intermediate scrutiny." *See Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) ("The Court has subjected [disclaimer and disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.").[15]

Though the strict scrutiny and intermediate scrutiny tests sometimes share the "exacting scrutiny" name, they are markedly different. For instance, this Court treats differently the evidence necessary to support the government's interest in a particular law based on the test it is applying. *Compare, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 822-23 (2000) (invalidating a law requiring the scrambling of sexually explicit material under the

[15] Lower courts other than the Ninth Circuit have recognized this standard of review to be intermediate scrutiny. *E.g.*, *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 548-49 (4th Cir. 2012).

narrow-tailoring and compelling-government-interest standard because the government failed to present more than "anecdote and supposition"), *with, e.g.*, *Citizens United*, 558 U.S. at 366-70 (concluding, without any particular evidentiary showing, that a campaign-finance-disclosure scheme was substantially related to a sufficiently important government interest). Moreover, the tailoring analysis differs between strict and intermediate scrutiny. *Compare, e.g.*, *Playboy Entm't*, 529 U.S. at 813 (holding that under strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"), *with, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (noting that, in reviewing contribution limits under intermediate scrutiny, "instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being *closely drawn* to match a sufficiently important interest" (emphasis added, internal quotation marks omitted)).

As was perhaps inevitable, this use of the same term to refer to two very different tests has now led to confusion in lower courts. Although other circuits have faithfully applied strict scrutiny to burdens on charitable solicitation, *see supra* § II.A, in this case, the Ninth Circuit saw the word "disclosure" and reflexively applied the campaign-finance-disclosure version of exacting scrutiny. But courts, like any

other government actor, may not "foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429. What matters is the nature of the underlying activity, and this Court's precedent makes absolutely clear that, when the underlying activity is charitable solicitation, strict scrutiny is the rule.

In this case, the failure to apply strict scrutiny was outcome determinative. Applying the correct standard, CCP was plainly entitled to a preliminary injunction. Strict scrutiny is demanding and requires that the government put forth specific, concrete evidence justifying why its regulation is necessary. *See, e.g.*, *Playboy Entm't*, 529 U.S. at 822-23 (striking down a law under strict scrutiny because the government proffered no evidence and "failed to establish a pervasive, nationwide problem justifying" the law). In contrast, the Ninth Circuit here accepted the government's argument that intrusive disclosure was necessary to effectively enforce the state's valid regulations of charitable solicitation without any actual evidence to support that proposition. Pet'r's App. 5a-6a, 19a-21a. Moreover, the court never asked whether the government interest could be adequately served by a less burdensome, more narrowly tailored law, as this Court's precedent requires. *See, e.g.*, *Vill. of Schaumburg*, 444 U.S. at 637-38. Here,

the government has a less intrusive approach available to it: It may request a warrant.[16]

If allowed to stand, the Ninth Circuit's ruling will have wide-ranging implications for charities throughout the Ninth Circuit, and it threatens to undermine this Court's previous holdings in such seminal cases as *Riley* and *Patterson*. And it is now the case that citizens in states within the Ninth Circuit are entitled to less protection of their charitable solicitation and association than citizens in other states because of the court's refusal to apply the proper precedent. Accordingly, this Court should grant certiorari to clarify that burdens on charitable solicitation, including compelled disclosure, are subject to the compelling-interest and narrow-tailoring test, i.e., strict scrutiny.

III. This Court Should Grant Review to Prevent Its *Sui Generis* Campaign-Finance Jurisprudence from Undermining First Amendment Protection in Other Areas of the Law.

As explained in the previous section, the Ninth Circuit erroneously relied upon campaign-finance-disclosure precedent in analyzing California's

[16] The Attorney General would no doubt object that seeking a warrant would interfere with her claimed interest in "increas[ing] her investigative efficiency," *see* Pet'r's App. 20a, but, as this Court has noted, "the First Amendment does not permit the State to sacrifice speech for efficiency," *Riley*, 487 U.S. at 795.

requirement that a registered charity disclose its donors. This error is particularly disturbing because, for nearly 40 years, this Court has treated certain aspects of campaign finance as outliers that may be subject to regulation that would never be tolerated in other areas of protected expression. But as this case illustrates, these aspects of the Court's campaign-finance jurisprudence are now leaking out to and endangering other First Amendment activity. This Court should grant certiorari to cabin the scope of its campaign-finance precedent and make clear that this precedent is not to be used to reduce constitutional protections outside the electoral setting.

As a general matter, this Court requires burdens on political speech to satisfy strict scrutiny, a standard that demands the government proffer actual evidence and prohibits laws that regulate with too broad a brush. However, this Court has departed from that approach, and thus ordinary First Amendment principles, in two areas of its campaign-finance jurisprudence – disclosure requirements, *see Citizens United*, 558 U.S. at 366-69, and contribution limitations, *see Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam).

Perhaps the most notable way in which this Court's treatment of campaign-finance disclosure and contribution limits varies from its approach in other cases is the treatment of evidence, or the lack thereof. For example, this Court has repeatedly said that government must proffer actual evidence to justify regulation of speech, including even categories of

speech traditionally entitled to limited First Amendment protection, such as commercial speech. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In campaign-finance-disclosure cases, however, this Court has deviated from that rule. It has, for example, upheld a disclosure requirement without relying on specific evidence because it assumed that requiring disclosure of campaign finances is valuable due to the information that such disclosure provides to voters. *E.g.*, *Citizens United*, 558 U.S. at 366-71. But the presumed value of disclosure does not withstand close examination. Indeed, there is a growing body of scholarship finding that disclosure has no discernible benefits for voter decision-making. *See, e.g.*, David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 Elec. L.J. 114, 127 (2013) (finding that disclosure information in ballot-issue campaigns had an "imperceptible" effect on the ability of voters to identify the positions of interest groups).

Similarly, this Court has upheld contribution limits as a valid means of combatting the appearance of corruption without any actual evidence that contribution limits are effective in achieving that goal. This Court's conclusion is by no means obvious; indeed, one recent study found virtually no relationship between trust in government and campaign-finance laws. David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 Elec. L.J. 23 (2006). Yet in *Nixon v. Shrink Missouri Government PAC*, this Court upheld

a contribution limit based largely on newspaper clippings that merely asserted that special interests were having an outsized role in Missouri politics. 528 U.S. 377, 393-95 (2000). Moreover, when the plaintiffs in that case offered actual studies on corruption to demonstrate the likely inefficacy of Missouri's contribution limits, this Court ignored those studies, stating simply that "there [was] little reason to doubt that sometimes large contributions will work actual corruption of our political system." *Id.* at 395. This led one scholar to note that actual evidence appears to be irrelevant in challenges to contribution limits. Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 176-78 (2001).

This Court would not countenance that type of fact-free speculation in any other area of First Amendment law. Even in cases involving deeply unpopular speech, this Court requires the government to produce evidence to meet its burden. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (rejecting ban on lying about military service because the government "point[ed] to no evidence to support its claim"); *cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435-39, 442 (2002) (plurality opinion) (upholding law restricting locations of sexually oriented businesses because the government produced evidence supporting its theory); *id.* at 451-52 (Kennedy, J., concurring in judgment) (discussing the city's "fact-bound empirical assessments"). Yet in cases regarding campaign-finance disclosure or

contribution limits, this evidentiary requirement is almost wholly absent.

Another way in which this Court's treatment of campaign-finance disclosure and campaign contributions differs from ordinary First Amendment cases is a relaxed view of how closely tailored a law must be to satisfy judicial scrutiny. For example, this Court has generally held that lawful expression may not be suppressed simply because it is difficult to distinguish from unlawful expression. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (striking down ban on virtual child pornography because "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter."). Yet in the context of campaign-contribution limits, this Court has allowed stringent limitations even while conceding "that most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Buckley*, 424 U.S. at 29-30.

Given how easy it is for government to satisfy the "exacting" scrutiny that this Court applies in cases involving campaign-finance disclosure and contribution limits – and how sharply that scrutiny departs from the much higher demands that this Court applies to virtually all other burdens on speech and association – it is no surprise that the government has attempted to import this precedent into other areas of First Amendment doctrine. The Ninth Circuit's decision below demonstrates how dangerous

such an expansion would be. If allowed to stand, the Ninth Circuit's decision will signal that campaign-finance precedent is no longer cabined to its unique circumstances and will result in the further chilling of speech.

Without further guidance from this Court, there is nothing to prevent this Court's unique jurisprudence regarding campaign-finance disclosure and contribution limits from expanding and swallowing the general rule that government may not regulate peaceful political speech and association unless it can satisfy the demanding requirements of strict scrutiny. Over the long term, this Court should bring its campaign-finance doctrine in line with the rest of First Amendment jurisprudence. But in the short term, this Court should grant certiorari so that it can make clear that nothing in its campaign-finance-disclosure cases was meant to supplant or overrule this Court's earlier decisions on compelled disclosure in other contexts.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari.

Respectfully submitted,

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