16-3310

United States Court of Appeals for the Second Circuit

CITIZENS UNITED AND CITIZENS UNITED FOUNDATION,
Plaintiffs-Appellants,

– v. –

ERIC T. SCHNEIDERMAN,
in his official capacity as New York Attorney General,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (STEIN, D.J.)

BRIEF FOR *AMICUS CURIAE* CAMPAIGN LEGAL CENTER SUPPORTING APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center is a nonprofit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of The Campaign Legal Center.

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center is a nonprofit, nonpartisan organization that represents the public interest in administrative and legal proceedings to enforce and defend political disclosure, campaign finance and election laws. *Amicus* submits this brief because it is concerned that a decision by this Court to reverse the district court would run counter to longstanding precedent and undermine the operation of disclosure laws across the nation.

SUMMARY OF ARGUMENT

Citizens United and the Citizens United Foundation (collectively, "Citizens United") are tax-exempt organizations active as charitable organizations in the State of New York. Yet Citizens United refuses to submit the list of its largest donors to the Attorney General, as required by state law, to effectuate the state's legitimate interests in preventing fraud and ensuring proper oversight of charities in New York. N.Y. Exec. Law § 172-b(1); 13 N.Y.C.R.R. § 91.5 ("Schedule B requirement"). It attempts to justify its actions by invoking the First Amendment and

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[1] Appellants and Appellee have consented to the filing of this brief. No party's counsel or other person authored this brief, in whole or in part, or contributed money to fund its preparation or submission.

by alleging fears of future harassment. But Citizens United's arguments conflate the burdens of private and public disclosure, rest on speculative and inadequate evidence, and dangerously expand both the prior restraint doctrine and the First Amendment's as-applied "harassment" exemption from disclosure laws.

Amicus' chief concern is Citizens United's distortion of the jurisprudence addressing how and whether compelled disclosure burdens First Amendment rights. This brief will consequently focus on Citizens United's failure to demonstrate a cognizable First Amendment injury. *Amicus* adopts the Attorney General's analysis of the important governmental interests justifying the challenged Schedule B reporting requirement, Appellee's Br. 44-49, but will not otherwise address the State's interest in the reporting of Schedule B information.[2]

The first error in Citizens United's First Amendment argument is its imprecise application of public disclosure doctrine to a private, regulatory disclosure regime. Its facial challenge to the Schedule B reporting requirement fails because the First Amendment burdens imposed by a reporting requirement that involves no public disclosure

[2] *Amicus* will likewise not address claims under New York state law or the Due Process and Supremacy Clauses.

are minimal, if they exist at all. Moreover, because the private disclosure requirement is part of a regulatory scheme that relates to Citizens United's tax-exempt status, New York's law-enforcement interest is stronger—and Citizens United's rights are more attenuated—than in the typical public disclosure case.

Citizens United's as-applied challenge fares no better. The Supreme Court has been overwhelmingly supportive of political disclosure laws, while recognizing that an as-applied harassment exemption may be warranted if the "threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that [the challenged disclosure requirements] cannot be constitutionally applied." *Buckley v. Valeo*, 424 U.S. 1, 71 (1976) (per curiam). But the prospect of public harassment is nonexistent when disclosure is made only to government authorities. Citizens United has provided no evidence that its Schedule B forms are in danger of being publicly disclosed, or that its donors will be harassed by the Office of the Attorney General itself.

Even if Citizens United could demonstrate some credible fear of public exposure, a group must present "specific evidence of past or

present harassment" or a "pattern of threats" in order to claim the exemption. *John Doe No. 1 v. Reed*, 561 U.S. 186, 204 (2010). Citizens United merely alleges in conclusory fashion that its donors worry about "backlash" should their support become public. But protests and disparaging words, however combative, are not harassment unless they stray from the confines of legality or cannot be addressed by law enforcement. As Justice Scalia recognized, "[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance." *Id.* at 228 (Scalia, J., concurring in the judgment).

Finally, Citizens United's claim that the Schedule B requirement is an unconstitutional "prior restraint" strains credulity. The Schedule B filing requirement does not apply "prior" to a charitable organization's speech, but instead only months after it has started soliciting in the state. Nor does filing a Schedule B constitute a "restraint" on speech. It is merely a request for information from organizations operating as tax-exempt charities and prevents no one from speaking.

Citizens United's expansive theories of First Amendment injury have troubling implications for both state oversight over charities and public disclosure laws. Its arguments, if accepted, would allow political groups to challenge or make irrelevant any number of non-public registration and reporting requirements for tax-exempt entities, which are designed to prevent fraud and safeguard the public fisc. And if permitted to infect *public* disclosure doctrine, these theories would nullify the Supreme Court's pro-disclosure holdings, preventing the robust debate that both the First Amendment and disclosure requirements are meant to foster.

ARGUMENT

I. Citizens United's Facial Challenge to New York's Schedule B Requirement Fails Because the Requirement Imposes at Most Minimal Burdens on First Amendment Activity.

Citizens United asks this Court to declare facially unconstitutional New York's policy of collecting charitable organizations' Schedules B for non-public use as part of its oversight over charitable activity in the State of New York. But the First Amendment burdens imposed by this minimal reporting obligation—if any exist at all—are greatly outweighed by the state's substantial

interests in preventing fraud and abuse, and easily clear exacting scrutiny. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-38 (1980).

A. New York's Schedule B reporting requirement is facially constitutional.

Citizens United claims that the district court made two reversible errors in rejecting its facial challenge. Both claims are unavailing.

First, Citizens United argues that the court below used an overly restrictive standard to review its overbreadth challenge. Appellants' Br. 32-34. But its claim would fail even under the less stringent standard it advocates. The Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). Yet there is no plausible evidence, whether in the complaint or in the real world, that disclosure requirements like New York's chill any significant amount of protected speech. *See* JA 139; *infra* Part II.A (illustrating the rarity of as-applied disclosure exemptions).

Citizens United does not identify any particular group of organizations—much less a "substantial" group—for which the

Schedule B requirement would be unconstitutional. Instead, Citizens United simply speculates that the Schedule B requirement might be unconstitutional "in at least some applications," Appellants' Br. 34, citing only a single case in support of this proposition: *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016), *appeal docketed*, No. 16-55786 (9th Cir. June 1, 2016). That case concerned the potential *public* disclosure of a charity's Schedule B, contradicted existing Ninth Circuit precedent and is currently on appeal to that court. Courts "generally do not apply the '"strong medicine"' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law"—and this Court should not do so here on the basis of a contested district court decision on appeal. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008).

In its next gambit, Citizens United argues that the donor disclosure regulation should be subject to strict scrutiny, rather than the lesser "exacting scrutiny" used for election-related disclosure requirements. Appellants' Br. 34. But there is no basis, in either law or logic, for ratcheting up the level of scrutiny here.

Citizens United attempts to distinguish the exacting scrutiny standard used for public disclosure laws by pointing to government interests that it says are unique to the campaign finance context. Appellants' Br. 35-37. This misstates First Amendment jurisprudence. When determining the level of scrutiny to apply, what matters is the nature of and burden on the *right* being threatened, not the strength of the government *interest*. The courts examine, for instance, "the importance of the 'political activity at issue' to effective speech or political association," *Fed. Election Commission (FEC) v. Beaumont*, 539 U.S. 146, 161 (2003), and whether a law "imposes a burden based on the content of speech," *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011). Accordingly, "the time to consider" the government's interest "is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Beaumont*, 539 U.S. at 162.

Moreover, the fact that direct restrictions on charitable solicitation are subject to strict scrutiny, *see Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1664 (2015) (plurality opinion), does not resolve the matter. Direct limitations on political speech are also subject to strict scrutiny. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

But disclosure requirements that affect political speech are subject only to "exacting" scrutiny, because they place lesser burdens on speech rights than do direct restrictions. *Id.* at 366-67. This is the standard even though political speech lies "at the core of . . . the First Amendment freedoms." *Buckley*, 424 U.S. at 39.

If disclosure laws that regulate political speech, our most protected form of expression, warrant only exacting scrutiny review, it would be illogical to apply a more stringent form of scrutiny to laws regulating charitable solicitation—especially as solicitation only receives heightened scrutiny in the first place because it may be "*intertwined* with informative and perhaps persuasive speech." *Williams-Yulee*, 135 S. Ct. at 1665 (emphasis added).[3]

B. Citizens United has demonstrated no burden on its First Amendment rights tantamount to the burdens analyzed in the political disclosure case law.

On one point, *amicus* and Citizens United are in agreement: the political disclosure cases are an imperfect fit here. But this hurts, rather than helps, Citizens United. The disclosure laws reviewed in

[3] Even under strict scrutiny, New York's registration and donor disclosure requirements would likely pass muster. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 162, 165 (2002).

Buckley and related cases implicated far greater First Amendment burdens than does the challenged regulation here—which requires nothing more than the non-public filing of a disclosure form that Citizens United has already submitted to a federal agency.

Two clear distinctions can be drawn between the instant case and the political disclosure cases: one, the challenged Schedule B reporting requirement is non-public in nature; and two, the challenged reporting requirement is part of a broader state regime regulating tax-exempt entities.

First, unlike the political disclosure cases, the reporting requirements under attack do not require Citizens United to publicly disclose the identities of its contributors or members. As the Ninth Circuit noted in reference to California's analogous Schedule B reporting requirement for state charities, the state "regime is readily distinguishable from state requirements mandating *public* disclosure—such as those often found in the regulation of elections—that are intended to inform the public and promote transparency." *Americans for Prosperity Foundation v. Harris*, 809 F.3d 536, 538 (2015) ("*AFPF*") (emphasis added).

The public nature of the political disclosure at issue in *Buckley* and similar cases was crucial to the Supreme Court's analysis of the First Amendment burdens imposed by the laws there. Indeed, the *Buckley* Court's very conception of the burdens of disclosure was premised on its publicity: "*public* disclosure of contributions to candidates and political parties" is potentially chilling because it "will deter some individuals who otherwise might contribute" and "may even expose contributors to harassment or retaliation." 424 U.S. at 68 (emphasis added). Ultimately, the Court found that this potential burden was outweighed by the governmental interests in providing public access to this information and "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. But it was the public nature of the disclosure that was the essence of the perceived burden.

Turning a blind eye to both state law and practice, Citizens United simply assumes that its donors would be publicly disclosed. It states that its donors "fear public backlash, financial harm, and worse, should their support of politically contentious and controversial causes

become *known publicly*." JA248 (emphasis added). But there is no basis to believe that Citizens United's donors would in fact become *known publicly*. As the district court found, "the complaint fails to properly allege that it is plausible that the attorney general will disclose plaintiffs' donors' identities to the public." SA11 n.1. In fact, New York keeps Schedule B forms confidential and exempts them from state freedom-of-information laws. JA94, 138. Citizens United's entire analysis of the First Amendment burden here—and more specifically, of the likelihood that its donors would face harassment—rests on a false premise.

The only justification for facial invalidation of the challenged regulation would be a theory of First Amendment harm arising from even *non-public* reporting of Schedule B forms to the Attorney General. But Citizens United has made no serious claim that it feared harassment by the government. *See infra* Part II.C. The district court likewise found that Citizens United had no plausible evidence of potential state harassment. SA11 n.1.

If the reporting is non-public and there is no credible fear of state harassment, the only First Amendment "burden that might apply . . . is

the Schedule B policy's frustration of Citizens United's donors' generalized interest in giving anonymously." JA139. But even "[t]o the extent such an interest actually exists," the group challenging such a reporting requirement would have to provide evidence that "the policy has caused donors to curtail their participation in, or contributions to, charities that engage in solicitation, advocacy, and informational campaigns." JA139.

Citizens United has not made any specific demonstration that submitting its Schedule B to the Attorney General on a confidential basis would lead to actual attrition of donors to Citizens United. Instead, it generally alleges that donors prefer anonymity and are concerned about any reporting obligations that could lead to exposure (including, presumably, reporting to the IRS). *See* JA248 (discussing only fears of attrition from *public* disclosure). But "a general fear of the IRS"—or of Attorney General Schneiderman—"is insufficient to establish that speech will be chilled." *United States v. Judicial Watch, Inc.*, 371 F.3d 824, 832 (D.C. Cir. 2004).

The second distinction between this case and the political disclosure cases is that the reporting requirement here applies to

Citizens United only because it has elected to operate as a tax-exempt charity. Citizens United would not be subject to New York's registration or reporting requirements—or to those of the IRS—if it were willing to forgo this status.[4] In the political disclosure cases, by contrast, reporting obligations were not connected to those groups' charitable, tax-exempt operations, but were generally triggered by the campaign-related content of the groups' independent communications.[5]

Exemption from income tax and the right to solicit untaxed contributions from state citizens are government benefits. The Supreme Court has confirmed that groups benefiting from such subsidies can permissibly be subject to disclosure and other regulations—both to

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[4] It may be theoretically possible that an organization could forgo tax exemption and yet remain subject to New York's charitable solicitation requirements. However, Citizens United has not shown—and, given the State's definition of "charitable organizations," likely could not show—that any meaningful percentage of groups subject to the requirements would not qualify for federal or state tax exemption. *See* 13 N.Y.C.R.R. § 90.2.

[5] The reporting requirement here is also distinguishable from the laws reviewed in the political disclosure cases in terms of the degree of detail required. Unlike most political disclosure laws, Schedule B reporting does not require Citizens United to produce a list of its rank-and-file members or small donors. *See* 26 C.F.R. § 1.6033-2(a)(2)(ii)(f), (iii)(a) (requiring only names of those donating more than $5,000 or, for certain 501(c)(3)'s, two percent of organization's total contributions).

guard against the abuse of those subsidies and to ensure their proper administration. Indeed, on these grounds, even substantive limitations on the activities of public charities have been upheld against First Amendment challenge. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 551 (1983) (upholding federal restrictions on lobbying activities of groups electing to organize under Section 501(c)(3)).

The total number of public charities, *i.e.*, Section 501(c)(3) organizations, listed by the Internal Revenue Service exceeds more than one million organizations.[6] All of these groups are subject to the Schedule B reporting requirement, 26 U.S.C. § 6033(a)-(b); 26 C.F.R. § 1.6033-2(a)(2)(ii)(f), (iii)(a), as well as a host of additional regulations. It would be extraordinary for each and every 501(c)(3) group to have a *prima facie* First Amendment case against the IRS solely on the basis of this reporting requirement. *Amicus* is aware of no First Amendment challenge to the federal Schedule B reporting requirement for 501(c)(3)

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[6] Nat'l Ctr. for Charitable Statistics, *Quick Facts About Nonprofits*, http://nccs.urban.org/statistics/quickfacts.cfm; *see also* 26 U.S.C. § 501(c)(3).

groups, and certainly knows of no such challenges that have been successful.

If the federal Schedule B reporting requirement is presumptively constitutional, so too is the reporting requirement challenged here. New York, like the IRS, requires a charitable organization to submit a Schedule B form on a *non-public* basis. And New York, like the IRS, does so to ensure that charitable organizations do not abuse their tax status or commit a fraud upon its citizens. This case is not about disclosure to the public. Any injury is so speculative and attenuated as to render Citizens United's facial challenge worthy of dismissal.

II. Citizens United Does Not Qualify for an As-Applied Exemption From the Reporting Requirement.

This is not a public disclosure case, and the possibility that Citizens United's Schedule B will be publicly revealed is entirely hypothetical. Even if it were likely that Citizens United's Schedule B would be made public, however, it has not demonstrated that this disclosure would give rise to a reasonable probability of threats, harassment or reprisals of its donors such that an as-applied exemption from reporting would be justified.

A. The "harassment" exemption was designed to protect vulnerable and pervasively abused minority groups, not politically powerful and wealthy donors to groups like Citizens United.

Citizens United seeks an exemption that was created for politically and socially marginalized groups like the sixty-member Socialist Workers' Party of Ohio (SWP), not nationally successful, well-funded advocacy organizations like Citizens United. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88 (1982). The as-applied harassment exemption carves out a protected space for "dissident" or minority viewpoints that would otherwise be removed from "the free circulation of ideas." *Id.* at 91, 93. Every case that has granted the disclosure exemption to date has involved a group whose size and influence is dwarfed by the weight of official opposition and public hostility to it.[7]

The Socialist Workers Party, for example, had a total of sixty members, yet supported its claim for exemption with evidence of pervasive and "ingrained" societal hostility. *Id.* at 101. Successful

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[7] The sole exception is *Americans for Prosperity Foundation v. Harris*, discussed *supra* Part I.A. That Citizens United places so much weight on this one outlying case, for both its facial and as-applied challenges, only illustrates how out of step its arguments are with prevailing law. *See* Appellants' Br. 34-36, 42.

political movements are "a far cry from the sixty-member SWP," which was "repeatedly unsuccessful at the polls, and incapable of raising sufficient funds." *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 928 (E.D. Cal. 2011), *aff'd in part, dismissed in part as moot sub nom. Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827 (9th Cir. 2014).

The few cases applying the exemption make clear that it is intended for groups facing severe societal hostility, state-sanctioned animus, and the real prospect of physical harm. None have shielded a group as influential and politically successful as Citizens United, which in any event "has been disclosing its donors for years" without incident. *Citizens United*, 558 U.S. at 370 (rejecting the group's unsubstantiated claim for an as-applied harassment exemption from federal campaign disclosure laws).

In its foundational ruling in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court explicitly tied the NAACP's prospect of First Amendment harm to the severity and degree of public opposition it faced in Alabama at that time. The Court noted that although privacy might be required in some instances to preserve freedom of association, disclosure of a group's rank-and-file membership

lists poses a measurably greater threat if the group "espouses dissident beliefs." *Id.* at 462.

When considering whether to extend as-applied relief to minor parties in *Buckley*, the Court focused particularly on how a group's minority status could leave it existentially vulnerable to any loss of revenue or membership. Reasoning that small and independent movements are "less likely to have a sound financial base" and "more vulnerable to falloffs in contributions," the Court worried that "fears of reprisal may deter contributions to the point where the movement cannot survive." 424 U.S. at 71. Nevertheless, it rejected evidence that "one or two persons" had in fact refused to make contributions to minor parties for fear of being disclosed as insufficient to merit as-applied exemption. *Id.* at 71-72. Any politically active organization is likely to encounter some opposition. But unless the magnitude of that opposition poses a severe, practically existential threat that law enforcement is unwilling or unable to control, an exemption is not warranted.

There is simply no comparison between Citizens United and the groups that have historically qualified for exemption. Like other groups that have unsuccessfully sought exemption, Citizens United cannot "in

good conscience analogize [its] current circumstances to those of either the SWP or the Alabama NAACP circa 1950." *ProtectMarriage.com*, 830 F. Supp. 2d at 928. Citizens United has suffered none of the violence, threats, harassment or reprisals that warranted exemptions for the SWP and NAACP. In particular, the NAACP's briefing stressed that its Alabama members faced a climate of "open opposition from state officials and an atmosphere of violent hostility" from the general public:

> The Governor, Lt. Governor, state legislators, the Alabama State Superintendent of Schools, local officials and even judges, have consistently issued public declarations that the constitutional mandate prohibiting racial discrimination in public education should be resisted. . . . Threatened and actual loss of employment and other forms of economic reprisals have accompanied legislation intended to punish financially those persons who advocate orderly compliance with the law as well as those who advocate equal rights for all. Violence and bloodshed have been predicted by high state officials . . . . Threats and actual acts of violence have been directed against Negroes. . . . While Negroes have been refused official protection from threats of physical violence, where Negroes have protested against deprivation of their rights, state officials have been quick to curb this "lawless" activity. . . . Alabama officials have committed themselves to a course of persecution and intimidation of all who seek to implement desegregation.

Brief for Petitioner, *NAACP v. Alabama*, 357 U.S. 449 (1958), 1957 WL 55387, at *12-*17 (footnotes omitted). The brief also cited news articles recounting, in part, a "year-long series of bombings and shootings"; "19

major acts of violence" in Montgomery—"9 bombings and 10 shootings"; "Ku Klux Klan activity, demonstrations, and cross burnings" in communities across Alabama"; and bombings of four churches and multiple private residences. *Id.* at *16 n.12.

But unlike the SWP and the NAACP, Citizens United is not a persecuted minority, and has certainly not suffered the equivalent in official abuse or private violence. On the contrary: Citizens United espouses mainstream views, the politicians it supports have been broadly successful on the national political stage,[8] and the few donors reported on its Schedule B forms are unlikely to be part of a demographic in need of protection from state authorities. In fact, by its own estimation, Citizens United is "the leading conservative advocacy group in the country." *Who We Are: David N. Bossie*, Citizens United, http://www.citizensunited.org/about-david-bossie.aspx (last visited Apr. 12, 2017). And its founder and president, David Bossie, served as both the deputy campaign manager of President Donald Trump's 2016 campaign and the deputy executive director of his transition team. *Id.*

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[8] *See, e.g.*, *Citizens United for the Trump Agenda*, Citizens United, https://citizens-united.rallycongress.net/ctas/citizens-united-trump-agenda/petition (last visited Apr. 12, 2017) ("Citizens United has been working closely with President Donald Trump for years.").

Like any association, Citizens United may "take stands that are controversial to segments of the public," and the well-known individuals who founded and direct Citizens United "may believe that they are targeted because of the positions they take," but that alone does not establish that the organization "faces the hardships that the NAACP and SWP were found to suffer." *McConnell v. FEC*, 251 F. Supp. 2d 176, 247 (D.D.C.) (three-judge court), *aff'd*, 540 U.S. 93 (2003).

B. Public criticism is not "harassment," and peaceful protests and boycotts are not "threats."

The primary forms of "harassment" from which Citizens United seeks protection—"public backlash" and "financial harm," JA248—are not tantamount to the violence and intimidation that necessitated such protection for the NAACP and the SWP. Incivility and political disagreement are not grounds for exemption.

Moreover, the supposed harassment that Citizens United's donors fear is in fact speech that has powerful First Amendment dimensions of its own. They are wary of the "public backlash" that comes from normal political debate, and the "financial harm" that would result from boycotts and other legitimate forms of protest. JA248. Indeed, Citizens United's "exemption argument appears to be premised, in large part, on

the concept that individuals should be free from even legal consequences of their speech." *ProtectMarriage.com*, 830 F. Supp. 2d at 932. "That is simply not the nature of their right." *Id.*

Citizens United's argument—that merely pleading a "fear [of] public backlash" should entitle it to an exemption, JA148[9]—is particularly unconvincing given where and how it chooses to operate: in the rough-and-tumble world of modern politics. There is little indication that its experiences are unique among its politically active peer groups, as Citizens United is no doubt aware given its considerable background in electoral politics. Anyone who has funded and directed the development of negative "attack" advertisements surely recognizes that polite discourse is not exactly a hallmark of competitive politics.[10] This

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[9] Citizens United claims that it cannot provide any more specific information about the harassment its donors supposedly fear, "because what the donors object to is *identifying* themselves." Appellants' Br. 42. This argument, however, would create a gaping loophole in disclosure law: if merely alleging that unidentified donors had subjective concerns about potential harassment sufficed, any group could circumvent disclosure requirements without ever having to prove that its donors actually have a reasonable fear of being harassed.

[10] *See* Eric Boehlert, *You Can't Teach an Old Attack Dog New Tricks*, Salon (July 20, 2004), http://www.salon.com/2004/07/20/david_bossie ("Bossie joined Citizens United in 1992 as its director of political affairs, which he quickly transformed into a full-time job of hounding the

evidence plainly does not bespeak the "rare circumstance" that would support an as-applied exemption. *Doe*, 561 U.S. at 215 (Sotomayor, J., concurring).

Indeed, even according to Citizens United's own submissions, what its donors apparently consider most threatening is the loss of anonymity in and of itself—and the public debate that may ensue. JA248. But "no case has ever held or implied that a disclosure requirement *in and of itself* constitutes a First Amendment injury." *Ctr. for Competitive Pol. v. Harris*, 784 F.3d 1307, 1316 (9th Cir.) ("*CCP*"), *cert. denied*, 136 S. Ct. 480 (2015). The district court rejected Citizens United's claim "that [New York's] disclosure policy will unduly burden them because their donors in particular 'value their privacy,' and 'if individuals know that their names could be divulged to the public, they often will refuse to donate.'" SA11 n.1. That argument, the district court correctly found, runs counter to governing precedent, which makes clear that "the desire for privacy and loss of donations alone does not render viable an as-applied challenge to a disclosure regime." *Id.*

Clintons. . . . Four years earlier Citizens United had produced the infamous race-baiting Willie Horton ad.").

The fact that certain donors strongly *prefer* absolute anonymity does not automatically entitle them to it, short of a demonstrable and serious risk of harassment specific to that particular group and disclosure requirement. And although some members of the public may criticize the policies and candidates endorsed by Citizens United and, by extension, Citizens United's donors, that does not amount to unconstitutional "harassment" of those donors or a violation of their First Amendment rights. On the contrary, this type of lawful public debate is precisely what the First Amendment is meant to promote.

C. Citizens United makes no credible claim that it fears state harassment.

The one slender reed remaining to Citizens United is the prospect of state harassment. But nothing in the record suggests that New York has or will target Citizens United or fail to protect its donors from threats or abuse. Insofar as Citizens United means to insinuate otherwise through misleading statements about the Attorney General's supposed antipathy, JA251-252, such suggestion and innuendo is unworthy of serious consideration. As the district court noted, Attorney General Schneiderman did not actually refer to Citizens United or its foundation at all. Rather, the Attorney General mentioned the *court*

decision Citizens United v. FEC—and the new opportunities it created for groups to evade campaign disclosure laws by giving to politically-active nonprofits, a concern recognized in numerous court decisions. SA11 n.1.

Moreover, to the extent that Citizens United's donors fear what would happen "if their identities were obtained by a hostile government official and disclosed," JA252, they can seek more targeted remedies to ensure that disclosures remain non-public. There is no need to compromise the state's important regulatory interests for a group that already has the full protection of state and federal law enforcement.

III. Citizens United's Prior Restraint Argument Is Without Merit.

Citizens United also makes the sweeping claim that the Schedule B requirement is a presumptively invalid prior restraint, and that consequently, the Attorney General now bears the burden of proving that it passes strict scrutiny. But "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957). And in this case, the challenged provision is neither "prior" nor a "restraint."

To begin with, the donor disclosure requirement does not act "prior" to speech. The cases in which the Supreme Court treated laws as presumptively invalid prior restraints "dealt with registration requirements that took effect before any speech had occurred." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 438 (5th Cir. 2014). In order to fit its claim into this framework, Citizens United conflates two separate provisions: New York's initial charitable registration requirement, N.Y. Exec. Law §§ 172(1), 172-d(10); 13 N.Y.C.R.R. § 91.4, and its annual donor disclosure requirement, 13 N.Y.C.R.R. § 91.5(c)(3)(i)(a).

Citizens United discusses these as a single unit, claiming that charitable organizations cannot solicit "unless they first register with the Attorney General and disclose their donors' identities." Appellants' Br. 23. This sleight-of-hand elides the fact that organizations must only file an initial registration form, and *not* their Schedule B, before soliciting as a charity in New York. *Compare* 13 N.Y.C.R.R. § 91.4(a) (requiring only organizational and tax-exemption information to register), *with id.* § 91.5(b), (c)(3)(i)(a) (requiring Schedule B as part of

annual filing for "organizations [already] registered with the Attorney General").

An organization can solicit for as long as a year before ever having to disclose its top donors to the Attorney General. By definition, the Schedule B requirement does not "impose a 'previous' or 'prior' restraint on speech," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976), because it does not "forbid[] certain communications . . . *in advance* of the time that such communications are to occur," *Perry v. McDonald*, 280 F.3d 159, 171 (2d Cir. 2001) (emphasis added) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)).

Nor is the Schedule B requirement a "restraint" on speech. As discussed above, *see supra* Part I, Citizens United is subject to the disclosure rule only because it a charity eligible for tax-exempt status. And "tax exemptions . . . are a form of subsidy that is administered through the tax system." *Regan*, 461 U.S. at 544. As the Supreme Court has repeatedly held, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* at 549.

Moreover, as discussed in Part I, the reporting requirements are so minimal as to scarcely constitute any cognizable "burden" on First

Amendment activities, much less a "restraint." The registration is a one-time filing that Citizens United has already submitted—and consequently, does not have standing to challenge, as Appellee has pointed out. *See* Br. at 26. New York's Schedule B reporting requirement demands nothing more than a photocopy of an IRS form that Citizens United has already completed for federal tax purposes.

The district court was therefore correct to evaluate the Schedule B requirement under the exacting scrutiny standard used for disclosure laws. Like other disclosure provisions, it merely "require[s] the provision of information, and only incidentally prevent[s] speech when the speaker is unwilling to provide the additional required information." *Reisman*, 764 F.3d at 426. Moreover, charitable organizations "remain fully in control of their compliance with the" Schedule B requirement; "any limit on speech created by the requirement arises solely from the [organization's] own choice to not provide information to the government." *Id.* at 439. Courts have repeatedly upheld registration,

disclaimer, and disclosure requirements of this sort—whether they mandate information before, during, or after speech.[11]

If anything, given the specific characteristics of the Schedule B requirement, exacting scrutiny may be *too strict*. The Court has consistently subjected "less onerous" speech burdens "to a lower level of scrutiny and upheld those restrictions." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735 (2011). It has also indicated that, when examining the regulation of charitable solicitation, the judiciary should strike "a balance between" the state's "interests and the effect of the regulations on First Amendment rights." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536

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[11] *E.g.*, *Citizens United*, 558 U.S. at 366-67 (disclaimer and disclosure requirements); *Buckley*, 424 U.S. at 35-36, 82 (registration requirements for PACs and disclosure requirements for independent expenditures); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (registration and reporting requirements for lobbying); *AFPF*, 809 F.3d at 538-39 (private Schedule B disclosure for charitable organizations); *CCP*, 784 F.3d at 1312, 1315-17 (same); *Reisman*, 764 F.3d at 440-41 (treasurer appointment and disclosure requirements triggered before political spending exceeds certain dollar threshold); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1249-53 (11th Cir. 2013) (organizational, registration, and reporting requirements); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 593-94 (8th Cir. 2013) (registration requirement for non-PAC groups); *SpeechNow.org v. FEC*, 599 F.3d 686, 697-98 (D.C. Cir. 2010) (en banc) (same); *Famine Relief Fund v. West Virginia*, 905 F.2d 747, 752 (4th Cir. 1990) ("A state's regulations can require a charity to disclose its financial statements.").

U.S. 150, 163 (2002); *see also id.* at 165 (stating that fraud prevention is an important interest that states "may seek to safeguard through some form of regulation of solicitation activity"). New York's Schedule B requirement applies only to charitable organizations; relates only to their solicitation of funds, not to more substantive forms of speech; requires only the duplication of the organization's submitted IRS returns; and involves non-public reporting. It is therefore unclear whether this requirement warrants even exacting scrutiny under traditional First Amendment principles.

IV. Citizens United's Novel Interpretation of Disclosure Jurisprudence Threatens Proper Oversight of State Programs, as Well as Political Disclosure Measures Nationwide.

Ratcheting up the degree of scrutiny for routine regulatory requirements, as Citizens United asks this Court to do, would have far-reaching implications for both the oversight of tax-exempt entities and the efficacy of political disclosure laws.

First, Citizens United makes a sweeping claim about the scope of the prior restraint doctrine. Taken to its logical conclusion, Citizens United's argument would subject to strict scrutiny *any* regulatory scheme that could be claimed to affect speech, no matter how minor the

administrative requirements.[12] Merely asking an organization to tell the government its name or address would trigger strict scrutiny. This would threaten all forty of the states that require pre-solicitation charitable registration.[13] It could likewise imperil political committee registration requirements, professional licensing schemes—even, perhaps, the IRS's entire system for granting tax-exempt status.

However, these everyday administrative schemes are not subject to such probing review. *See Reisman*, 764 F.3d at 438-39. And neither is New York's donor disclosure requirement. "The mere fact that a charitable group claims First Amendment privileges cannot shield that group from the scrutiny of the Attorney General." *Abrams on Behalf of People v. N.Y. Found. For Homeless, Inc.*, 562 N.Y.S. 2d 325, 328 (Sup. Ct. 1990).

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[12] Indeed, that appears to have been Citizens United's intent at first. Its complaint alleged that the registration requirement alone constituted a facially invalid prior restraint. JA 253. However, since its opening brief on appeal challenges only the *combination* of the registration and donor disclosure requirements, Appellants' Br. 23-24, Citizens United has waived its challenge to the registration provision *per se*, *see Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

[13] *Fundraising Compliance Guide*, Harbor Compliance (Oct. 15, 2014), https://www.harborcompliance.com/information/charitable-registration.

Second, Citizens United seeks to dangerously expand the harassment exemption to disclosure laws. As discussed *supra* Parts I.A, III, this case concerns a reporting requirement that is part of a broader tax-exemption regime. Citizens United is hardly the first political group to argue that it should be exempted from the requirements of charitable solicitation laws. Like Citizens United here, the Americans for Prosperity Foundation and the Center for Competitive Politics have attacked the very legitimacy of non-public disclosure requirements for charities. *CCP*, 784 F.3d at 1312, 1314; *AFPF*, 809 F.3d at 539. However, charitable disclosure requirements, like many other oversight measures, serve "substantial governmental interests 'in protecting the public from fraud, crime and undue annoyance.'" *Schaumburg*, 444 U.S. at 636. If this Court allows Citizens United to evade non-public reporting here, it would permit organizations to argue that the First Amendment gives them the right to receive government benefits without corresponding government oversight.

Furthermore, even if this Court assumed that this case implicated *public* disclosure, Citizens United twists public disclosure doctrine to the point of harming democratic discourse. Disclosure requirements are

designed to inform the public about who is spending money in the electoral sphere. *See Citizens United*, 558 U.S. at 367. By doing so, disclosure serves our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

This commitment does not come without cost—but "harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance." *Doe*, 561 U.S. at 228 (Scalia, J., concurring in the judgment). Permitting the wealthy and powerful to shield themselves from public criticism for their political stances would eliminate the robust discussion that undergirds our political system.

For this reason, it is "the unusual case" that presents "a genuine threat of harassment or retaliation" sufficient to evade disclosure. *Family PAC v. McKenna*, 685 F.3d 800, 808 (9th Cir. 2012). If disclosure would create a real risk of physical harm or serious harassment, then this danger is enough to outweigh the public interest. *See McConnell*, 540 U.S. at 198-99. But if this Court were to expand the harassment exemption beyond those limited circumstances, donors could use the

sometimes-adversarial debate that disclosure requirements are meant to foster as an excuse to avoid disclosure entirely.

There is no question that some political groups will aggressively pursue any avenue to evade disclosure requirements. Since *Doe v. Reed*, litigants have increasingly looked to the harassment exemption in their attempts to elude federal and state disclosure laws. For instance, in *Many Cultures, One Message v. Clements*, the Washington district court rejected an as-applied challenge to the compelled disclosure of grassroots lobbying contributions and expenditures, noting that "[t]he evidence, or rather the lack thereof" was "substantially similar to that [which] the Supreme Court found lacking" in *Buckley* and *Doe*. 830 F. Supp. 2d 1111, 1187 (W.D. Wash. 2011), *aff'd in part, vacated in part, remanded*, 520 F. App'x 517 (9th Cir. 2013). In a different case, a set of California ballot measure proponents claiming an exemption actually admitted that they did so not because they feared reprisals, but rather for strategic reasons. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 542 (9th Cir. 2015) (en banc) (noting that plaintiffs "explained in depositions that they did not really desire anonymity"). If this Court accepted Citizens United's theories of First

Amendment injury, a similar wave of challenges to disclosure laws would surely follow.

CONCLUSION

For the reasons set forth above, the district court decision should be **AFFIRMED**.

Respectfully submitted,

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Dated: April 14, 2017

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,867 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Office Word 2016 in Century Schoolbook 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* for the Campaign Legal Center with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 14, 2017. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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