No. 16-55727 & 16-55786

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff-Appellee/Cross-Appellant,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, IN HIS OFFICIAL CAPACITY,

Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. CV-14-9448-R-FFM, The Honorable Manuel L. Real

BRIEF OF AMICI STATES ARIZONA, ALABAMA, LOUISIANA, MICHIGAN, NEVADA, TEXAS, AND WISCONSIN SUPPORTING PLAINTIFF-APPELLEE/CROSS-APPELANT

Mark Brnovich
Attorney General
Dominic E. Draye
Solicitor General
Keith J. Miller
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-3333

Counsel for *Amicus Curiae* State of Arizona
Additional counsel listed on inside cover

Additional Counsel for *Amici* States:

Luther Strange
Attorney General of Alabama

Jeff Landry
Attorney General of Louisiana

Bill Schuette
Attorney General of Michigan

Adam Paul Laxalt
Attorney General of Nevada

Ken Paxton
Attorney General of Texas

Brad D. Schimel
Attorney General of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

As the chief law enforcement authorities of sovereign States, the Attorneys General of Arizona, Alabama, Louisiana, Michigan, Nevada, Texas, and Wisconsin pursue fraudulent acts committed by non-profits soliciting donations within their respective jurisdictions. Like the vast majority of States, *amici* States undertake this responsibility without requiring non-profits to report annually the names of their significant donors as the Attorney General of California is requiring Appellee/Cross-Appellant Americans for Prosperity Foundation ("the Foundation") to do.

Although *amici* States possess a keen interest in deterring and prosecuting fraud, they support the Foundation's arguments and oppose the positions taken by the Attorney General of California. *Amici* States take this position because they also have a vital interest in protecting their citizens' First Amendment right of freedom of association against unconstitutional interference. *Amici* States limit their discussion to describing the majority rule—that disclosure to the state of significant donors is not required to solicit within a state—adopted by 47 states

[1] All parties were notified of *amici* States' intention to file this brief.

and the District of Columbia, and an explanation of the dangers posed by California's departure from that rule.

ARGUMENT

The *amici* States agree with the Foundation that the First Amendment protects the right of charitable groups to choose not to disclose the names of their donors to state officials. The Supreme Court has consistently recognized, perhaps most famously in *Buckley v. Valeo*, 424 U.S. 1 (1976), that mandatory disclosure rules invariably chill the freedom of association. As a consequence, such interference in the citizenry's First Amendment rights is subject to "exacting scrutiny." *Id.* at 16. This heightened standard of review requires a showing that the governmental intrusion must be narrowly tailored to accomplish a compelling governmental interest. *Davis v. FEC*, 554 U.S. 724, 744 (2008) ("the strength of the government interest must reflect the seriousness of the actual burden on First Amendment rights").

The district court correctly ruled that requiring the Foundation to submit its unredacted Schedule B is unconstitutional as applied to the Foundation. By requiring the Foundation to disclose the identities of its

major donors without first establishing any particularized suspicion of any wrongdoing by the Foundation, the California Attorney General chilled the associational rights of the Foundation's members. The district court reached this conclusion after considering the "ample evidence" that the Foundation's "employees, supporters and donors" severally "face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." ER 7.

The California Attorney General's demand that the Foundation surrender the identities of their substantial supporters is not substantially related to its interest for two reasons. First, the link between the required disclosure of donor information and the California Attorney General's asserted governmental interest is tenuous. Forty-seven states and the District of Columbia have virtually identical governmental interests to those asserted by California, yet they do not require the preemptive disclosure of donor information demanded here. The extreme nature of California's intrusion into associational privacy suggests that it should not survive application of exacting scrutiny. Furthermore, the mere collection of these names and addresses by the

state creates the potential for unintentional disclosure to the public. As accidental disclosure following state collection is a valid concern (as evidenced by the record in this case), mere collection itself may chill the associational rights that the First Amendment protects.

Secondly, the generalized collection of the Foundation's donor names and addresses increases the possibility that unscrupulous public officials could target donors for various kinds of retaliatory actions. Even if the names of significant donors are never released to the public—intentionally or unintentionally—government officials might use the donor information to single out their political opponents for retribution. That the Foundation and the current California Attorney General seldom come down on the same side of public debate makes this fear of retribution potentially relevant. The First Amendment harm is inherent in the disclosure to the government official and does not require an additional showing of a likelihood of public disclosure.

I. Required Disclosure of Donors to the State is Not Substantially Related to the California Attorney General's Legitimate Governmental Interest

State scrutiny of an organization's membership roll is an infringement on the First Amendment's guarantee of privacy of association, which can only be justified by "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64. In *Center for Competitive Politics v. Harris*, ("*CCP*" 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (2015), a panel of this Court found that the disclosure requirement bears a substantial relation to a sufficiently important government interest. *Id.* at 1317. After conducting a bench trial in this case, the district court found that that California's Attorney General had failed to prove that its office "actually needs Schedule B forms to effectively conduct its investigations." ER3–4.

On the contrary, the district court found that this disclosure requirement serves nearly no purpose at all. California's Attorney General "virtually never" uses Schedule Bs, and even when the office does so, it could easily obtain the relevant information through a more targeted approach. ER3–6, 11. But not only is this finding of no

substantial relation supported by the record at trial, it also squares with the fact that nearly every other state follows a different rule and does not require submission of an unredacted Schedule Bs.

A. The Vast Majority of States Do Not Require Charities to Disclose Donor Information

Disclosure of significant donors is not relevantly correlated to the state's valid law enforcement interests. All 50 state attorneys general possess a law enforcement interest in preventing non-profits from defrauding their citizens, yet only California, Hawaii, and New York require disclosure of the unredacted Schedule Bs containing donors' names and addresses. Although Florida briefly joined the list of states requiring submission of unredacted Schedule Bs, the Florida legislature acted quickly to reverse this policy and explicitly allows non-profits to file redacted Schedule B.[2] Not only do 47 states and the District of Columbia not require annual submission of unredacted Schedule Bs, 12 of those states do not require registration at all. In 2013, Arizona joined Delaware, Idaho, Indiana, Iowa, Montana, Nebraska, Nevada, South Dakota, Texas, Vermont, and Wyoming in adopting this non-

[2] FLA. STAT. 496.407 (2)(a) (2014).

registration standard.[3] The fundraising registration requirement that Arizona repealed was cumbersome—two notarized signatures had to be filed annually—and lacked exemptions for very small organizations. Rather than try to fine tune a tool of vanishing utility, Arizona chose to repeal the registration requirement altogether.

B. The States That Do Not Require Disclosure of Donor Information Adequately Pursue Their Valid Law Enforcement Interests

Despite *amici* States' lack of donor disclosure requirements, they routinely and effectively exercise oversight over non-profits actively soliciting donations within their jurisdictions and investigate, prosecute, and deter fraudulent activities.

For instance, *amici* States joined with every other state in a civil enforcement action against four sham cancer charities and the individuals who run them pursuant to the states' consumer protection, charitable solicitation, and/or charitable trust enforcement authority. Collectively the sham non-profits raised more than $187 million from

---

[3] Arizona requires veterans' organizations to register; Texas requires law enforcement, public safety, and veterans' organizations to register.

donors across the United States.[4] The California Attorney General claimed at trial that this very case was one where the Schedule B had been part of the investigation. However, this claim was not borne out by the evidence. The Schedule B used by a California Attorney General's office attorney was obtained by a targeted subpoena rather than during the generally applicable annual disclosure filing. ER1756. Indeed, the fact that Arizona does not even require charities to register before soliciting donations within the state proved no obstacle to Arizona's vigorous pursuit of this matter.

The California Attorney General's donor disclosure requirement is not narrowly tailored to a compelling state interest. The district court found that even "assuming the Attorney General presented a sufficiently important governmental interest," that "the testimony of the Attorney General's own attorneys" indicated that there was a more narrow way to achieve that interest. ER5. The record demonstrates that requiring submission of unredacted Schedule Bs does nothing to increase the Attorney General's investigative efficiency or lead to

---

[4] Complaint, FTC, 50 States, and D.C. v. Cancer Fund of America, Inc., et al., No. 2:15-cv-00884-NVW (D. Ariz. May 18, 2015).

suspicious activity being flagged. It is all cost with very little if any benefit.

For this Court to reverse the district court's holding, it would both disregard the record below and conclude that the 48 similarly situated jurisdictions not mandating disclosure of donor information either lack California's law enforcement interests, or inadequately regulate non-profit organizations. To the contrary, *amici* States share California's law enforcement concerns and diligently regulate non-profits; however, *amici* States have struck a constitutional balance between their law enforcement interests and their citizens' First Amendment rights. Rather than impose sweeping mandatory donor disclosure rules, *amici* States have satisfied their law enforcement interests by traditional methods such as compliance audits and subpoenaing donor information after developing a particularized suspicion of wrongdoing. In sum, simple law enforcement interests cannot justify the California Attorney General's generalized mandatory donor disclosure requirements.

C. Required Nonpublic Disclosure of Donor Information Creates the Potential for Accidental Public Disclosure

One additional rationale for the majority rule is data security. After California's Attorney General collects this information in advance

of any oversight need, the office will need to store that data in such a way as to prevent unintentional disclosure to the public. Apparently endeavoring to highlight this potential difficulty, California has posted more than a thousand unredacted Schedule Bs online, thereby disclosing to the public the names and addresses of thousands of donors. ER9. Separately, the Registry made all 400,000 of its confidential documents—including Schedule Bs—accessible to anyone who is clever with a web browser. ER390–94. The district court was clear-voiced in finding that "[t]he pervasive, recurring pattern of uncontained Schedule B disclosures—a pattern that has persisted even during this trial—is irreconcilable with the Attorney General's assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry." ER9.

While not all states that collect donors' names and addresses from unredacted Schedule Bs will be as careless with that information as California has been, the potential for a breach of security will be ever present. This danger helps explain why the overwhelming majority of states pursue their law enforcement interest without demanding every charity operating in their state surrender a list of this sensitive information. A state cannot inadvertently disclose the identity of a

donor who wishes to remain anonymous if the state never has that information in the first place.

II. Required Disclosure to the State is a Cognizable First Amendment Injury

"Time for some traffic problems in Fort Lee."[5]

With that eight-word email, Bridget Anne Kelly, then serving as Deputy Chief of Staff for New Jersey Governor Chris Christie, vividly demonstrated why disclosure of a political membership roll to a state official is, in itself, a First Amendment harm that must be justified by a compelling state interest. Kelly's infamous message, which resulted in the politically motivated partial closure of the George Washington Bridge, was to settle a score with the Mayor of Fort Lee who had dared to decline to endorse Governor Christie's re-election effort.

The Christie gubernatorial administration is far from the first and will certainly not be the last to, as President Richard Nixon's White House counsel John Dean put it, "use the available [governmental]

---

[5] *Christie administration traffic jam correspondence*, Mother Jones: Documents, goo.gl/xhRKL5.

machinery to screw our political enemies."[6] Ultimately, this is an argument for limiting the scope of what is available. While hope springs eternal that the better angels of our elected officials will prevail, experience has shown that state and federal office-holders are subject to human frailty, including the potential to misuse donor information. So for organizations whose efforts might attract the ire of those in positions of power, the specter of such misuse will inherently chill the constitutionally protected freedom of association with those groups as long as the information is collected.

This Court should use this opportunity to reinforce *Buckley*, which struck down mandatory disclosure on a facial challenge. 424 U.S. at 64-65. To the extent that the panel in *CCP* held that compelled disclosure of political donor information is problematic only where the information is made public, that holding is inconsistent with *Buckley*. Merely placing this information in the hands of government officials can constitute a cognizable First Amendment injury and this Court should so find.

---

[6] Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 1689 (1973).

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment to the extent it permanently enjoins the mandatory disclosure of unredacted Schedule Bs with respect to the Foundation. Additionally, for these same reasons, *Amici* States join the Foundation in urging this Court to reverse and remand with instructions that the mandatory disclosure of unredacted Schedule Bs is facially unconstitutional.

Respectfully Submitted,

/s/ Keith J. Miller
Mark Brnovich
Arizona Attorney General
Dominic E. Draye
Arizona Solicitor General
Keith J. Miller
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-3333

Attorneys for *Amicus Curiae*
State of Arizona

January 27, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2201 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Microsoft Word 2010 in 14-point Century type.

/s/ Keith J. Miller
Keith J. Miller
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-3333

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief Amicus Curiae for the State of Arizona with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 27, 2017. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Keith J. Miller
Keith J. Miller
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-3333