Nos. 16-55727 & 16-55786

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff-Appellee-Cross-Appellant,

v.

KAMALA HARRIS, Attorney General of the State of California, in her official capacity

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Central District of California
Civil Action No. 2:14-cv-09448-R-FFM

BRIEF FOR *AMICUS CURIAE* CAMPAIGN LEGAL CENTER SUPPORTING DEFENDANT-APPELLANT AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center is a non-profit 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 promote the enforcement of political disclosure, campaign finance and election laws. *Amicus* submits this brief because it is concerned that a decision by this Court to affirm the district court would run counter to longstanding precedent and undermine the operation of disclosure laws across the nation.

SUMMARY OF ARGUMENT

Americans for Prosperity Foundation ("AFPF") has sought and received the benefit of tax-exempt status from the State of California. Yet it will not 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 public charities operating in California. AFPF attempts to justify its actions by pointing to the First Amendment, and by pleading fears of future harassment. But the district court's ruling in favor of AFPF conflates

[1] Appellant 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.

the burdens of private and public disclosure, credits speculative and inadequate evidence and dangerously expands the First Amendment's harassment exemption from disclosure laws.

Amicus' chief concern is AFPF's distortion of the jurisprudence addressing how and whether compelled disclosure burdens First Amendment rights. This brief will thus focus on the district court's analysis of whether AFPF has demonstrated a cognizable First Amendment injury. *Amicus* adopts the Attorney General's analysis of the important governmental interests justifying the challenged Schedule B reporting requirement, Appellant-Cross-Appellee's Opening Br. at 47, but will not otherwise address the Attorney General's interest in the reporting of Schedule B information.

In its analysis of AFPF's alleged First Amendment injury, the district court's first error was its imprecise application of public disclosure doctrine to a private, regulatory disclosure regime. The fear of public harassment is nonexistent when disclosure is made only to government authorities. AFPF has provided no evidence that its Schedule Bs are in danger of being publicly disclosed, or that the Attorney General's Office itself will harass AFPF donors. The burden on

AFPF's First Amendment rights, therefore, is minimal, if it even exists at all. Moreover, because the private disclosure requirement is part of a regulatory scheme that provides AFPF with tax-exempt status, California's law-enforcement interest is stronger—and AFPF's rights are more attenuated—than in public disclosure cases.

Second, the district court erred in granting AFPF an as-applied disclosure exemption, which has only extended to groups facing severe harassment from official and private actors. The Supreme Court has been overwhelmingly supportive of political disclosure laws in general, but has recognized 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). This exemption is designed for vulnerable groups, not for one of the nation's most well-established and prosperous advocacy groups. Moreover, AFPF did not present the "specific evidence of past or present harassment" or "pattern of threats" required to claim the exemption. *John Doe No. 1 v. Reed*, 561 U.S. 186, 204 (2010). Instead, it presented evidence that was

either speculative or legally insufficient to constitute harassment, including criticism of AFPF's founders and supporters for public advocacy on various political and legislative matters. 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, the district court's expansion of the harassment exemption has troubling implications for other disclosure laws. It would allow political groups to challenge or make irrelevant any number of non-public reporting requirements designed to prevent fraud and safeguard the public fisc. If permitted to infect *public* disclosure doctrine, the district court's harassment exemption would swallow the Supreme Court's pro-disclosure rule, preventing the robust debate that both the First Amendment and disclosure requirements themselves are meant to foster.

ARGUMENT

I. AFPF Has Demonstrated No Burden on Its First Amendment Rights Sufficient to Justify the District Court's Broad Remedy.

The district court below enjoined the California Attorney General on First Amendment grounds from collecting a charitable organization's Schedule B form for non-public use as part of her administration of state tax laws. In support of its holding, the district court relied almost exclusively on case law that considered—and sustained—a variety of political disclosure laws that required groups engaged in independent political advocacy to disclose their donors or supporters to the *public*. *See* ER 3, 5 (citing, *e.g.*, *Buckley*, 424 U.S. 1; *Doe*, 561 U.S. 186; *Citizens United v. FEC*, 558 U.S. 310 (2010)). But these political disclosure cases are imperfect analogies, at best. AFPF alleges no First Amendment injury tantamount to that considered in *Buckley* or its progeny, and certainly not one warranting the district court's sweeping permanent injunction.

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 necessary to the administration of a broader regime of state tax exemption, not a freestanding requirement triggered by the content of AFPF's speech.

First, unlike the political disclosure cases, the reporting requirements under attack do not require AFPF to publicly disclose the identities of its contributors or members. As this Court has already held, the challenged "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 Found. v. Harris*, 809 F.3d 536, 538 (2015) ("*AFPF*") (emphasis added).

The public nature of the political disclosure at issue in *Buckley*, *Doe*, and similar cases was crucial to the Supreme Court's legal analysis of the First Amendment burdens imposed by the laws there. *See, e.g.*, *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1316 (9th Cir.) ("*CCP*") ("[U]nlike in [*Doe*] or in other cases requiring the disclosure of the names of petition signatories, in this case, the disclosure would not be public."), *cert. denied*, 136 S. Ct. 480 (2015). Indeed, the *Buckley* Court's very conception of the burdens of disclosure was premised on its

publicity, finding that "*public* disclosure of contributions to candidates and political parties" was 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 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.

The district court proceeded from the faulty assumption that AFPF's donors would be publicly disclosed. It states that there was "ample evidence establishing that AFP[F], its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization *becomes publicly known*," ER 7 (emphasis added), although there was no evidence that AFPF's donors in fact would be *publicly disclosed*. The parties do not dispute, and this Court has already found, that the "longstanding policy" of the Attorney General, as well as "her proposed

regulation formalizing that policy," is to maintain the confidentiality of Schedule B forms. *AFPF*, 809 F.3d at 538. That proposed regulation is now in effect. Cal. Code Regs. tit. 11, § 310(b) (effective July 8, 2016). The district court's entire analysis of the First Amendment burden here—and more specifically, of the likelihood that AFPF's donors would face harassment—rests on a false premise.

To be sure, the district court expressed "serious concerns" about the Attorney General's "inability to keep confidential Schedule Bs private" in the past. ER 8. But it made no finding that AFPF's Schedule B forms are in any specific danger of being publicly disclosed. All of AFPF's allegations of confidentiality breaches rest on the potential vulnerability of the registry website—not on any evidence that the public in fact accessed any Schedule Bs on the website. *See*, *e.g.*, ER 82-83. But even if the lower court's concerns were well-founded, the permanent injunction it ordered to remedy this perceived risk is grossly overbroad. The narrow preliminary relief devised by this Court in its December 29, 2015 opinion—wherein the Attorney General would be enjoined only from making AFPF's Schedule B information public, not

from collecting and using such information for enforcement—would more than suffice. 809 F.3d at 543; ER 58-59.

Beyond that, the only justification for broadening the scope of the relief would be a theory of First Amendment harm arising from even *non-public* reporting of Schedule B forms to the Attorney General. And there has been no such harm demonstrated. AFPF made no serious claim that it feared harassment by the government. *See* Section II.D. *infra*. *See also CCP*, 784 F.3d at 1316-17 ("[Although it is certainly true that non-public disclosures can still chill protected activity where a plaintiff fears the reprisals of a government entity, CCP has not alleged any such fear here."). The district court likewise made no finding of potential state harassment. ER 3-4, 8-10, 1100-01.

If the reporting is in fact non-public, the only First Amendment "burden that might apply . . . is the Schedule B policy's frustration of [AFPF's] donors' generalized interest in giving anonymously." *Citizens United v. Schneiderman*, 115 F. Supp. 3d 457, 466-67 (S.D.N.Y. 2015) (denying preliminary injunction); *see also Citizens United v. Schneiderman*, No. 14-cv-3703 (SHS), 2016 WL 4521627, at *7 n.1 (S.D.N.Y. Aug. 29, 2016) (dismissing amended complaint because

allegations "that the [New York] attorney general will disclose plaintiffs' donors' identities to the public" were not plausible), *appeal docketed*, No. 16-3310 (2d Cir. Sept. 26, 2016). 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." *Schneiderman* 115 F. Supp. 3d at 467. AFPF 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 AFPF, *e.g.*, ER 201 (discussing only fears of attrition from *public* disclosure); instead, it generally alleges that donors prefer anonymity and are concerned about all of AFPF's reporting obligations, including to the IRS, *see* Section II.B., *infra*.

The second distinction between this case and the political disclosure cases cited by the district court is that the reporting requirement here applies to AFPF only because it has elected to avail itself of a governmental benefit—namely, tax-exempt status under California law. AFPF would be free of these reporting requirements if it

were willing to forgo the privileges of tax-exempt status under California law. In the political disclosure cases, by contrast, reporting obligations were not connected to those groups' receipt of a state subsidy, but were generally triggered by the campaign-related content of the groups' independent communications.[2]

Exemption from income tax and the right to solicit tax-deductible contributions from state citizens are state benefits that can permissibly be conditioned on reporting and other restrictions, because those requirements enable California to properly administer the benefits it provides. Indeed, on this ground, 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

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[2] 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 AFPF to produce a list of its rank-and-file members or small donors. *See* 26 C.F.R. § 1.6033-2(a)(2)(iii) (requiring only names of those donating more than 2% of organization's total contributions).

Internal Revenue Service exceeds more than one million organizations, all of which 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), as well as a host of additional regulations.[3] 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) 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. California, like the IRS, requires a charitable organization to submit a Schedule B form on a *non-public* basis. And California, like the IRS, does so for the purpose of ensuring oversight over the provision of a state subsidy in the form of tax exemption. This case is not about disclosure to the public. And insofar as the harm asserted here is the possibility of an inadvertent breach of the confidentiality of AFPF's

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[3] 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).

donor information, the injury is so speculative and attenuated as to render the district court's remedy unnecessarily broad.

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

This is not a public disclosure case, and the possibility that AFPF's Schedule B will be accidentally revealed is minute. Even if it were likely that AFPF'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 AFPF.

AFPF 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 networks like AFPF and its affiliates. *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—other than this one—has involved a group whose size and influence is dwarfed by the weight of official opposition and public hostility to it.

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 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 standard make clear that it is reserved for groups facing severe societal hostility, state-sanctioned animus, and the real prospect of physical harm. None has shielded a group as influential and politically successful as AFPF. 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.

Based on the same principles, the Second Circuit granted an exemption to the Communist Party, a group specifically identified as "unpopular or unorthodox." *See FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 420 (2d Cir. 1982). In particular, the court highlighted evidence of pervasive *government* hostility including not only a long "history of governmental surveillance and harassment," but also an "extensive body of state and federal legislation subjecting Communist Party members to civil disability and criminal liability." *Id.* at 419.

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, the Court 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 AFPF and the groups that have historically qualified for exemption. Like other groups that have unsuccessfully sought exemption, AFPF 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. AFPF 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. Negroes who seek to secure their constitutional rights do so at the peril of intimidation, vilification, economic reprisals, and physical harm.

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, AFPF is not a persecuted minority, and has certainly not suffered the equivalent in official abuse or private violence. On the contrary: AFPF espouses undeniably mainstream views, its publicly-known supporters are eminent industrialists who have been broadly successful on the national political stage, and the few other donors potentially subject to Schedule B disclosure are not a demographic in need of protection from state authorities. *See* Appellant-Cross-Appellee's Opening Br. at 13, 29-30, 33-35. AFPF and its affiliates shape policy views among lawmakers nationwide, including at the highest levels of government.[4] Like any association, AFPF may "take stands that are controversial to segments of the public," and the well-known individuals who founded and direct AFPF "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).

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[4] *See, e.g.*, Kenneth P. Vogel & Eliana Johnson, *Trump's Koch administration*, Politico (Nov. 28, 2016), http://www.politico.com/story/2016/11/trump-koch-brothers-231863.

B. The district court erroneously accepted "unfounded speculation" with no connection to the Schedule B requirement as proof that AFPF will be exposed to "threats, harassment or reprisals."

As Justice Stevens put it, any court extending an as-applied disclosure exemption should "demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech." *Doe*, 561 U.S. at 219 (Stevens, J., concurring). Whether the quantum of evidence is sufficient in a given case will vary, but the degree of public opposition must create an actual—not speculative—burden on the group's freedom to associate. *See Buckley*, 424 U.S. at 69-70.

In this case, there is no clear nexus between the evidence of harassment offered by AFPF and the Schedule B requirement at issue. Most of the alleged harassment relied upon by the district court—and all of the evidence described in any detail—involved well-known public figures who spoke voluntarily about their high-profile ideological commitments and associations, including many completely unconnected to AFPF. Art Pope, for example, would be a prominent public figure quite apart from any affiliation with AFPF. Pope is the CEO of his family's privately-held retail chain, which has stores across the

Southeastern U.S., and he is one of the best-known politicians in North Carolina.[5]

The district court's undemanding conception of the proof necessary to establish an "actual burden" on the First Amendment rights of AFPF and its donors has no support in the case law. AFPF has advanced a standard that would allow any subjectively "threatening" incident—whether or not it has any connection to AFPF itself or its donors, or to the Schedule B requirement—to support a claim for exemption. According to one witness, AFPF's understanding of the word "threats" is "very broad," so as to encompass anything that AFPF donors "consider threatening." ER 351. And what AFPF donors appear to consider most threatening is the loss of anonymity in and of itself, *id.*—not primarily because that exposure will lead to serious threats or reprisals, but because, in the words of plaintiff's own expert, it might

[5] Matea Gold, *In N.C., conservative donor Art Pope sits at heart of government he helped transform*, Wash. Post, July 19, 2014, https://www.washingtonpost.com/politics/in-nc-conservative-donor-art-pope-sits-at-heart-of-government-he-helped-transform/2014/07/19/eece18ec-0d22-11e4-b8e5-d0de80767fc2_story.html (noting that according to a friend and state legislator, "Pope 'has been working all of his life to get in a position of influence in North Carolina.'").

subject donors to being "bother[ed]" for "additional contributions," ER 518.

But "no case has ever held or implied that a disclosure requirement *in and of itself* constitutes a First Amendment injury." *CCP*, 784 F.3d at 1316. For example, a federal district court recently rebuffed a group's attempt to support its as-applied challenge to New York's Schedule B disclosure provision "by claiming that the 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.'" *Schneiderman*, 2016 WL 4521627, at *7 n.1. That argument, the court 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.*

According to a recent sociological study of private wealth managers, secrecy is a standard financial planning imperative for ultra-high-net-worth individuals, who demand anonymity both as a means of tax avoidance and to secure less tangible benefits that are "scarce in the Internet era, and increasingly valuable in light of protest movements

such as Occupy Wall Street." Brooke Harrington, *Capital without Borders: Wealth Managers and the One Percent* 224-25 (2016). These donors use anonymity to "cloak [their] political and economic privilege in a strategic veil of privacy," where they are kept "largely safe from opposition or accountability." *Id.* Many or most of AFPF's largest donors—the only donors that would be subject to the Schedule B disclosure at issue here—may hail from this class of donors. *See* Appellant-Cross-Appellee's Opening Br. at 14 (stating that AFPF's 2014 Schedule B reporting threshold was $429,000). But the fact that certain donors strongly *prefer* anonymity does not necessarily entitle them to it, short of a demonstrable and serious risk of First Amendment chill specific to that particular group and disclosure requirement.

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

The primary form of "harassment" from which AFPF seeks protection—"disparaging comments," ER 254, and "negative press," ER 250, 261—is 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, nor are "character assassinations" by journalists or "unfair[]" treatment by

partisan bloggers. ER 303, 344. Moreover, much of AFPF's evidence of supposed harassment involves speech that has powerful First Amendment dimensions of its own, such as "picketing" and "calls for boycotts on their businesses." ER 329, 486. *See also, e.g.*, ER 198; 339-40. Indeed, AFPF'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. That is simply not the nature of their right." *ProtectMarriage.com*, 830 F. Supp. 2d at 932.

AFPF's purported evidence of injury suffered in online forums and on social media is particularly unavailing since online harassment has become increasingly commonplace for many internet users. A 2014 Pew Research Center study found that 73 percent of adult internet users had seen someone harassed online and 40 percent had personally experienced online harassment; 25 percent report observing somebody physically threatened.[6] Given the prevalence of online harassment, mean tweets and Reddit posts are not sufficient, on their own, to support an exemption from otherwise applicable disclosure laws, or the exception would quickly swallow the rule. When necessary, law

[6] Maeve Duggan, *Online Harassment*, Pew Research Center (Oct. 22, 2014), http://www.pewinternet.org/2014/10/22/online-harassment/.

enforcement can better address more pernicious forms of abuse, as it did for AFPF's witnesses. *See, e.g.*, ER 280-83.

Similarly, AFPF alleges that its canvassers and field operatives have been threatened while engaging in canvassing and door-to-door activities, and been subjected to "multiple instances of police officers stop[ping] employees and ask[ing] them what they're doing." ER 354. But such experiences are not unusual for canvassers—this treatment is a common, if sometimes unpleasant, function of political work, not a harm suffered uniquely by AFPF affiliates. For example, canvassers gathering signatures for an initiative to regulate oil and gas extraction in Colorado reported similar treatment,[7] as have canvassers seeking to raise the minimum wage in Arkansas.[8]

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[7] *See* Angela K. Evans, *Initiatives canvassers report harassment,* Boulder Weekly (Jul. 28, 2016), http://www.boulderweekly.com/news/initiatives-canvassers-report-harassment ("[C]anvassers have been followed by cars, petition signers have been intimidated to cross out their names and opponents have posted threats on social media.").

[8] Josh Berry, *Petition Canvassers Harassed by Homeowners, Police*, NBC 4 KARK (Mar. 26, 2014), http://www.arkansasmatters.com/news/ar-local/petition-canvassers-harassed-by-homeowners-police ("[Pulaski County Field Organizer Emily Farris] says the police have even questioned them. She said, 'That kind of comes with the territory.'").

Although the harassment alleged towards AFPF supporters and employees is unfortunate, there is little indication that their experiences are unique among those who have internet access or engage in canvassing activities, as AFPF's leadership and major donors are no doubt aware given their considerable backgrounds 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.[9] This evidence plainly does not bespeak the "rare circumstance" that would support an as-applied exemption. *Doe*, 561 U.S. at 215 (Sotomayor, J., concurring).

Finally, organized boycotts and peaceful protests are constitutionally protected forms of speech themselves, and often the only effective way for the economically powerless to speak at all. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-10 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."). The recognition that "[c]oncerted action is a powerful weapon," *id.* at 932, is shared by

[9] *See* Jane Mayer, *State for Sale*, The New Yorker (Oct. 10, 2011), http://www.newyorker.com/magazine/2011/10/10/state-for-sale ("'Art would provide some of the guidance' on the attack ads, Knight said, and because Pope was on the board 'he would approve them.'")

Americans of all political persuasions, including some of AFPF's witnesses below.[10] Indeed, as one witness affirmed, he was undeterred from appearing at a public AFP event in Michigan to promote a Right to Work bill—despite his awareness that there would be union protestors opposing them—because he wanted to demonstrate "having the courage to continue to speak out on these issues." ER 216.

Many of those demonstrations were protesting legislative changes for which AFPF, as well as some of AFPF's public supporters, actively and publicly lobbied. In North Carolina, for example, there were weekly demonstrations in the state capitol in response to the legislature's "approv[al of] a torrent of conservative measures that resembled ideas touted by [Art] Pope's think tanks," including "bills that cut unemployment benefits, blocked the expansion of Medicaid, restricted access to abortions and ushered in new restrictions on voting."[11] Now, AFPF seeks a disclosure exemption for its largest donors based in part

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[10] *See, e.g.*, ER 284-85 (Holden "joke[d]" in a speech to a "few hundred people" that he would boycott businesses of progressive donors); Steven Perlberg, *Breitbart Takes Aim at Kellogg in Ad Dispute*, Wall St. Journal (Dec. 1, 2016), http://www.wsj.com/articles/breitbart-takes-aim-at-kellogg-in-ad-dispute-1480552446.

[11] Gold, *supra* note 5.

on the "negative consequences" that one of them—Pope, who was by then North Carolina's State Budget Director—supposedly suffered as a result of the protestors' activity. Of course, protestors have no corresponding means of shielding their identities from public view, and they are just as susceptible to criticism for their political convictions. Indeed, the Civitas Institute, a nonprofit established and almost entirely funded by Pope's family foundation, specifically exploited that fact: it attempted "to puncture the demonstrations' impact by creating an online database of those arrested in the protests" that "included names, race, age, arrest record, employer's name and voting history."[12]

At the same time, many of those activists pushed for boycotts of Pope's retail chain. But the supposed "negative consequences" of these boycotts, if any, are far from clear. Although Pope claims that his business suffered, "he could not quantify" the dollar amount because "[i]t's difficult." ER 460. Pope also "testified that he considered stopping funding or providing support to AFP," but he decided to continue his support. ER 8. In contrast, the economic reprisals cited in *Socialist Workers* included "evidence that in the 12-month period before trial, 22

12 *Id.*

SWP members . . . were fired because of their party membership," and made clear that "private hostility and harassment toward SWP members make it difficult for them to maintain employment." 459 U.S. at 98-99.

D. There is no evidence of government hostility or animus directed at AFPF that would warrant its demand for special treatment.

AFPF also failed to demonstrate "a significant threat of harassment . . . that *cannot be mitigated by law enforcement measures*." *Doe*, 561 U.S. at 218 (Stevens, J., concurring) (emphasis added). There was absolutely no evidence below that AFPF or its donors has ever been, or will likely be, exposed to any kind of harassment that law enforcement cannot or will not address. Indeed, AFPF's witnesses acknowledged that the law enforcement response "has been great." (ER 280), and there was certainly no suggestion that AFPF lacks adequate recourse if confronted with any actual or perceived threats.

Nor is there anything in the record to suggest that California has or will target AFPF or fail to protect its donors from threats or abuse. Insofar as AFPF means to insinuate otherwise through vague statements about the Attorney General's political ties to President

Obama, such suggestion and innuendo is unworthy of serious consideration.[13] And, to the extent AFPF's donors were specifically "trouble[d]" by the "negative press" because they "felt [the accusations] were false," ER 261, they plainly have the means to seek more targeted recourse.

Likewise unavailing is the suggestion that unnamed large donors perceived various federal regulatory efforts as "targeting" them or their businesses. Many or most of those publicly affiliated with AFPF, and presumably most other AFPF donors that contribute generously enough to appear on its Schedule Bs, own or operate large business enterprises. There is no creditable evidence of official persecution in the record, notwithstanding whatever supposed "government intrusiveness they felt" from the IRS, "OSHA, the labor department in various states, [or] environmental agencies." ER 337. The fact that wealthy "donors have a

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[13] President Obama's "negative public remarks" did not refer to AFPF at all, but to the politically active (c)(4) and other groups financing "negative ads." More broadly, the President appears to have been reacting to the *Citizens United* decision and the new opportunities it created for groups to evade campaign disclosure laws by giving to politically-active nonprofits with "harmless-sounding" names, a concern recognized in numerous court decisions. The campaign finance case law provides rich evidence of organizations with "misleading" or "mysterious" names that participate in elections while disguising funding sources. *McConnell*, 540 U.S. at 128 & n.23.

circle of influence" with which they are likely to share their subjective "personal experience in regards to the IRS targeting or the government-agency targeting" does not improve this line of argument. ER 346.

There was no need to compromise the state's legitimate regulatory interests for a group that already has the full protection of state and federal law enforcement. But the district court, in its haste to shield AFPF from harsh criticism, completely failed to consider whether AFPF's concerns were adequately addressed by existing laws.

III. The District Court's Broad Interpretation of the Harassment Exemption Threatens Proper Oversight of State Programs, as Well as Political Disclosure Measures Nationwide.

Relaxing the harassment exemption standard, as the district court has done, has far-reaching implications for the regulation of tax-exempt entities and the efficacy of political disclosure laws.

First, this case concerns a reporting requirement that is a part of a broader regime of state tax exemption. The district court's ruling gives rise to the troubling possibility that the First Amendment will be used as a sword against lawful and proper oversight over the public fisc, rather than as a shield against state censorship of speech. AFPF is far from the first political group to argue that it should be exempted from

the requirements of charitable solicitation laws. Like AFPF here, Citizens United and the Center for Competitive Politics have attacked the very legitimacy of non-public disclosure requirements for charities. *CCP*, 784 F.3d at 1311-12, 1314; *Schneiderman*, 115 F. Supp. 3d at 463. However, charitable disclosure requirements, like many other oversight measures, serve "substantial governmental interests 'in protecting the public from fraud, crime and undue annoyance.'" *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980). If this Court allows AFPF to evade non-public reporting here, it would permit organizations to argue that their own political activities give them a First Amendment right to receive government benefits without corresponding government oversight.

Furthermore, even if this Court accepts the district court's assumption that this case concerns *public* disclosure, the ruling below 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. As the Supreme Court has recognized, public debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.* However, "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

critical speech that disclosure requirements are meant to foster as an excuse to avoid disclosure entirely.

This danger is made still greater by the tangled web of connections that comprise the modern political structure. The district court determined that AFPF fell within the harassment exemption based in part on claims that individuals connected to AFPF were threatened. However, there was no evidence that this harassment was tied to the specific work of AFPF, as opposed to other related groups. For instance, the district court stated as evidence of harassment that "Charles and David Koch, two of [AFPF]'s most high-profile associates, have faced threats, attacks, and harassment, including death threats." ER 7. The Koch brothers did found AFPF—but they also founded Americans for Prosperity, a related 501(c)(4) organization,[14] and help run a sprawling "network of small-government advocacy groups."[15]

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[14] Felicia Sonmez, *Who Is "Americans for Prosperity?,"* Wash. Post (Aug. 26, 2010), http://voices.washingtonpost.com/thefix/senate/who-is-americans-for-prosperit.html.

[15] Kenneth P. Vogel, *Secret Koch Memo Outlines Plans for 2016*, Politico (Apr. 23, 2015), http://www.politico.com/story/2015/04/koch-brothers-2016-election-memo-117238.

Their work with these other groups—even apart from their involvement with AFPF—has given the Koch brothers widespread notoriety.

Allowing AFPF to piggyback on claims of harassment against those associated with it would blow open the harassment exemption. Today, many political groups share founders, major donors, or histories. Just as Charles and David Koch helped found both AFPF and Americans for Prosperity, so too did Karl Rove found both American Crossroads, a Super PAC with public disclosure requirements, and Crossroads GPS, a 501(c)(4) without them.[16] Environmental activist Tom Steyer founded the Super PAC NextGen Climate, while donating millions to the Democrats' Senate Majority PAC.[17] When individuals with such public profiles have a hand in so many endeavors, organizations seeking to avoid disclosure will inevitably try to impute any threat of harassment from those individuals to the organizations

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[16] Jessica Yellin, *Karl Rove, American Crossroads and the Super PAC Democrats Love to Hate*, CNN (Jan. 24, 2012), http://www.cnn.com/2012/01/23/politics/rove-super-pac/index.html.

[17] Katia Savchuk, *Billionaire Tom Steyer on Money in Politics, Spending $74M on the Election*, Forbes (Nov. 3, 2014), http://www.forbes.com/sites/katiasavchuk/2014/11/03/billionaire-tom-steyer-on-money-in-politics-spending-74-m-on-the-election/#585387927cce.

themselves. Indeed, AFPF attempted below to conflate harassment against the Kochs as individuals, and harassment of "other Koch-affiliated groups," with harassment of AFPF. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at 72-74, *AFPF*, 2016 WL 1610591 (No. 14-cv-9448). Expanding the harassment exemption could break down the barriers between legally separate organizations, allowing a perceived threat to one to subvert disclosure for all.

There is no question that political groups will aggressively pursue such claims to evade disclosure requirements. Since *Doe v. Reed*, litigants have increasingly looked to the harassment exemption in their attempts to elude federal and state money-in-politics 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 the 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").

In sum, if this Court accepts AFPF's invitation to broaden the harassment exemption, shrewd political operatives—who over the years have proven quite adept at exploiting loopholes and circumventing disclosure requirements, *see, e.g.*, *Buckley*, 424 U.S. at 62 n. 71—will seize this Court's decision and seek to undermine disclosure laws from coast to coast.

CONCLUSION

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

Respectfully submitted,

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Dated: December 2, 2016

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 6,914 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 2010 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 Ninth Circuit by using the appellate CM/ECF system on December 2, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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