C.A. No. 17-17403

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSTITUTE FOR FREE SPEECH,

Plaintiff-Appellant,

v.

XAVIER BECERRA,
in his official capacity as the Attorney General of California,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S PETITION FOR INITIAL HEARING *EN BANC*

Appeal from the Judgment of the United States District Court
for the Eastern District of California
D.C. No. 14-cv-00636-MCE-DAD
(Honorable Morrison C. England)

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FED. R. APP. P. 35(b)(1) STATEMENT

Plaintiff-Appellant, the Institute for Free Speech ("IFS"), respectfully requests that this Court hear this case *en banc* in the first instance. In granting Defendant-Appellee, the Attorney General of California, his motion to dismiss, the district court below faithfully applied a panel decision of this Court, *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015) ("*CCP*"), which (1) conflicts with landmark U.S. Supreme Court precedent regarding First Amendment associational liberty, *e.g. NAACP v. Ala. ex rel. Patterson*, 347 U.S. 449 (1958), *Talley v. Calif.*, 362 U.S. 60 (1960), (2) conflicts with this Court's own precedents regarding non-election-related compelled disclosure, *Acorn Invs. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), and (3) involves a "question[] of exceptional importance," namely whether a compelled disclosure law of any sort may be facially unconstitutional under the First and Fourteenth Amendments within this Circuit, Fed. R. App. P. 35(b)(1).

Judicial economy interests also counsel in favor of *en banc* consideration. The district court ruled for the Attorney General because the current law of the Circuit holds that compelled disclosure of donor information to the government poses no First Amendment burden whatsoever. No party nor this Court would benefit from consideration of that question by another three-judge panel bound by the *CCP* opinion.

CASE BACKGROUND

a. The Attorney General's Demand for Confidential Donor Lists.

Any charitable nonprofit raising funds in California must provide the Attorney General with an unredacted copy of its Internal Revenue Service Form 990, Schedule B ("Schedule of Contributors"). That form contains the names and addresses of donors whose annual gifts to a charity aggregate more than five thousand dollars or constitute 2% of the charity's budget. The Attorney General must obtain these donor lists from the charities themselves, rather than the Internal Revenue Service, because in 2006 Congress explicitly prohibited state attorneys general from obtaining Schedule B in order to regulate charitable solicitation. 26 U.S.C. § 6104(c)(3). Indeed, federal tax law prohibits the unauthorized distribution or publication of a Schedule B, and imposes heavy criminal and financial penalties for doing so. California is one of only two states that demands this information.[1]

At some point in 2010, the Attorney General began demanding these donor lists by sending *ad hoc* demand letters.[2] Nevertheless, the Institute (then-operating under its former name, the Center for Competitive Politics), did not receive a demand letter until 2014. That letter informed the Institute that unless it provided its donor

[1] The other is New York. Florida once had such a requirement, but repealed it in 2014. The *CCP* panel suggested that Hawaii, Mississippi, and Kentucky require this information, 784 F.3d at 1310 n.1, but this was incorrect both then and now.

[2] After the Attorney General's Schedule B policy became the subject of litigation, the policy was adopted by regulation. 11 Cal. Code Regs., § 310(b).

list, the Attorney General would suspend its membership in the California Registry of Charitable Trusts. Membership in the Registry is a legal requirement for § 501(c)(3) nonprofits seeking to solicit funds within California.

The Institute filed suit, and sought a preliminary injunction in the United States District Court for the Eastern District of California on the grounds that the Attorney General's demand is facially unconstitutional. Other organizations, namely the Americans for Prosperity Foundation and the Thomas More Law Center, later filed similar complaints in the Central District of California. Those plaintiffs, unlike the Institute, argued that compelled disclosure would lead to threats, harassments, and reprisals against their donors.

b. Summary of the Institute's Federal Litigation.

The Institute sought a preliminary injunction against the Attorney General's compelled disclosure regime, which the district court denied on May 14, 2014. IFS timely appealed to this Court, which affirmed on May 1, 2015. The Institute then sought a writ of *certiorari* from the U.S. Supreme Court, which was denied on November 9, 2015.

The panel decision stated that it "is incorrect" to contend that "compelled disclosure *itself* constitutes" First Amendment injury, holding that "[t]his is a novel theory, but it is not supported by our case law or by Supreme Court precedent." *CCP*, 784 F.3d at 1314 (emphasis in original); *id*. at 1312. While the panel ostensibly

applied exacting scrutiny "the strict test established by *NAACP v. Alabama*," it found that disclosure imposes no inherent First Amendment injury that the Court "must weigh." 784 F.3d at 1313-14 (citation omitted) (internal quotation marks omitted). Therefore, it sufficed that the "Attorney General has provided justifications for employing a disclosure requirement" that "are not wholly without rationality." *Id*. at 1317 (internal quotation marks omitted).

On remand, the Institute amended its complaint to include information that had been revealed during the trial in *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016). That court had found, *inter alia*, that Schedule B information has been used in fewer than 1% of investigations conducted by the Attorney General's Charitable Trusts Section. 182 F. Supp. 3d at 1054 ("[A] supervising investigative auditor for the Attorney General[] testified that out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section, only five instances involved the use of a Schedule B."). The Institute's amended complaint contended that the Attorney General is insufficiently capable of ensuring the confidentiality of Schedule B data, and that donor information "has never served as the basis for initiating an investigation by the Attorney General into whether a charity was in violation of California laws against self-dealing, improper loans, interested persons, or illegal or unfair business practices." First Am. Compl. at 6, ¶19, *Ctr. for Competitive Politics v. Harris*, No.

14-636 (E.D. Cal. Aug. 12, 2016), ECF No. 37. Accordingly, the Institute filed a new motion for preliminary relief. The Attorney General filed a motion to dismiss, and both motions were fully briefed by the end of September 2016.

On October 31, 2017, over one year later, and without benefit of oral argument for either motion, the district court dismissed the case and held that no further leave to amend would be permitted. Even taking the Institute's allegations as fact, the court found that the amended complaint

> [F]ails to identify any cognizable burden on Plaintiff's freedom of association . . . [because] there are no allegations that the Attorney General's demand for and collection of Schedule B forms for nonpublic use has caused any threat, harm, or negative consequences to Plaintiff or its members.

Ctr. for Competitive Politics v. Harris, 2017 U.S. Dist. LEXIS 180557, at *3-14 (E.D. Cal. 2017) ("*CCP II*").

The district court's ruling was based almost entirely on the 2015 *CCP* panel opinion. *See, e.g.*, *id*. at 12. There, the Attorney General argued that "in the absence of any showing of harm, the law does not require the Attorney General to explain the necessity of the required disclosure." 9th Cir. Opp'n Br. at 29. This Court ratified that position, holding that the Institute was "incorrect" in "argu[ing] that compelled disclosure *itself* constitutes such an injury," and consequently that the Court determined it need not "weigh that injury when applying exacting scrutiny." *CCP*, 784 F.3d at 1314 (emphasis in original). Asked to balance a purported lack of

constitutional injury against the Institute's claims that the Schedule B program is useless and fails to safeguard private donor information, the district court deferred to the Attorney General. Just as this Court has instructed.

ARGUMENT

1. Only this Court, *en banc*, may overturn *Center for Competitive Politics v. Harris*.

Even taking all facts and assertions in the light most favorable to the Institute, the district court was compelled by the panel opinion in *Center for Competitive Politics v. Harris* to find that the Attorney General is entitled to demand donor information. *CCP II*, 2017 U.S. Dist. LEXIS 180557, at *6 ("[T]he appellate panel made it clear that compelled disclosure alone does not constitute a First Amendment injury") (citing *CCP*, 784 F.3d at 1314). Unless a complaint alleges "'evidence to suggest that . . . significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirements'" it will be dismissed without leave to amend, even if the complaint alleges facts showing that the Attorney General does not actually need or use the disclosed data to further any substantial governmental interest. *CCP II*, 2017 U.S. Dist. LEXIS 180557, at *6 (quoting *CCP*, 784 F.3d at 1316).

Left unreviewed, the *CCP* panel decision will compel the same result for any facial challenge to any compulsory disclosure program. *Lair v. Bullock*, 787 F.3d 989, 999 (9th Cir. 2015) ("[W]e are bound by a prior three-judge panel's published

opinions"); 9th Cir. R. 36-1. A disclosure regime's facts or circumstances will not be the subject of discovery or trial; instead the government will procure summary dismissal of any facial First Amendment challenge so long as it is able to proffer (1) a "non-irrational" justification for it and (2) the plaintiff is unable to meet the extraordinary burden of preemptively demonstrating that its financial supporters will be subject to an unusual level of threats, harassments, and reprisals from public or private entities. *CCP*, 784 F.3d at 1312-1317; *CCP II*, 2017 U.S. Dist. LEXIS 180557, at *15 ("As indicated above, groups so qualifying were generally subjected to both government-sponsored hostility and brutal, pervasive private violence both generally and a result of disclosure . . . such that they could not seek adequate relief from either law enforcement or the legal system." (citations omitted)).

In short, First Amendment facial challenges to compulsory disclosure regimes appear to have been disallowed. This conflicts with both U.S. Supreme Court precedent and prior precedent of this Court. It also implicates a question of national importance: the right of all Americans "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP*, 357 U.S. at 466; *Gibson v. Fla. Legis. Investigative Comm.*, 372 U.S. 539, 544-546 (1963) (finding "privacy in group association" an interest "of significant magnitude") (citation omitted) (internal quotation marks omitted).

2. Prior to *Center for Competitive Politics v. Harris*, both the U.S. Supreme Court and this Court determined that compelled disclosure, in and of itself, constitutes First Amendment injury.

The panel decision stated that "no case has ever held or implied that a disclosure requirement in and of itself has constituted First Amendment injury." *CCP*, 784 F.3d at 1316. But this is not so.[3]

a. The U.S. Supreme Court has consistently held that compelled disclosure constitutes First Amendment injury.

For 60 years, since the Supreme Court's decision in *NAACP v. Alabama*, the First Amendment's protection of freedom of association has been "beyond debate." 357 U.S. at 460. The First Amendment, accordingly, provides for "immunity from state scrutiny of membership lists" or donor lists. *Id*. at 466; *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 98 (1974) ("The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure.") (Marshall, J., dissenting) (citing *NAACP* and collecting cases). Indeed, the Court has not hesitated to strike compelled disclosure regimes facially, even

[3] Even the Second Circuit, in rejecting a First Amendment challenge to the New York attorney general's Schedule B disclosure regime, acknowledged that there is an inherent constitutional injury in disclosure. It simply found that the "restraint on associational rights" at issue did not "have sufficient heft" to "outweigh[] the government's (and the public's) interests in disclosure." *Citizens United v. Schneiderman*, 2018 U.S App. LEXIS 3516, at *16 (2d Cir. Feb. 15, 2018). This petition presents an opportunity to resolve this circuit split.

where it made "no appraisal of the circumstances, or substantiality of the claims of the litigants" and the "record [was] barren of any claim, much less proof" that disclosure would result in threats, harassments, or reprisals. *Talley*, 362 U.S. at 69 (Clark, J., dissenting) (emphasis removed). Thus, "all legitimate organizations are the beneficiaries of" the Constitution's "strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs." *Gibson*, 372 U.S. at 555-56.

The *CCP* panel's decision to shrink landmark First Amendment precedents to their particular time and place—by footnote no less—was a serious error that merits correction. *CCP*, 784 F.3d at 1312 n.3 (noting that "because all of them are as-applied challenges involving the NAACP . . . these cases are all inapposite"); *id*. at 1316, n.8 (distinguishing *Talley v. California* on the grounds that, despite the *Talley* Court's reliance on *NAACP v. Alabama* and other civil rights cases, the disclosure occurred on printed handbills). On remand, the district court followed suit, holding that relief was available only to groups "generally subjected to both government-sponsored hostility" or to "brutal, pervasive private violence . . . such that they could not seek adequate relief from either law enforcement or the legal system." *CCP II*, 2017 U.S. Dist. LEXIS 180557, at *15.

b. The CCP *panel decision also conflicts with Circuit precedent holding that compelled disclosure, in and of itself, constitutes First Amendment injury.*

In 1989, a panel of this Court unanimously invalidated Seattle's compelled shareholder disclosure regime for investors in panoram businesses. Like the Attorney General's disclosure regime here, the disclosure was officially nonpublic and made only "to the licensing agency." *Acorn Invs.*, 887 F.2d at 225, n.9.[4] The relevant statute "expressly provide[d] that no applicant will be denied a license because of the identity of any of its shareholders," 887 F.2d at 225, and the panel opinion makes no mention of threats, harassments, or reprisals against Acorn Investments or, for that matter, any other Seattle shareholder. *Cf. CCP*, 784 F.3d at 1313 (confining *Acorn Investments* to the category of cases where First Amendment injury occurs because a statute is "adopted or is enforced to harass members").[5]

[4] At a minimum, the *Acorn* Court made no mention of public disclosure, and the possibility that the demanded information would leave government hands played no role in its analysis.

[5] The panel's misreading of the *Acorn Investments* case appears to come from its conflation of the *Acorn* Court's summary of the Seventh Circuit's holding in *Genusa*—that the disclosure provision served "'no purpose other than harassment in requiring the individual . . . stockholders to file separate statements or applications,'" 887 F.2d at 226 (ellipses in original) (quoting *Genusa v. City of Peoria*, 619 F.2d 1203, 1217 (7th Cir. 1980))—with the holding of the *Acorn* Court itself. This Court did not rely on the risk of harassment, but rather ruled as it did because there was no "connection between the City's legitimate interest in compliance with the panoram ordinance and the rule requiring disclosure of the names of shareholders." *Acorn*, 887 F.2d at 226.

Nevertheless, the *Acorn* Court still determined that the mere existence of a compulsory disclosure regime placed the burden of demonstrating proper tailoring on the government, "even when it is not the government's intention to suppress particular expression." *Acorn Invs.*, 887 F.2d at 225 (citing *NAACP*, 357 U.S. at 461). And rather than ruling as-applied, the *Acorn Investments* Court struck the Seattle ordinance facially. *Id*. at 226. In short, *Acorn* is a case that "held or implied that a disclosure requirement in and of itself has constituted First Amendment injury." *CCP*, 784 F.3d at 1316.[6]

c. The CCP *panel's error derived from its incorrect reading of inapposite campaign finance case law.*

The *CCP* panel, however, spent little time with those cases establishing a general presumption, rooted in the First Amendment, against compelled disclosure. *Acorn Invs.*, 887 F.2d at 225 ("…a compelled content-neutral disclosure rule is unconstitutional unless it furthers a substantial governmental interest."). Instead, it relied on campaign finance cases, such as *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), where the Supreme Court upheld narrow forms of disclosure due to the public's interest in knowing the financial constituencies of candidates for public office. *See CCP*, 784 F.3d at 1312-1317.

[6] Indeed, at least one other Court of Appeals has applied the *Acorn Investments* decision in analogous circumstances. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1359, 1366-67 (11th Cir. 1999). Hearing this case *en banc* would provide an opportunity for this Court to close that circuit split as well.

But *Buckley v. Valeo* did not hold that compelled disclosure imposes no First Amendment injury. *CCP*, 784 F.3d at 1313. To the contrary: it reiterated that the Court "long ha[d] recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure *imposes* cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64 (emphasis supplied).[7] While compelled disclosure is often upheld in the discrete and narrow realm of campaign finance law, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367-371 (2010), that subset of First Amendment law does not support the general proposition that "no case has ever held or implied that a disclosure requirement in and of itself has constituted First Amendment injury." *CCP*, 784 F.3d at 1316. Those cases simply demonstrate that First Amendment injury may sometimes be tolerable.

3. The *CCP* panel replaced "exacting scrutiny" with analysis akin to rational basis review.

Over the past 60 years, the Supreme Court and this Circuit have required compelled disclosure regimes to be reviewed under exacting scrutiny. Under that

[7] The panel's decision to the contrary appears to stem from a preceding sentence, where the *Buckley* Court noted that "compelled disclosure, in itself, *can* seriously infringe on privacy of association and believe guaranteed by the First Amendment." 424 U.S. at 64 (emphasis supplied). But that just means that governments have to justify whether the "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes" are "serious[]" injuries—that is, the Court called for a tailoring analysis. *Id.* The difference between a mild sprain and a compound fracture can be substantial, but it does not mean that a sprain is not a painful injury.

standard "it is not enough that the means chosen in furtherance of the [government's] interest be rationally related to that end." *Elrod v. Burns*, 427 U.S. 347, 362 (1963) (Brennan, J., plurality op.). Rather, "the burden is on the government to show that" disclosure both (1) advances a "paramount" interest "of vital importance," *id.*, and (2) that the regime is properly tailored to serve that interest. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. __, 134 S. Ct. 1434, 1456-1457 (2014) ("In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect . . . but a means narrowly tailored to achieve the desired objective") (citation and quotation marks omitted) (punctuation altered for clarity).

Until the *CCP* decision, this Court applied that test. In *Acorn Investments*, this Court held that "a compelled content-neutral disclosure rule is unconstitutional unless it furthers a substantial government interest. Further, there *must* be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." 887 F.2d at 225 (emphasis supplied, quotation marks and citation omitted).

But the *CCP* panel did not require the government to bear the burden of fitting means with ends, instead allowing the Attorney General to assert "reasons . . . for the disclosure requirement" that "are not wholly without rationality." *CCP*, 784 F.3d at 1317 (citation and quotation marks omitted). This is not "the strict test established

by *NAACP v. Alabama*;" it is a permission slip for governments to demand dragnet disclosure so long as a government official can muster a non-absurd reason why he does so. *Id*. at 1313 (citation and quotation marks omitted).

The panel's novel promulgation of a rational basis test compelled the outcome below, even though "[o]n a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summitt P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). The Institute's complaint properly pled that the Attorney General's disclosure program is not actually used to enforce the law and provided evidence for the proposition from a federal court's factual findings. But by holding that it is "incorrect" to "weigh" any harm of "compelled disclosure itself . . . when applying exacting scrutiny," the *CCP* panel rendered such objections irrelevant. 758 F.3d at 1313.

And the district court complied with this Court's directive. Despite citing the finding of the Central District of California in the *Americans for Prosperity Foundation* litigation, including that the Attorney General does not actually use Schedule B as claimed, *CCP II*, 2017 U.S. Dist. LEXIS 180557, at *17, the district court dismissed the Institute's case because "the absence" of a request by the Institute for as-applied relief on the basis of violence or harassment rendered "the balancing engaged in by [the Central District] unnecessary." *Id*.

As this application of the panel opinion demonstrates, this Court has rendered any facial First Amendment challenge to a compelled disclosure regime functionally impossible. Going forward, in such matters, the government will receive the level of deference commonly afforded to review of economic regulations. No case, even in the context of campaign finance disclosure, has ever held that a mere "non-irrational" statement from the government trumps under exacting scrutiny. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . ."); *see Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1008-1019 (9th Cir. 2010) (applying tailoring analysis against Washington State campaign finance law).

CONCLUSION

The right to preserve the privacy of one's associations, financial and otherwise, stands at the very core of the First Amendment. Nevertheless, every court in this Circuit is presently bound by a decision claiming that when the government forcibly demands the donor lists of nonprofit organizations, it imposes no First Amendment injury whatsoever – no matter how slight, or even pretextual, its purpose. Only *en banc* review can restore associational privacy to its proper place in the law of this Circuit.

Respectfully submitted,

s/Allen Dickerson

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Dated: March 9, 2018

CERTIFICATE OF COMPLIANCE

I certify that the foregoing petition complies with the type-volume limitation of Fed. R. App. P 35(b)(2)(A) because it contains 3,696 words. This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

s/ Allen Dickerson

C.A. No. 17-17403

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, I filed the foregoing Petition for Initial Hearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system. 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.

s/ Allen Dickerson
Allen Dickerson