Nos. 19-251, 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
PETITIONER
v.
XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA, RESPONDENT

THOMAS MORE LAW CENTER, PETITIONER
v.
XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA, RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

PHILIP HAMBURGER
MARK CHENOWETH
MICHAEL P. DEGRANDIS
ADITYA DYNAR
MARGARET A. LITTLE
Counsel of Record

New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
(202) 869-5210
peggy.little@ncla.onmicrosoft.com

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INTEREST OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms against systemic threats, including attacks by administrative agencies and state attorneys-general on due process, jury rights,

[1] All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

freedom of speech and association, and other civil liberties. We uphold these constitutional rights on behalf of all Americans, of all backgrounds and beliefs, through original litigation, occasional *amicus curiae* briefs, and other advocacy.

The "new civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as freedom of association and the right to be tried in front of an impartial and independent judge. However, these selfsame civil rights are also "new"—and in dire need of renewed vindication—precisely because state attorneys-general and other executive branch entities have arrogated legislative power unto themselves and failed to respect vital civil liberties in the process. NCLA therefore aims to defend civil liberties—primarily by asserting constitutional constraints on administrative and executive actors, including state attorneys-general.

NCLA supports Petitioners because the Question Presented implicates the legacy of an irreplaceable civil rights-era precedent. NCLA is particularly disturbed that a state attorney general, without authority from an act of the state legislature, has invented a new, binding obligation on charities' soliciting donations in the State of California. Requiring these groups to turn over a list of their major supporters for their various charitable endeavors violates the First Amendment of the United States Constitution as applied to the states under the Fourteenth Amendment.

NCLA's chief interest as a civil rights organization participating in this litigation is to vindicate the associational freedom and anonymity principles enunciated in *NAACP v. Alabama ex rel. Patterson, Attorney General*, 357 U.S. 449 (1958). When a state

attorney general establishes a disclosure requirement via administrative fiat, when the attorney general can "insist on a list" without any legislative authority, it shifts lawmaking from elected legislators to the State of California's executive branch. Worse yet, it turns back the clock to the pre-civil rights era when dissident organizations labored at the mercy and sufferance of hostile state attorneys general.

It is unfair to NCLA's overwhelming majority of donors from outside California who desire anonymity—and who have a limited ability to influence an attorney general for whom they cannot vote—for the organization to subject them to California's disclosure regime, which the U.S. Court of Appeals for the Second Circuit has called out for its "systematic incompetence in keeping donor lists confidential." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018).

Success in this litigation would allow NCLA to solicit contributions in California without jeopardizing the anonymity of any donors who desire it. NCLA has no way to know whether donations to our group would ever be controversial or attract reprisals, but we stand up for the rights of free association and expression for all groups—popular and unpopular alike. NCLA ardently hopes that this Court will reverse the Ninth Circuit and reaffirm our nation's commitment to the bedrock civil rights legacy of *NAACP v. Alabama*, rather than the unconstitutional balancing test contrived by the Ninth Circuit.

SUMMARY OF THE ARGUMENT

Justice Harlan, writing for a *unanimous* Court, proclaimed the right of associational anonymity in the landmark civil rights case of *NAACP v. Alabama ex rel. Patterson, Attorney General*, 357 U.S. 449 (1958). The giants of jurisprudence who recognized the vital need for unpopular minority organizations of all stripes to conduct their lawful private activities freely without pretextual oversight by, or suspicionless disclosures to, a state attorney general would be dismayed if today's Court were to reverse that hard-won civil liberty.

The Ninth Circuit refused to require the Attorney General to show that his *ad hoc* demand for charities' IRS Form 990 Schedule Bs was narrowly tailored to advance the government's purported law enforcement interests, thereby dramatically departing from 60 years of controlling civil rights precedent established by this Court. *See* Ams. for Prosperity Found. (AFPF) Merits Br., at 2 (Feb. 22, 2021) *and* Thomas More Law Ctr. (Thomas More) Merits Br., at 16 (Feb. 22, 2021). At most, the Attorney General has an interest and ability to protect California-based donors. But the Form 990 Schedule Bs divulge a charity's largest donors, not its California donors. These large donors are the very ones best positioned to look after their own interests.

The Supreme Court should make it abundantly clear that *NAACP* still supplies the definitive authority on First Amendment jurisprudence in this area, for four principal reasons.

First, this Court should be alarmed that the California Attorney General is so openly flouting the constitutional protections for privacy and

associational freedom recognized by the Supreme Court in *NAACP v. Alabama*. When the Supreme Court famously held that Alabama Attorney General John Patterson could not compel the NAACP to produce its membership list, the justices applied a simple rule that bears no resemblance to the loose and indeterminate balancing test dubiously dubbed "exacting scrutiny" by the opinion below. *See NAACP*, 357 U.S. at 466.

The *NAACP* Court first observed that NAACP's members had been subjected to harassment when the fact of their membership had been revealed in the past. That *alone* was enough to show that disclosure to the state attorney general could deter people from joining the organization. *See id.* at 462–63. Then the Court considered Alabama's purported "interest" in obtaining the membership list—to determine whether the NAACP was violating the state's foreign corporation registration statute by conducting "intrastate business"—and held that the state's demand for the membership list had no "substantial bearing" to this putative state interest. *Id.* at 464.

The Ninth Circuit replaced the straightforward *NAACP* test with a vague and jargon-riddled "exacting scrutiny" standard that no longer protects unpopular minorities. *See Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1008 (Sept. 11, 2018). There is nothing at all "exacting" about the panel's standard of review. Instead of applying *NAACP*, the court borrowed a gestalt balancing test from cases involving compelled disclosures in the field of election law. *See id.* (holding that the "exacting scrutiny" standard "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest" and that "the

strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.") (quoting *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010) and *Davis v. FEC*, 554 U.S. 724, 744 (2008)) (internal quotations omitted). This approach finds no support in the *NAACP* opinion, which the Ninth Circuit was bound to follow as direct, on-point authority.

Second, the Ninth Circuit's decision erodes constitutional protections for political minorities. Many of the Constitution's structural provisions and guarantees of rights safeguard minorities and unpopular minority opinions. But these protections lose much of their value when courts fail to protect dissident organizations from compelled disclosure decrees that intimidate charities' supporters.

Third, the opinion below impinges on the religious freedom of donors who want to give anonymously in accordance with the teachings of major religions.

And finally, the Ninth Circuit ignored the ineluctable truth that the Attorney General lacked the statutory power to demand charities' Schedule Bs at all. By permitting his regulation-by-fiat, the Court would facilitate his subversion of both the California Constitution and the United States Constitution.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION IS INCONSISTENT WITH THE ROBUST CONSTITUTIONAL PROTECTIONS FOR CIVIL LIBERTIES THE SUPREME COURT ARTICULATED IN *NAACP V. ALABAMA*

NAACP v. Alabama is one of the canonical rulings of the civil rights era. It protects the rights of all dissident organizations to keep their supporter lists private from prying government officials. *NAACP*'s

holding is not limited to organizations that promote the cause of racial equality—it extends equally to other organizations whose beliefs may provoke hostility and opposition, or whose supporters could be deterred from affiliating absent assurances of privacy and confidentiality.

A. *NAACP v. Alabama* Protects Supporter Lists to Ensure Freedom and Privacy of Association

This Court, in one of its finest hours, acknowledged the truth of the "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 462. For the past 60 years, this Court has recognized that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.*

In analyzing the Alabama state attorney general's demand for NAACP's member list, the Court applied a straightforward test that asks whether an organization's members have previously encountered "public hostility" when their membership was revealed. *See id.* at 462–63. If so, then Alabama must show that disclosure has a "substantial bearing" on the State's asserted interest in obtaining the list of names. *See id.* at 464.

Under *NAACP*, if an organization shows that one or more of its supporters had encountered "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," that alone was enough to establish that disclosing the supporter lists to the state "may induce members to withdraw from the Association and dissuade others from joining it." *Id.* at 463. As the Court explained:

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

Id. at 462–63. Under this approach, an organization needs only to present evidence of past hostility encountered by its known supporters or affiliates on account of their relationship with the organization. That by itself shows that disclosure will burden the organization's First Amendment rights, and that showing then requires the state to demonstrate that the forced disclosure of these names will have a "substantial bearing" on whatever interest the state asserts in taking names.

There is sufficient cause for reversal of the Ninth Circuit's decision under this test. But if the Court is so inclined, it should also course correct one aspect of the test. The current test unfairly extends less protection to newer charities. A group must show it suffered negative effects *before* it gains the First Amendment's protection. The First Amendment,

however, can sustain no such time dimension because it prohibits the "abridging [of] the freedom of speech" here and now; it should not require a complainant to show it faced similar abridgment in the past to prove current or future abridgment. The Court should consider strengthening the *NAACP v. Alabama* test in this respect.

B. The "Exacting Scrutiny" Standard Is Inconsistent with *NAACP* and Flips the Burden to Americans to Justify Their Right to Privacy in Their Associations

The most striking aspect of the Ninth Circuit's "exacting scrutiny" standard is how little resemblance it bears to the Supreme Court's approach in *NAACP*—a case that the court barely mentioned.

The Ninth Circuit held that it was not enough for the plaintiffs to show that others had previously threatened and harassed their supporters and affiliates—even though the plaintiffs had produced extensive evidence of this in the trial court. *See Americans for Prosperity Found. (AFPF) v. Becerra*, 903 F.3d 1000, 1015–17 (9th Cir. Sept. 11, 2018); *see also id.* at 1017 (acknowledging that "this evidence plainly shows at least the *possibility* that the plaintiffs' Schedule B contributors would face threats, harassment or reprisals if their information were to become public.") (emphasis in original). Instead, the court held that the plaintiffs must also show a "reasonable probability" that the Attorney General would somehow disclose the plaintiffs' Schedule B contributors to the public. *See id.* at 1015. *NAACP* imposed no such requirement. The mere fact that the NAACP's supporter list would be in the hands of government officials was enough to establish a

chilling effect that "may induce members to withdraw" or "dissuade others from joining." *NAACP*, 357 U.S. at 463. The probability or likelihood of public disclosure played no role in *NAACP v. Alabama*'s First Amendment analysis.

The *NAACP* Court was correct to downplay the question of public disclosure. In contrast, the Ninth Circuit was wrong to require the plaintiffs to show a "reasonable probability" that the Attorney General would disclose their Schedule B contributors to the public. To begin, the risk of future disclosure is impossible to quantify, even though everyone agrees there is some risk of disclosure. *See AFPF*, 903 F.3d at 1018 ("Nothing is perfectly secure on the internet in 2018."); *id.* at 1019 ("[T]here is always a risk somebody in the Attorney General's office will let confidential information slip notwithstanding an express prohibition.") (quoting *Citizens United*, 882 F.3d at 384) (internal quotations omitted). So how is a judge—or litigant—supposed to determine when the risk of public disclosure is so great as to become a "reasonable" probability? And how is a charity supposed to demonstrate a "reasonable probability" of public disclosure?

More importantly, *any* chance of public disclosure is enough to deter some individuals at the margin from joining or donating to dissident organizations. Deterrence depends entirely on an individual's personal situation and personal considerations.[2]

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[2] *See* Harold J. Brumm & Dale O. Cloninger, *Perceived Risk of Punishment and the Commission of Homicides: A Covariance Structure Analysis*, 31 J. Econ. Behavior & Org. 1 (1996); Maynard L. Erickson, Jack P. Gibbs, & Gary F. Jensen, *The Deterrence Doctrine and the Perceived Certainty of Legal Punishments*, 42 Am. Soc. Rev. 305 (1977).

Someone whose circumstances leaves him particularly vulnerable to public disclosure—or who is dependent on the state and therefore worries about retaliation from hostile state officials even absent public disclosure—will be dissuaded from joining or donating, notwithstanding that the probability of disclosure may be small. Even a marginal chilling effect may substantially burden the First Amendment rights of organizations and their supporters.

A compelled disclosure regime produces this chilling effect whenever it demands a list from an entity. *NAACP* correctly declined to consider whether the Alabama Attorney General would actually disclose the NAACP's membership list to the public. Instead, the mere demand for the list created the chilling effect that burdened the members' First Amendment rights. Thus, *NAACP* requires the State of California to show that the compelled disclosure has a "substantial bearing" on the interests that it asserts, which it cannot do. *See NAACP*, 357 U.S. at 462–63; 464–65.

The Attorney General's forced disclosure of supporters' lists cannot be justified by any state interest, much less a substantial one. Schedule B will not ferret out fraud. Top association supporters—reported on Schedule B by the nonprofit *itself*—are the *most* capable of monitoring their association's management and the *least* likely to disapprove of it. Further, any association supporter, whether listed on Schedule B or not, may freely choose to cooperate with the Attorney General to investigate an association's alleged fraud. Indeed, given that less than 1% of investigations of charities implicate Schedule B, it is fair to question the Attorney General's true motives

in casting such a wide, First Amendment-chilling net.[3]

C. *NAACP* 's Holding and Analysis Apply to All Circumstances of Potential Retribution for Exercising Freedom of Association

The Ninth Circuit diluted the protections *NAACP* established by engaging in two specious doctrinal maneuvers. The first of these maneuvers has already been explained in the plaintiffs' Petitions: The court relied on cases involving compelled disclosures in election law, where the Court has established a far more forgiving standard of review than the rigorous standard that governs non-election cases such as *NAACP* and this one.[4] *See* Ams. for Prosperity Found. (AFPF) Pet. for Writ of Cert., at 2–3 (Aug. 26, 2019).

But the Ninth Circuit's second maneuver is more subtle and more pernicious. The opinion—like the Second Circuit's in *Citizens United v.*

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[3] *See* AFPF Merits Br., at 33 ("In the ten years preceding the trial in this case, fewer than 1% (5 out of 540) of the Attorney General's investigations of charities so much as implicated Schedule B. … Even in [those] five investigations, … the same information could have been obtained from other sources.").

[4] Nevertheless, even in the sphere of election law, courts apply *NAACP* 's foundational premise that disclosure obligations chill speech. For example, the Fourth Circuit invalidated a Maryland law that imposed two sets of disclosure obligations on online platforms regarding political ad purchasers. *Wash. Post v. McManus*, 944 F.3d 506, 523 (4th Cir. 2019). The court relied in part upon *NAACP* for the proposition that "the specter of a broad inspection authority, coupled with an expanded disclosure obligation, can chill speech and is a form of state power the Supreme Court would not countenance." *Id.* at 519 (citing *NAACP*, 357 U.S. at 462).

Schneiderman—attempted to cabin the holding of *NAACP* to situations in which an organization's supporters would face *violent* retaliation if their affiliations were disclosed. The Second Circuit, for example, tried to distinguish *NAACP* as follows:

> NAACP members *rightly feared violent retaliation* from white supremacists for their membership in an organization then actively fighting to overthrow Jim Crow. Ample evidence of past retaliation and threats had been presented to the Court. Requiring the NAACP to turn over its member list to a state government that would very likely make that information available to *violent white supremacist organizations*, the Court concluded, would reasonably prevent at least some of those members from engaging in further speech and/or association.

Citizens United, 882 F.3d at 381 (emphasis added) (internal citations omitted). Later in the opinion, the Second Circuit again attempted to distinguish *NAACP* by noting that civil rights activists had encountered not merely hostility but *violent* retribution:

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

Id. at 385 (emphasis added). The Ninth Circuit's panel opinion likewise distinguished *NAACP* in a footnote by quoting this exact passage from *Citizens United*. *See AFPF*, 903 F.3d at 1014–15 & n.5.

NAACP, however, never limits its holding to situations in which an organization's supporters are subjected to physical violence. Quite the opposite, the Supreme Court said that the NAACP:

> made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to *economic reprisal, loss of employment*, threat of physical coercion, and other manifestations of public hostility.

NAACP, 357 U.S. at 462 (emphasis added). Then it said that this evidence—which included non-violent forms of retribution—showed that disclosure of the supporter list:

> may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

Id. at 463. Nowhere does the Court's opinion mention or acknowledge the previous acts of violence committed against civil rights activists—let alone imply that its holding was predicated on these past acts of violence or threats of future violence.

Even the court below—in a case decided six months *after* the Petitioners filed their Petitions to this Court—recognized that threats of violence are not the only threats that have a chilling effect on

speech. In *Doe v. Univ. of Wash.*, 798 Fed. Appx. 1009 (9th Cir. 2020), the movants sought to enjoin disclosure of their association in a public records request. 798 Fed. Appx. at 1010. The trial court had determined that the movants were engaged in the First Amendment-protected activity of fetal tissue and abortion advocacy. *Doe v. Univ. of Wash.*, No. C16-1212JLR, 2017 U.S. Dist. LEXIS 197244, *26 (W.D. Wash. Nov. 30, 2017). The trial court also found that:

> disclosure of their personally identifying information would render them and those similarly situated uniquely vulnerable to *harassment, shaming, stalking, or worse*, and in this context, would violate their constitutional First Amendment rights of expression and association.

Id. at *6 (emphasis added). Citing *NAACP*, the Ninth Circuit agreed, finding that the movants "were associated with advocacy for reproductive rights." *Univ. of Wash.*, 798 Fed. Appx. at 1010-11 (regarding movant-Does 3, 4, 5, 7, and 8) (citing *NAACP*, 357 U.S. at 462). The court unanimously affirmed the trial court's preliminary injunction, holding that the movants faced:

> a reasonable probability that the compelled disclosure of personal information will subject those individuals or groups of individuals to threats, harassment, *or* reprisals that would have a chilling effect on that activity.

Id. at 1010 (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 200 (2010)) (emphasis added) (internal quotations omitted).

As the Ninth Circuit recognized in *University of Washington*, non-violent harassment is as capable of chilling First Amendment freedoms as physical force. Indeed, as the California Attorney General full well knows, activists who support same-sex marriage targeted the former CEO of Mozilla and forced him to resign his job after discovering that he had donated $1,000 to California Proposition 8.[5] Activists likewise targeted the Artistic Director of the California Musical Theater, who was forced to resign his job once his $1,000 donation to Proposition 8 was publicly disclosed.[6] Notably, those reprisals came in response to donations to an initiative that a majority of voters had *approved*.[7]

Free speech and association are guaranteed by our Constitution without resort to prior proof of actual or threatened victimization. Donors to organizations that support unpopular causes are equally susceptible to non-violent bullying of this sort, and the fear of losing employment and business opportunities is no less menacing to First Amendment freedoms than the threat of physical

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[5] *See* Nick Bilton and Noam Cohen, *Mozilla's Chief Felled by View on Gay Unions*, New York Times (April 3, 2014), available at https://nyti.ms/2zQ1vu0 (last visited on March 1, 2021).

[6] *See* https://www.wsj.com/articles/SB123033766467736451 (last visited on March 1, 2021).

[7] *See* Chris Cillizza & Sean Sulivan, *How Proposition 8 passed in California — and why it wouldn't today*, Wash. Post, available at https://www.washingtonpost.com/news/the-fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today/ (last visited on March 1, 2021).

violence.[8] For the Ninth Circuit to treat *NAACP*s holding as turning on the violence and brutality of white supremacists guts one of the canonical precedents of the civil rights era, converting it into a one-off holding that protects only those who can show that their physical safety would be endangered by disclosing their association with a dissident organization.[9] Worse, it requires a speaker to invoke such a menacing scenario in order to protect the speaker's liberty of expression. That dramatic, burden-shifting misreading betrays *NAACP*s original holding and is unworkable in practice since once violence

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[8] Even if the Attorney General does not disclose the list, supporters may also reasonably fear loss of business opportunities caused by disclosure to the Attorney General. California has been known to attempt to influence the internal politics of other states by prohibiting state employee travel to states that make policy choices that differ from California's. It is hardly a stretch to contemplate that the Attorney General and his successors may use supporter lists internally to the detriment of those supporters without their knowing the reason why they have lost business from the state, or why they have been targeted for regulatory mischief or perhaps even singled out for criminal investigations and prosecutions.

[9] That said, the threat to individuals of physical violence by today's extremists should not be discounted. Whether doxxing at the University of Texas (https://www.foxnews.com/media/texas-students-react-doxxing-threats-conservatives), SWATting in Wichita (https://www.nytimes.com/2018/11/13/us/barriss-swatting-wichita.html), Antifa at a Boston parade or ICE facilities (https://www.bostonherald.com/2019/09/01/call-antifa-what-they-are-domestic-terrorists/), a mob trying to break into a journalist's home (https://www.usatoday.com/story/news/politics/2018/11/08/mob-tucker-carlsons-home-antifa-break-door-chant-fox-host/1927868002/), or death threats against Covington students (https://www.thedailybeast.com/covington-catholic-students-claim-death-threats-after-dc-encounter), there are far too many examples of violence or threats of violence in an increasingly polarized society.

occurs the harm is already incurred and some portion of the free association right is irremediable. The decisions below threaten the legacy of the civil rights movement by diluting the protections for associational freedom and privacy that the Supreme Court established in *NAACP v. Alabama*, and by attempting to limit *NAACP*'s holding to situations involving the extraordinary acts of brutality that characterized the civil rights era. The Court should reaffirm *NAACP* and apply its public hostility test to this case.

II. THE COURT SHOULD NOT ERODE PROTECTIONS FOR MINORITY OPINIONS

The Constitution does much to protect the rights of political minorities, but many of those protections are under assault by forces that want to stamp out dissent and unpopular viewpoints. The Ninth Circuit's decision continues this trend of erosion of protections for minority opinions.

A. The Administrative State Has Gutted Much of the Constitution's Structural and Textual Protections for Minority Opinions

The Constitution's federalist structure is designed, in part, to preserve safe harbors where political minorities can thrive and even push back against a prevailing practice or ideology. *See* The Federalist No. 10 (James Madison).[10] Its enumerated federal

[10] "Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, (by their number and local situation, unable to concert and carry into effect schemes of oppression. * * * A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking." The Federalist No. 10 (James Madison).

powers provide additional safeguards. Article I, section 7, for example, prevents any bill from becoming law unless it obtains approval from three separate institutions—the House, the Senate, and the President—or unless it secures a two-thirds override approval in both the House and Senate after a presidential veto. U.S. Const. art. I, § 7. This scheme of bicameral presentment to the chief executive is designed to force a deliberative process to reduce the threat that a majority could abuse its power or act arbitrarily. *See* Todd David Peterson, *Procedural Checks: How the Constitution (and Congress) Control the Power of the Three Branches*, 13 Duke J. Const. Law & Pub. Pol'y 209, 247–48 (2017); Cal. Const. art. IV, § 10(a).

National lawmaking by administrative agencies, however, has weakened the protections that federalism and Article I, section 7 confer on political minorities. In a world where bicameralism and presentment are respected, political minorities hold considerable power to block proposed legislation, which enables them to insist on compromise. Administrative lawmaking guts these protections by empowering federal agencies or, in this case, a state attorney general, to rule by unilateral decree.

B. The Court Should Protect Minority Opinions and First Amendment Civil Liberties

The First Amendment does more than protect dissident organizations from direct government coercion. It also stops government from enabling the bullying and intimidation wrought by private citizens against others who anonymously join together to express unpopular views through an organization.

Bullying and intimidation were the principal concerns of this Court in *NAACP*. The *NAACP* Court acknowledged that supporters of dissident organizations are vulnerable to coercion and being silenced. The compelled disclosure of supporter names facilitates pressure from those who oppose the organization's views and who are determined to use social pressure or threats to stamp out opposing viewpoints. The very real danger today is that state-compelled disclosure regimes can be combined with social media tools to coordinate unwarranted social pressure and threats against a dissident organization's supporters, creating the same one-two punch that so troubled the Supreme Court in 1958. *See NAACP*, 357 U.S. at 462–64.

The ease with which information can now be shared—or hacked by malevolent individuals and foreign governments—makes compelled disclosures an even greater threat to First Amendment freedoms than they were at the time of *NAACP v. Alabama*. The Court should reverse the Ninth Circuit to reinvigorate constitutional protections for all opinions, regardless of viewpoint, including minority and unpopular ones.

C. *NAACP v. Alabama*'s Holding Should Be Reaffirmed to Restore Freedoms of Association and Speech

Those who hold unpopular minority viewpoints face physical, financial, social, and other threats that could destroy their lives and their families. The Supreme Court's approach to addressing this problem in *NAACP v. Alabama* was to categorically prohibit Alabama's Attorney General from acquiring NAACP's supporter lists. The Supreme Court thereby

protected Americans from the association-chilling and speech-chilling effects of forced disclosure to government.

The Ninth Circuit takes the exact opposite approach to the problems faced by people who tout unpopular positions. Its approach enables the Attorney General to leverage popular hostility against minority opinion, to create fear among those who associate with unpopular views, thereby undermining their right of association and their freedom of speech—all contrary to the holding of *NAACP*. If anything, that precedent should be bolstered so that states cannot enlist private hostility to undermine minority opinion and freedom. This is an ever-present danger because popularly elected statewide officials, like California's Attorney General, have incentives to marginalize unpopular people and viewpoints.

III. THE COURT SHOULD NOT THREATEN THE RELIGIOUS FREEDOM OF THOSE WHO WISH TO PRACTICE ANONYMOUS CHARITABLE GIVING

A donor's need for anonymity may extend beyond the fear of intimidation or retaliation. For many donors, their desire to remain anonymous stems from a religious conviction that charitable giving should be done in secret. This desire can exist independently of whether the recipient of the charitable act is itself a religious entity.

Christians quote Jesus as saying "when you give to the needy, do not announce it with trumpets" and "when you give to the needy, do not let your left hand know what your right hand is doing."[11] Jewish

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[11] Matthew 6:2–3.

scholar Maimonides set forth eight levels of charity or "tzedakah," with two of the highest levels requiring anonymity.[12]

Muslims quote the Quran as saying "[i]f you disclose your Sadaqaat [almsgiving], it is well; but if you conceal them and give them to the poor, that is better for you."[13] In fact, one study found that anonymity significantly increased the number of donations from 59% to 77%.[14]

The Ninth Circuit's decision makes anonymous giving impossible for adherents to at least three of the world's major religions—and this can deter their charitable giving by changing a crucial aspect of the charitable act, even if the donor does not fear retribution. Hence, in addition to reducing religious liberty, forced disclosure can also shrink the total level of contributions nonprofit organizations receive.

IV. THE CALIFORNIA ATTORNEY GENERAL LACKS PROPER AUTHORITY UNDER CALIFORNIA LAW TO DEMAND CHARITIES' IRS FORM 990 SCHEDULE BS

Not only does the Ninth Circuit's decision undo decades of hard-earned and long-standing civil rights precedent, the Attorney General's demand for every charity's Schedule B is also unlawful because the Attorney General lacks the legal authority to make

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[12] *See* Mishneh Torah, Gifts to the Poor 10:7–14, https://bit.ly/2lrqj71.

[13] Quran 2:271 (as transliterated by Zakat Foundation, https://www.zakat.org/en/giving-charity-secret-publicly/ (last visited March 1, 2021)).

[14] *See* F. Lambarraa & G. Riener, *On the Norms of Charitable Giving in Islam: Two Field Experiments in Morocco*, 118 J. Econ. Behavior & Org. 69–84 (2015).

law by fiat. Indeed, the Attorney General's decree violates the California Constitution's separation of powers.

A. The Attorney General Does Not Have the Statutory Authority to Demand Charities' Form 990 Schedule Bs

Under the California State Constitution, the Attorney General is the chief law enforcement officer of the state, whose duty it is "to see that the laws of the State are uniformly and adequately enforced." Cal. Const. art. V, § 13. The Attorney General has supervisory authority over state district attorneys and state law enforcement. *Id.* No California law gives the Attorney General the power to demand IRS Form 990 Schedule Bs.

Additionally, even if the Attorney General's Schedule B demand were authorized by statute—which it is not—the only conceivable way the Attorney General could lawfully require Schedule B disclosure would be following the process for promulgating disclosure regulations under California's Administrative Procedure Act (APA). Compliance with the APA is mandatory, *see Armistead v. State Personnel Bd.*, 583 P.2d 744, 747 (Cal. 1978), and all Attorney General-regulations are subject to APA rulemaking, *see Engelmann v. State Bd. of Educ.*, 2 Cal. App. 4th 47, 55 (1991). *See also* Cal. Gov't Code § 11340.5(a). As the California Court of Appeal has explained, "if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it." *State Water Res. Control Bd. v. Office of Admin. Law*, 12 Cal. App. 4th 697, 702 (1993).

In 2019, California codified the disclosure requirement, more than four years into this litigation. *See* AFPF Merits Br. at 7-8. It is unclear whether the Attorney General complied with California's APA in promulgating the 2019 regulatory change, such compliance being mandatory. The fact remains, however, that one state official has commanded "give me your Schedule Bs" without the citizens of California having any opportunity to participate in making this regulation—a regulation that binds them under threat of penalty and deprives them of their civil liberties. This late applied band-aid cannot stanch the Attorney General's double-edged blow to core constitutional freedoms *and* separation of powers.

B. The Attorney General's Unlawful Demand Violates California's Separation of Powers Doctrine

The California Constitution divides state government powers among the legislative, executive, and judicial branches. Cal. Const. art. III, § 3. A branch may not exercise the power of another unless expressly permitted by the California Constitution. *Id.* The California Legislature has the exclusive power to make law. Cal. Const. art. IV, § 1. In some circumstances, an agency may lawfully determine whether the facts of a case bring it within the ambit of a rule or standard previously established by the Legislature, but it may never formulate legislative policy or make law. *See Coastside Fishing Club v. Cal. Res. Agency*, 158 Cal. App. 4th 1183, 1205 (2008). The key consideration is whether the administrator is complying with the "legislative will[,]" rather than his or her own. *See id.* Moreover, the California Legislature may not delegate its authority to make

law, as this would result in an agency wielding unchecked power. *See id.*

In this case, the California Legislature has not delegated to the Attorney General—constitutionally or unconstitutionally—the authority to demand Schedule Bs from charities.[15] California's Attorney General's authority, as a member of the Executive Branch, is limited to enforcing duly enacted law. Cal Const. art. III, § 3. The Attorney General nevertheless made California policy and law by fiat. In so doing, the Attorney General usurped exclusive legislative prerogatives, and violated the constitutional doctrine of separation of powers.

CONCLUSION

This Court should reverse the Ninth Circuit because it misapplied this Court's long-standing civil rights precedent first articulated by *NAACP v. Alabama* and due to other constitutional infirmities inherent in the opinion rendered below.

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[15] This is not to say that the California Legislature could constitutionally violate the right to privacy in Californians' (or any other American's) associations. The California Constitution is unequivocal:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.

Cal. Const. art. I, § 1 (emphasis added). If its *legislature* cannot intrude upon these constitutional rights, *a fortiori,* a lone member of the executive branch lacks such power.

Respectfully submitted.

PHILIP HAMBURGER
MARK CHENOWETH
MICHAEL P. DEGRANDIS
ADITYA DYNAR
MARGARET A. LITTLE
Counsel of Record
New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
(202) 869-5210
peggy.little@ncla.onmicrosoft.com

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