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 PETITIONS FOR 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

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QUESTION PRESENTED

In the landmark civil rights case *NAACP v. Alabama ex rel. Patterson*, the Supreme Court denied a state attorney general's purportedly legitimate efforts to procure the local NAACP's membership list. In so doing, it acknowledged the right to privacy in exercising the freedom of association—a birthright cherished by all Americans ever since. The Court further recognized that the right to associational privacy is all the more crucial to those who face harassment and intimidation simply because they belong to a group with whom they share unpopular minority opinions.

The question presented in this case is whether the holding of *NAACP v. Alabama ex rel. Patterson* will be applied to modern state attorneys-general who compel disclosure of supporter lists of unpopular organizations without articulating a substantial state interest in obtaining the information. That is, does this hard-won, bedrock civil rights era precedent still protect the vital relationship between the freedom to associate and privacy in one's associations?

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INTEREST OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance (NCLA) is a non-profit civil rights organization and public-interest law

[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.

firm devoted to defending constitutional freedoms against systemic threats, including attacks by administrative agencies and state attorneys-general on due process, jury rights, 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 the petition for certiorari—the first *amicus* brief NCLA has filed at the certiorari stage—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 in the State of California. Requiring these groups to turn over a list of their major supporters

when they solicit donations for their various charitable endeavors violates the First Amendment of the United States Constitution as applied to the states under the Fourteenth Amendment.

Justice Harlan, joined by a *unanimous* Supreme 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 judges were to reverse that hard-won civil liberty.

NCLA's principal 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*. When a state attorney general establishes a disclosure requirement via administrative fiat, when he can "insist on a list" without any legislative authority, it shifts lawmaking from elected legislators to 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.

NCLA is a relatively new 501(c)(3) organization. We have not yet seen fit to solicit contributions in California and we will not be likely to do so in the future, if the Court validates this law's intrusive disclosure

regime. It would be unfair to any of NCLA's 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 grant the writs of certiorari, reverse the Ninth Circuit, and reaffirm our nation's commitment to the bedrock civil rights legacy of *NAACP v. Alabama*, rather than the unconstitutionally intrusive balancing test contrived by the Ninth Circuit.

SUMMARY OF THE ARGUMENT

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) Pet. for Writ of Cert., at 1 (Aug. 26, 2019) *and* Thomas

More Law Ctr. (Thomas More) Pet. for Writ of Cert., at 14 (Aug. 26, 2019). 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 dubbed "exacting scrutiny" by the opinion below. *See NAACP v. Alabama ex rel. Patterson, Attorney General*, 357 U.S. 449, 466 (1958).

The *NAACP* Court first observed that the NAACP's members had been subjected to harassment when 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 has replaced the straightforward *NAACP* test with a vague and jargon-riddled "exacting scrutiny" standard that offers little protection to unpopular minorities. *See Ams. 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 are designed to 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 their religion.

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 ex rel. Patterson 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. The *NAACP v. Alabama* Test 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.

B. The Ninth Circuit's "Exacting Scrutiny" Standard Is Inconsistent with *NAACP* and Constitutionally Incorrect

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 Ams. for Prosperity Found. (AFPF) v. Becerra*, 903 F.3d 1000, 1015–17 (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*'s First Amendment analysis.

And 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 plaintiff 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] 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. This marginal chilling effect is alone enough to substantially burden the First Amendment rights of organizations and their supporters.

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[2] *See* Harold J. Brumm and 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, and Gary F. Jensen, *The Deterrence Doctrine and the Perceived Certainty of Legal Punishments*, 42 Am. Soc. Rev. 305 (1977).

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 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.

Attorney General Becerra'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. Moreover, 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 Attorney General Becerra's true motives in casting such a wide, First Amendment-chilling net.[3]

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[3] *See* AFPF Pet. for Writ of Cert., at 13 ("[L]ess than 1% (5 out of 540) of the Attorney General's investigations of charities over the past ten years had even implicated Schedule B, and,

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

The Ninth Circuit diluted the protections established in *NAACP* 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 Supreme 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. *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. Schneiderman*—attempted to limit 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

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even in those five investigations, the investigators were able to obtain the pertinent Schedule B information from other sources.").

> 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 observing 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.

Non-violent harassment is as capable of chilling First Amendment freedoms as physical force. Indeed, as Attorney General Becerra 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.[4] 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.[5] Notably, those reprisals came in response to donations to an initiative that the voters had *approved*.[6]

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 violence.[7] For the Ninth Circuit to

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[4] *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 September 24, 2019).

[5] *See* https://www. wsj.com/articles/SB123033766467736451 (last visited on September 24, 2019).

[6] *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 September 24, 2019).

[7] 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

make *NAACP*'s holding turn 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.[8] Worse, it requires a speaker to invoke such a menacing scenario in order to protect the speaker's liberty of expression.

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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 not much of 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.

[8] 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.

The *AFPF* decision threatens 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 ex rel. Patterson*, 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 grant certiorari to reaffirm *NAACP* and apply its public hostility test to this case.

II. THE NINTH CIRCUIT'S OPINION ERODES 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).[9] Its enumerated federal powers

[9] "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,

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).

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.

(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).

B. The Ninth Circuit's Opinion Jeopardizes Protections for Minority Opinions by Undermining First Amendment Civil Liberties

The First Amendment does more than simply 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 their 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 *NAACP*. *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 grant certiorari to reinvigorate constitutional protections for all opinions, regardless of viewpoint, including minority and unpopular opinions.

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, and social threats that could destroy their lives and their families. The Supreme Court's approach to addressing this problem in *NAACP v. Alabama ex rel. Patterson* was to categorically prohibit Attorney General Patterson 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 take unpopular positions. Its approach enables Attorney General Becerra to play upon popular hostility against minority opinion, so as 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.

III. THE NINTH CIRCUIT'S OPINION THREATENS 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 religious.

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."[10] Maimonides set forth eight levels of charity or "tzedakah," with two of the highest levels requiring anonymity.[11]

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."[12] In fact, one study found that anonymity

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[10] Matthew 6:2–3.

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

[12] Quran 2:271 (as transliterated by Zakat Foundation, https://www.zakat.org/en/giving-charity-secret-publicly/ (last visited September 24, 2019)).

significantly increased the number of donations from 59% to 77%.[13]

The Ninth Circuit's decision makes anonymous giving impossible for adherents of 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 has no fear of retribution. Thus, in addition to impacting religious liberty, forced disclosure can also reduce the total level of contributions nonprofit organizations receive.

IV. THE CALIFORNIA ATTORNEY GENERAL LACKS THE 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 law by fiat. Indeed, the Attorney General's decree violates the California Constitution's separation of powers.

A. The Attorney General Has Neither the Statutory Nor Regulatory 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

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[13] *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).

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 B.

Additionally, even if the Schedule B demand were within the ambit of the Attorney General's constitutional or statutory power—which it is not—the only conceivable way the Attorney General could lawfully require Schedule B disclosure would be after following the process for promulgating 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 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). Nevertheless, 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.

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.*. 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. The Attorney General took it upon himself to make California policy and law in this area. He usurped exclusive legislative prerogatives, and in doing so, violated the constitutional doctrine of separation of powers.

CONCLUSION

This Court should grant the Americans for Prosperity Foundation and the Thomas More Law Center writs of certiorari because the Ninth Circuit misapplied this Court's long-standing civil rights precedent first articulated by *NAACP v. Alabama ex rel. Patterson* and due to other constitutional infirmities inherent in the opinion rendered below.

Respectfully submitted.

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