No. 15-_____

In The
Supreme Court of the United States

CENTER FOR COMPETITIVE POLITICS,

Petitioner,

v.

KAMALA D. HARRIS,
ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state official's demand for all significant donors to a nonprofit organization, as a precondition to engaging in constitutionally-protected speech, constitutes a First Amendment injury.

2. Whether the "exacting scrutiny" standard applied in compelled disclosure cases permits state officials to demand donor information based upon generalized "law enforcement" interests, without making any specific showing of need.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Plaintiff-Appellant in the court below, is the Center for Competitive Politics ("CCP"). CCP is a nonprofit corporation organized under 26 U.S.C. § 501(c)(3). CCP solicits financial contributions throughout the United States, including from donors who reside in California. CCP does not engage in electoral or candidate-related activity, but exists to educate the public on the benefits of political engagement.

CCP is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with any ownership stake in CCP.

Respondent, who was Defendant-Appellee below, is Kamala D. Harris, in her official capacity as the Attorney General of California.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

The Center for Competitive Politics ("CCP") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 784 F.3d 1307 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Eastern District of California is reproduced at App. 29a.

JURISDICTION

The Ninth Circuit issued its opinion and order below on May 1, 2015. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. U.S. Const. amend. I.

Other pertinent statutes and regulations are reproduced in the Appendix at App. 29a.

INTRODUCTION

Individuals are not required to trust state officials with sensitive information about their private associations. Landmark rulings of this Court have long held that private association is a fundamental liberty, the invasion of which can only be permitted where the state carries its burden and specifically justifies the intrusion. The First Amendment contains no "trust us" exception for state officials wishing to pry into Americans' choices of charitable beneficiaries and ideological companions.

Nevertheless, California's Attorney General has demanded the identities of all significant donors to nonprofit educational and charitable groups as a precondition to speaking with potential donors. She has provided no evidence that seizing donor information will in fact advance any state interest, let alone that the use of subpoenas on a case-by-case basis would be ineffective.

Beginning with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and continuing through the facial ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has consistently recognized that the freedom to associate, and to speak in concert with others, would inevitably be chilled by unjustified governmental intrusion. The point is sufficiently obvious that the federal courts of appeals, with the

exception of the Ninth Circuit, have required that forced disclosure of membership and donor information be justified under the heightened standard of "exacting scrutiny."

Below, the Ninth Circuit claimed to apply exacting scrutiny while in fact applying a weakened form of rational basis review. The court began by stating, contrary to this Court's many precedents, that compelled disclosure of donor information to the government imposes no First Amendment injury. It then blessed the Attorney General's demand based upon the mere invocation of a governmental interest, without any evidence of tailoring. This form of scrutiny is in no way exacting.

The Ninth Circuit's standard allows state governments to engage in the bulk collection of donor information from non-profit organizations, and its reasoning justifies the bulk collection of nearly any kind of information from any licensed speaker.

California, New York, and Florida – three of the wealthiest and most populous states in the Union – recently began demanding this information from all charities. If this Court permits the Ninth Circuit's approach to stand, rational basis review will rip away the First Amendment's protection of private association and belief, and chill charitable giving nationwide. Further, because "exacting scrutiny" is commonly used by the federal courts to analyze challenges to governmental regulation of speech and association more generally, this case provides an

ideal vehicle for clarifying the standard to be used in judging such cases.

Accordingly, this petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

1. The Attorney General Compels Donor Disclosure From All Charitable Organizations As A Precondition To Soliciting Donations In California

Before asking Californians for financial support, a § 501(c)(3) nonprofit corporation must be a member of that state's Registry of Charitable Trusts, which is administered by the Attorney General. CAL. GOV'T CODE §§ 12584; 12585. CCP has been a Registry member since 2008.

As part of its annual re-registration filings, CCP provides the Attorney General with its public copy of Form 990, the tax form filed by nonprofit corporations with the Internal Revenue Service ("IRS"). CODE OF CALIF. REGS. tit. 11, § 301; CAL. GOV'T CODE § 12586; 26 U.S.C. § 6033(b).

Form 990 is a lengthy, 12-part document.[1] An additional 16 schedules expand upon answers given

[1] Form 990 and its schedules are available via the IRS Website at: http://www.irs.gov/pub/irs-pdf/f990.pdf; http://www.irs.gov/uac/Form-990-Schedules.

on the main form. One of these, Schedule B, requires a nonprofit to list the names and addresses of contributors giving the greater of $5,000 or 2% of the total funds raised by the nonprofit in a calendar year. Return of Organization Exempt From Income Tax ("Form 990"), Sch. B; Form 990 Part VII, *l*. 1h. Pursuant to federal law, when filing copies of its Form 990 with the Registry, CCP redacts the names and addresses of those contributors.[2] 26 U.S.C. § 6104(d)(3)(A) (copies of Form 990 "shall not require the disclosure of the name or address of any contributor to the organization"). While several states require nonprofits to provide a copy of Form 990, those states have never objected when CCP provided a copy of Form 990 wherein the private information on Schedule B was redacted. Indeed, besides California, only New York and Florida, to CCP's knowledge, condition charitable registration upon the filing of confidential Schedule B information.[3]

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[2] The constitutionality of the *IRS*'s demand for donor information has never been reviewed by this Court, and is not challenged here. There are grounds for compelled disclosure in the IRS context that may survive exacting scrutiny. These include cross referencing Schedule B information against personal tax returns to catch fraudulent attempts to claim tax deductions for charitable gifts that were never made. No such interest is present here.

[3] The court of appeals suggested otherwise, at App. 5a n.1, explicitly referencing statutes from Hawaii, Kentucky, and Mississippi. But those statutes refer simply to Form 990, and do not suggest that state agencies are seeking non-public copies of that document.

The confidentiality of Schedule B information is protected by federal law and backed by significant sanctions. Internal Revenue Code § 6104 provides that § 501(c)(3) organizations may keep their donor lists private on public copies of Form 990, and prohibits the Treasury Secretary from revealing that donor information to state officials seeking that information "for the purpose of . . . the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations." 26 U.S.C. §§ 6104(d)(3)(A); 6104(c)(3). Federal and state officials face meaningful civil and criminal sanctions for improperly disclosing tax returns or permitting unauthorized inspection of those documents. 26 U.S.C. §§ 7431 (civil damages for unauthorized inspection or disclosure of returns or return information); 7213(a)(1) (criminal sanctions for disclosure of returns or return information by federal employees); 7213(a)(2) (same for state employees); 7213A(a)(2), 7213A(b)(1) (criminal sanctions for unauthorized inspection of returns or return information, including by state employees); 7216 (criminal sanctions for disclosure of tax return or return information by tax preparers). The State of California provides no such statutory protections against unauthorized release of material collected pursuant to the Attorney General's compulsory disclosure program.

On February 6, 2014, CCP received a letter, signed by Office Technician "A.B." App. 59a-60a. This letter informed CCP, for the first time, that the Attorney General considered its registration

"incomplete because the copy of Schedule B, Schedule of Contributors, d[id] not include the names and addresses of contributors." App. 59a (emphasis removed). This letter did not initiate a compliance audit, nor did it subpoena information predicated upon articulable suspicion.

Failure to comply with the Attorney General's demand would have serious consequences, as CCP would learn pursuant to a letter the Registry mailed three days after oral argument in the court of appeals. App. 61a-63a.

First, "the California Franchise Tax Board [would] be notified to disallow the tax exemption of [CCP]." App. 62a. Second, late fees would be imposed, and "[d]irectors, trustees, officers[,] and return preparers responsible for failure to timely file these reports [would be] **. . . personally liable** for payment of all late fees." *Id*. (bold in original). Third, "the Attorney General **w[ould] suspend the registration** of [CCP]." App. 63a (bold in original).

Were CCP's Registry membership suspended, the group would be barred from speaking with Californians in order to solicit financial support for its mission. *Compare Williams-Yulee v. The Florida Bar*, 576 U.S. ___, 135 S. Ct. 1656, 1665 (2015) (Roberts, C.J., controlling opinion) ("restricting the solicitation of contributions to charity . . . threaten[s] the exercise of rights so vital to the maintenance of democratic institutions") (citations and quotation marks omitted).

2. Proceedings Below

On March 7, 2014, CCP filed a complaint in the United States District Court for the Eastern District of California, asserting, *inter alia*, that the Attorney General's demand letter violated the First Amendment, as applied to the states via the Fourteenth Amendment. App. 29a.[4] On March 20, CCP moved for a preliminary injunction. In response, the Attorney General justified her demand by asserting that unredacted Schedule B information "allows her to determine 'whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons, or illegal or unfair business practices.'" App. 44a-45a (quoting Attorney General's briefing, internal citations omitted). She failed, however, to explain any mechanism by which knowing the names and addresses of CCP's donors would further any such end. Nonetheless, the district court denied the motion, and CCP timely appealed.

On May 29, 2014, the district court stayed its proceedings.

The Ninth Circuit heard oral argument on December 8, 2014. There, the Attorney General provided for the first time "an example," which appears to have been a hypothetical, "of how the Attorney General uses Form 990 Schedule B in order to enforce these laws." App. 5a.

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[4] The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202, and 42 U.S.C. § 1983.

Specifically, counsel posited a scenario involving a lightly capitalized charity disclosing over $2 million in donations, the vast majority of which came from inflating the value of a worthless painting. Oral Argument at 28:25, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. Dec. 8, 2014). What California law enforcement (as opposed to federal tax enforcement) interest would be served by knowing the names of donors to such an organization was not identified and remains unknown.

Moreover, the public version of Form 990 would already provide the Attorney General with reason to be suspicious. It would show extremely low outlays and an extremely high professed income. Additionally, the public copy of Form 990 would list the *amount* of the painting donation, and that it was a non-cash contribution. Finally, a separate schedule of the Form, open to public inspection, would also list a "[d]escription of noncash property given," in this case that the donation was a painting, and its "FMV" (fair market value). Form 990, Sch. B., Part II; *see also* Form 990, Sch. M. (listing artwork as first reporting category for non-cash contributions). At that point, the Attorney General would be within her rights to subpoena additional information concerning the circumstances of that particular donation.

Three days after oral argument, the Attorney General sent a letter demanding that CCP turn over its donors' private information within 30 days or face the significant sanctions discussed *supra*. On December 18, 2014, citing the irreparable harm this demand posed, CCP requested an injunction pending appeal.

The Ninth Circuit granted that request on January 6, 2015.

On May 1, 2015, the Ninth Circuit affirmed the district court's denial of a preliminary injunction and lifted the injunction it had issued in January. The court of appeals neither followed the reasoning of the district court, nor cited the principal cases upon which the lower court had relied.

Instead, the Ninth Circuit rejected the view "that the Attorney General's disclosure requirement is, in and of itself, injurious to CCP's and its supporters' exercise of their First Amendment rights to freedom of association." App. 9a. The court then purported to apply exacting scrutiny, but merely "balance[d] the plaintiff's First Amendment injury against the government's interest," and did not, as this Court did in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), count compelled disclosure as a harm in and of itself. App. 12a. Rather, the court of appeals demanded evidence of some other, additional, "burden" on a specific group's association – such as evidence the Attorney General's disclosure regime was designed only to harass CCP or that disclosure to the Attorney General would result in threats, harassments, or reprisals against its donors. App. 10a-12a. The court of appeals then ruled that, because the Attorney General's "assert[ion] for the disclosure requirement" was not "wholly without rationality . . . CCP's First Amendment facial challenge to the Attorney General's disclosure requirement fail[ed] exacting scrutiny." App. 20a-21a (citation and quotation marks omitted).

On May 5, CCP asked the Ninth Circuit to stay the mandate and renew its injunction pending the filing of this Petition. On May 11, the Ninth Circuit agreed to stay the mandate, but declined to issue an injunction protecting CCP while it sought this Court's review.

3. Application To Circuit Justice

On May 13, mindful of the significant penalties threatened by the Attorney General's letter of December 8, CCP applied for an emergency injunction pending *certiorari* from the Circuit Justice for the Ninth Circuit. On May 18, the Circuit Justice declined to issue an injunction, but did so "without prejudice to renewal of the application in light of any further developments."

CCP has received no further communication from Respondent regarding its Registry membership and, accordingly, has not renewed its application with the Circuit Justice.

REASONS FOR GRANTING THE WRIT

I. In Holding That Compelled Disclosure Of Private Associations Creates No First Amendment Injury, The Ninth Circuit Has Both Misapplied This Court's Precedents And Contradicted The Authority Of Other Courts Of Appeals.

The court of appeals flatly declared that "no case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury." App. 17a-18a. Not so. This Court long ago announced that unjustified "state scrutiny" of organizational membership was inconsistent with all Americans' right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP*, 357 U.S. at 466.

In denying this precedent, the panel purported to distinguish *Buckley v. Valeo*'s facial ruling limiting donor disclosure in the campaign finance context, ("we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," 424 U.S. at 64), arguing that *Buckley* "cited a series of Civil Rights Era as-applied cases in which the NAACP challenged compelled donor disclosure of its members' identities at a time when many NAACP members experienced violence or serious threats of violence based on their membership in that organization." App. 9a. Thus, the panel ignored the fact that *Buckley* itself was a facial challenge, and consigned some of the civil rights era's most significant

precedents – *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); and *NAACP v. Alabama* – to a footnote, limiting them to the specific facts of a specific organization in a singular time and place. App. 9a-10a n.3.

The Ninth Circuit's startling error is made especially dangerous by its unambiguous language. Under this newly-articulated rule, state officials will be emboldened to demand the donor and membership lists of private associations upon the thinnest pretexts and without fear of effective judicial oversight. This holding alone presents a question of sufficient national importance to necessitate the granting of *certiorari.*

1. When a government compels disclosure of an organization's financial supporters, the government intrudes upon the First Amendment's protection of free association. *Buckley*, 424 U.S. at 64 (compelled disclosure has been "long . . . recognized" as a "significant encroachment[ ] on First Amendment rights"); *NAACP*, 357 U.S. at 462 ("[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as taxing First Amendment activity); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974) ("an organization may have standing to assert that constitutional rights of its members be protected from governmentally compelled disclosure of their membership in the

organization, and that absent a countervailing governmental interest, such information may not be compelled"); *id.* at 98 ("[t]he 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). Indeed, this Court has long taken for granted that disclosure imposes a First Amendment injury, one that "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64. This position has been so obvious that there has been little need for courts to revisit it.

Yet, the Ninth Circuit determined that the existence of the Attorney General's unwritten disclosure policy – under which, beginning in 2014, she demanded CCP's list of substantial donors for the first time – imposed no "actual burden" upon the First Amendment rights of CCP or its supporters. App. 17a (citation omitted). *Cf. Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2010) (quoting *Buckley*, 424 U.S. at 64) ("We have repeatedly found that compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment") (punctuation altered, emphasis supplied).

Worse, under the Ninth Circuit's rule, governments may prohibit associations from engaging in other, fully protected First Amendment activities as the price for not turning over their membership lists or donor information. In this case, CCP will be

banned from speaking with potential donors in California unless it complies with the Attorney General's demand. Since any direct limit on charitable solicitations would unquestionably be reviewed under strict scrutiny, the harm here is especially pronounced. *See Williams-Yulee*, 135 S. Ct. at 1664 (strict scrutiny applies to "laws restricting the solicitation of contributions to charity"); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) ("conducting fundraising for charitable organizations . . . [is] fully protected speech"); *Gaudiya Vaishnava Soc'y v. San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1991) (same). But there is no reason to believe that the Ninth Circuit's reasoning, or the Attorney General's "law enforcement" interest, is limited to the charitable solicitation context.

Consequently, this decision constitutes an extraordinary piercing of the associational veil. *NAACP*, 357 U.S. at 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations"). It is also a grave misreading of fundamental legal precedents. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." *NAACP*, 357 U.S. at 460. "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious[,] or cultural matters . . . state action which may have the effect of curtailing the freedom to associate is subject to the closest

scrutiny." *Id*. at 460-61. After all, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were also not guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

In defense of its expansive ruling, the Ninth Circuit pointed to this Court's precedent in *Buckley v. Valeo*, which stated that "[c]ompelled disclosure, in itself can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64. The court of appeals placed great weight on the word "can," observing that just because government power "'can'" inflict serious injury, that does not mean that it "'always does.'" App. 9a. This is true, so far as it goes. But the Ninth Circuit ignores the *Buckley* Court's use of the modifier "serious." Disclosure *always* imposes First Amendment injuries. *Buckley*, 424 U.S. at 64 ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure *imposes* . . . ") (emphasis supplied). Some of the First Amendment injuries are "serious," some may be more modest, and perhaps the state can demonstrate that some injuries are necessary. But injuries they are, and the state must demonstrate some concrete need before imposing a dragnet disclosure regime.

In citing *Buckley*, the Ninth Circuit turned that case topsy-turvy. The *Buckley* Court imposed a narrowing gloss upon the portion of the Federal Election

Campaign Act that demanded a wide swath of disclosure from citizen groups labeled as "political committees." 424 U.S. at 79-81; *id.* at 80 n.108. This was a facial ruling, unencumbered by any caveat that the disclosure laws posed a danger of threats, harassments, and reprisals to groups that would otherwise have been regulated as political committees.

Indeed, where the Ninth Circuit dealt squarely with the *Buckley* opinion, insisting on a showing of threats or harassment in order to demonstrate irreparable injury, it relied upon the Court's rejection of an exemption from disclosure requirements for minor political parties, such as the Libertarian Party, one of the *Buckley* plaintiffs. But the court of appeals completely ignored *Buckley* as to non-candidate organizations that do not have "the major purpose" of influencing elections. For those groups – which include CCP – *Buckley* facially rewrote the statute to avoid constitutional overbreadth, and exempted all of them from compulsory disclosure. This was done with *no* specific factual showing of harassment at all, demonstrating how little support *Buckley* provides for the Ninth Circuit's dramatic narrowing of the First Amendment. In *Buckley*, unlike here, the state proffered a specific, concrete reason for requiring disclosure of donor information to candidate committees and political parties. But because the statute reached too far, even the invocation of that narrow, concrete interest was insufficient to carry the government's burden.

Nor was *Buckley* an outlier. This Court has not hesitated to strike down disclosure provisions, even

when "[t]he record is barren of any claim, much less proof . . . that [a plaintiff] or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility.'" *Talley v. California*, 362 U.S. 60, 69 (1960) (Clark, J., dissenting) (citing *NAACP*, 357 U.S. at 462, brackets in *Talley*).

To say, as the court of appeals did, that compelled disclosure imposes *no* First Amendment harm constitutes an expansive grant of power, allowing governments to rustle through the private workings of private organizations. It also, inherently, diminishes the value of privacy of association as a First Amendment right. The First Amendment's protection of free association "need[s] breathing space to survive," and is accordingly "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Thus, the Ninth Circuit misapplied or ignored important – indeed iconic – authority from this Court in reaching its decision.

2. Unsurprisingly, the Ninth Circuit's erroneous ruling also creates a split among the courts of appeals.

The Second Circuit recently held that the American Civil Liberties Union had standing to bring a First Amendment claim concerning the government's bulk collection of telephone metadata.

Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 802-03 (2d Cir. 2015). That decision was explicitly grounded in the ACLU's "members' interests in keeping their associations and contacts private," and the Second Circuit relied in part upon prior precedent holding that an injury in fact occurred merely when an organization's "information was obtained by the government," without more. *Id.* at 802 (quoting *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (2d Cir. 2011)). Moreover, it noted that the "*potential* 'chilling effect'" of governmental scrutiny was itself a "concrete, fairly traceable, and redressable injury." *Id.* at 802 (emphasis supplied). In short, the Second Circuit does not require additional evidence of harm, nor the public dissemination of acquired information, before recognizing the injury inherent in governmental scrutiny of private association.[5]

The decision below also created a significant conflict with the Eleventh Circuit. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir. 1999). That case involved a municipal "provision that require[d] corporate applicants for adult business licenses to disclose the names of 'principal stockholders.'" *City of Jacksonville*, 176 F.3d at 1366.

[5] The Second Circuit resolved the appeal on statutory grounds and did not reach that plaintiff's constitutional claim. But in ruling upon the sufficiency of the ACLU's claimed injury, it nonetheless created a circuit split with the Ninth Circuit on this point.

This disclosure, like that at issue here, was made to city officials and was not publicly disseminated.

That court did not require the adult businesses to place any further evidence in the record, beyond the statute itself, to demonstrate "actual" First Amendment harm. Nor did it require Lady J. Lingerie, Inc. to demonstrate that the ordinance was designed merely to harass businesses or that its stockholders would suffer threats, harassment, or reprisals as a result of the disclosure. Instead, the Eleventh Circuit assumed that compelled disclosure *itself* was the First Amendment harm at issue, and applied "exacting scrutiny." *Id*. at 1366 (citing *Buckley v. Valeo* and *NAACP v. Alabama*).

This conflict among the circuits was avoidable. The *City of Jacksonville* court grounded its analysis in, *inter alia*, *Acorn Invs. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), which also invalidated a compelled disclosure statute without requiring the plaintiff to demonstrate harm beyond the act of disclosure to city officials. The Ninth Circuit chose to distinguish its own precedent, which relied upon *Talley v. California*, *NAACP v. Alabama*, and *Buckley v. Valeo*, and which had required the governmental entity to provide "a substantial governmental interest that [was] furthered by requiring disclosure." *Acorn Invs.*, 887 F.2d at 225.

Consequently, the Ninth Circuit's ruling directly conflicts with decisions of the Second and Eleventh Circuits.

II. The Ninth Circuit's Conversion Of Exacting Scrutiny To Rational Basis Review Contradicts Decisions Of This Court And Nearly All Other Circuits.

1. The Ninth Circuit's ruling is at odds with this Court's decisions requiring the application of exacting scrutiny, "[t]he strict test established by *NAACP v. Alabama*," when governments seek to obtain private donor information from organizations. *Buckley*, 424 U.S. at 66. This Court has consistently refused to allow governments to obtain member and donor information based upon a "slender" or "mere showing of some legitimate government interest." *Gibson*, 372 U.S. at 556; *Buckley*, 424 U.S. at 64. By drastically shifting the burden of persuasion, the court of appeals's decision turns exacting scrutiny on its head.

Exacting scrutiny is premised upon the belief that governments must justify their demands for disclosure, not force citizens to explain why the State's accumulation of a vast database of private, constitutionally-protected information is harmless. *Elrod v. Burns*, 427 U.S. 347, 362 (1963) (to survive exacting scrutiny "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest . . . it is not enough that the means chosen in furtherance of the interest be rationally related to that end") (emphasis supplied). Nor is it enough for the government to simply invoke a general interest; the government must show that its disclosure regime is properly tailored to that interest. *Citizens United v. FEC*,

558 U.S. 310, 366-67 (2010). Such tailoring is not met simply because the government asserts a generalized law enforcement interest, backed up by a hypothetical at oral argument. *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1449 (2014) ("[T]here are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good"); *In re Primus*, 436 U.S. 412, 434 n.27 (1978) ("Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court"); *see also Uphaus v. Wyman*, 360 U.S. 72, 104 (1959) (Brennan, J., dissenting) ("It is anomalous to say . . . that the vaguer the State's interest is, the more laxly will the Court view the matter and indulge a presumption of the existence of a valid subordinating state interest"). As this Court has noted in the campaign finance context – where governments have traditionally been given greater latitude to regulate speech and association – "[i]n the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456.

2. Other circuit courts of appeals have followed this Court's instruction that, in disclosure cases, exacting scrutiny requires the government to bear the burden of persuasion and demonstrate that it has tailored its response to a sufficiently-important state interest. *Delaware Strong Families v. Att'y General*, Case No. 14-1887, 2015 U.S. App. LEXIS 12277 (3d Cir. July 16, 2015) (Exacting scrutiny "is a heightened level of scrutiny, which accounts for the general

interest in associational privacy by requiring a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (quotation marks and citation omitted); *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 282 (4th Cir. 2012) (Exacting scrutiny "requires the government to show that the statute bears a substantial relation to a sufficiently important governmental interest") (quotation marks and citation omitted); *FEC v. La Rouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1982) ("[W]here the disclosure sought will compromise the privacy of individual political associations . . . the agency *must* make some showing of need for the material sought beyond its mere relevance to a proper investigation") (emphasis supplied); *Familias Unidas v. Briscoe*, 619 F.2d 391, 400 (5th Cir. 1980) ("Thus, the act of disclosure. . . . does bear a relevant correlation to the legitimate object of peaceful operation of the schools . . . Nonetheless, the disclosure requirement of section 4.28, while it is generally related to the effectuation of a permissible state purpose, sweeps too broadly, and therefore cannot stand").[6]

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[6] The list goes on. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 56-57 (1st Cir. 2011) ("[W]e will consider a law constitutional under exacting scrutiny standards where there is a substantial relation between the law and a sufficiently important governmental interest") (quotation marks and citation omitted); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132-33 (2d Cir. 2014) ("[T]he statutes remain subject to exacting scrutiny, which requires a substantial relation between the disclosure

(Continued on following page)

To take one example, in the *City of Jacksonville* case the Eleventh Circuit found the proffered government interest, "[c]ombating the harmful secondary effects of adult businesses," to be "substantial." 176 F.3d at 1361. Nonetheless, conducting a tailoring analysis, the court of appeals ruled that the "City's

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requirement and a sufficiently important governmental interest") (quotation marks and citation omitted); *Justice v. Hosemann*, 771 F.3d 285, 297, 299 (5th Cir. 2014) ("The first question under the exacting scrutiny standard" is whether the government has identified a proper interest, if so, "[t]he only remaining question is whether [the] disclosure requirements are substantially related" to that interest) (punctuation altered, citations omitted); *Frank v. City of Akron*, 290 F.3d 813, 821 (6th Cir. 2002) ("The Supreme Court has 'repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.' As a result, 'the subordinating interests of the State must survive exacting scrutiny,' and there must 'be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed.' " (citing *Buckley*, 424 U.S. at 64); *Wisc. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014) ("So the Board must justify the rule under exacting scrutiny, which requires a substantial relationship between the disclosure requirements and an important governmental interest. This is not a loose form of judicial review") (quotation marks and citation omitted); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (*en banc*); *Citizens United v. Gessler*, 773 F.3d 200, 210 (10th Cir. 2014) ("For the law to pass muster there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (quotation marks and citation omitted); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) (" 'Though possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp' ") (quoting *Minn. Citizens Concerned for Life*, 692 F.3d at 876).

best argument" for the disclosure ordinance, that "principal stockholders tend to have a discernable influence on management, and that the City needs to keep an eye on who is running adult businesses in town" flunked exacting scrutiny because "stockholders, *qua* stockholders, do not run corporations; officers and directors do. The City can enforce its rules through them." *Id*. at 1366 (citations omitted). Because of the statute's improper fit, it was struck as unconstitutional. *Id*. at 1367; *McCutcheon*, 134 S. Ct. at 1456 ("fit matters").

3. By contrast, the Ninth Circuit has effectively rewritten exacting scrutiny into a form of rational basis review. The Ninth Circuit did not find that the government had proven that its demand for CCP's donor information was properly tailored to a sufficient government interest, but rather that, absent specific evidence that CCP and its donors would be harmed, the Attorney General need only assert a "not wholly irrational" basis for her demand. In practice, then, the Ninth Circuit has held that any and all compelled disclosure regimes are appropriately tailored so long as the government offers a remotely plausible excuse for compelling private information from an organization. *But see Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) (plurality op.) ("[W]hen a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution").

This was a grave error, and a stunning departure from the normal operation of heightened judicial review. Once the Attorney General sought "state scrutiny" of CCP's donor information, this act alone triggered the need for at least exacting judicial review. Under exacting scrutiny, "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest." *Elrod*, 427 U.S. at 362 (citations omitted) (emphasis supplied). The Ninth Circuit inverted this requirement, instead requiring CCP to justify why it need not disclose sensitive information to the government.

Moreover, the burden upon the Attorney General does not end merely upon the invocation of a legitimate governmental interest. *Buckley*, 424 U.S. at 64 ("We long have 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"). CCP "asserts no right to absolute immunity from state investigation, and no right to disregard [California]'s laws." *NAACP*, 357 U.S. at 463. CCP concedes, as it has at every stage of this litigation, that the enforcement of laws against fraud, self-dealing, interested persons, and the like are vital and paramount interests for the government to pursue.[7]

[7] Furthermore, CCP has no objection to the Attorney General conducting compliance audits, or subpoenaing certain

(Continued on following page)

But the Attorney General has *never* provided *any* evidence of the mechanism by which CCP's donor information would vindicate that interest. CCP Mot. to Stay the Mandate and Mot. for Prelim. Inj. Relief at 7-8, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. May 5, 2015), Dkt. No. 37 (summarizing the Attorney General's repeated invocation of her governmental interest, without providing an explanation as to how CCP donor information would support that interest). At most, she provided "*an* example," for the first time, at oral argument on appeal, "of how the Attorney General uses Form 990 Schedule B in order to enforce these laws." App. 5a (emphasis supplied). As discussed *supra*, the Attorney General's sole example consists of a (possibly hypothetical) enforcement action based upon the inflation of the value of a worthless painting donated to a lightly funded group. This example, even if it actually happened and were properly presented, does not show that a dragnet demand for donors is sufficiently tailored. The hypothetical group's Form 990 would raise a number of

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donor information as part of an investigation if a charity's annual filing demonstrates a particularized suspicion of wrongdoing. *See* CAL. GOV'T CODE § 12588 ("[t]he Attorney General may investigate transactions and relationships of corporations and trustees subject to this article . . . "). That approach also protects the judiciary's role in supervising subpoenas and warrants, a vital check on governmental power required by both the First and Fourth Amendments. If the mere invocation of a "law enforcement" interest is sufficient to gather private information from any organization, law enforcement officers are unlikely to instead choose these more closely-scrutinized routes to that same information.

red flags. *Supra* at 8-9. Even granting credence to her example, whether reality or speculation, it cannot justify, under exacting scrutiny, obtaining *all* significant donors to *all* charities. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 201, 204 (1999) (when demanded disclosure is only "tenuously related" to the state's interest in "compelled disclosure of the name[s] and addresses" of individuals, it "fail[s] exacting scrutiny") (citation and quotation marks omitted). Of course, this scenario was not briefed in the Ninth Circuit or provided to the district court in any form. *Gibson*, 372 U.S. at 555-56 (associational freedom "may not be substantially infringed upon such a slender showing as here made by the respondent").

Perhaps more troubling, it was upon this scintilla of far-fetched argument – it cannot be called evidence – that the court of appeals found that the state's dragnet demand for donor lists assisted "investigative efficiency." App. 6a; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) ("[W]e have never accepted mere conjecture as adequate to carry a First Amendment burden"); *McCullen v. Coakley*, 573 U.S. __, 134 S. Ct. 2518, 2534 (2014) ("[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency") (citation and quotation marks omitted). But the Attorney General has many tools at her disposal, from random audits to simple reviews of the other information available on Form 990. That form provides a highly-detailed view of potential conflicts of interest, payments to officers and directors, organizational finances, the dollar

amount of reported contributions, whether each was a non-cash contribution, and if so a description of the property contributed. If that information showed that the identity of a specific donor would be useful, the state would be within its rights to issue subpoenas subject to the supervision of the courts.

Put simply, the Ninth Circuit conducted no analysis as to whether the Attorney General's demand was properly tailored. *McCutcheon*, 134 S. Ct. at 1456 ("Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but . . . narrowly tailored to achieve the desired outcome") (citation and quotation marks omitted). Indeed, the Ninth Circuit did not even ask, as this Court did in *Shrink Missouri Government PAC*, whether "the novelty and plausibility of the justification raised" by the Attorney General could be justified by such a low, essentially non-existent, "quantum of empirical evidence." *Shrink Missouri*, 528 U.S. at 391.

Instead, at most the Ninth Circuit engaged in a very basic balancing test: having found that there was no First Amendment injury in compelled disclosure, it required the Attorney General to place only a featherweight, if that, on her side of the scales. There is reason to believe that, because it imposes a "wholly without rationality" test, this approach would not even be sufficient under the ordinary rational basis standard. *See Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) (under rational basis review, legislation "will be sustained if the

classification drawn by the statute is rationally related to a legitimate state interest") (citation and quotation marks omitted). Regardless, rational basis cannot be the standard here. *See District of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect").

Under the Ninth Circuit's ruling, *NAACP v. Alabama*, its progeny, and those cases' defense of associational privacy against state review of membership information must have been overruled or dramatically narrowed. *Bates*, 361 U.S. at 525 ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion . . . "). Had the Ninth Circuit properly applied exacting scrutiny, it ought to have ruled for Petitioner. The Attorney General never demonstrated that "[t]he gain to the subordinating interest provided by the means" used to further that interest – in this case, a universal disclosure regime specifically targeting First Amendment sensitive data – was even remotely, let alone "narrowly tailored." *Elrod*, 427 U.S. at 362 (citations omitted); *McCutcheon*, 134 S. Ct. at 1456 (citations omitted).

The Ninth Circuit's "balancing test" thus directly conflicts with how other courts believe proper constitutional review operates. Indeed, as recently as

October 7, 2014, a different panel of the Ninth Circuit hearing a compelled disclosure case refused to treat exacting scrutiny as a balancing test susceptible to conversion into rational basis review. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 684 (9th Cir. 2014) (Kozinski, C.J.), *rev'd en banc*, 782 F.3d 520 (9th Cir. 2015) ("Moreover, it is the *government*'s burden to show that its interests are substantial, that those interests are furthered by the disclosure requirement, and that those interests outweigh the First Amendment burden the disclosure requirement imposes on political speech") (emphasis in original, other punctuation altered, citations omitted). This Court ought to grant the writ, so that it may restore the exacting scrutiny test in the Ninth Circuit and resolve the lower court's conflict with the other courts of appeals.

III. This Case Is An Excellent Vehicle For Defining Exacting Scrutiny In Associational Liberties Cases, A Pressing Constitutional Question That Can Only Be Addressed By This Court.

As the foregoing shows, the lower courts have too often misunderstood the "exacting scrutiny" standard *NAACP* and *Buckley* imposed to protect privacy of association and belief. That ambiguity emboldens overly-invasive state regulation and chills fundamental First Amendment rights. This case is an ideal vehicle for clarifying the proper standard in compelled disclosure cases. Since this question arises in

situations at the heart of First Amendment freedoms, where the potential for governmental abuse is gravest, the articulation of a clear and easily-applied standard is a matter of pressing national importance that can only be addressed by this Court.

1. Reviewing the disclosure regime of the Federal Election Campaign Act, this Court, in the context of a facial challenge to a compelled disclosure regime, applied the "strict test" of *NAACP v. Alabama*. *Buckley*, 424 U.S. at 66; *NAACP*, 357 U.S. at 460-61 ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny").

In *Buckley*'s immediate aftermath, the federal judiciary treated that ruling as imposing what would now be thought of as strict scrutiny. *E.g. Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) ("[t]he strict or exacting scrutiny standard requires that a state must show the regulation in question is substantially related to a compelling government interest and is narrowly tailored to achieve that end") (citing *Burson v. Freeman*, 504 U.S. 191, 198 (1992)); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984) (under exacting scrutiny, "the government must demonstrate that the means chosen to further its compelling interest are those least restrictive of freedom of belief and association"); *Familias Unidas*, 619 F.2d at 399 ("Even when related to an overriding, legitimate state purpose, statutory disclosure requirements will survive this exacting scrutiny only if drawn with sufficiently narrow specificity to avoid

impinging more broadly upon First Amendment liberties than is absolutely necessary").

For the past several Terms, this Court has suggested that exacting scrutiny is a form of review akin to strict scrutiny. In *United States v. Alvarez*, Justice Kennedy, writing for four members of the Court, determined that "exacting scrutiny" applied to the Stolen Valor Act of 2005, which prohibited falsely claiming that one had been awarded military honors. 567 U.S. ___, 132 S. Ct. 2537, 2543 (2012) ("When content-based speech regulation is in question, however, exacting scrutiny is required"). Justice Kennedy's plurality opinion alternated between calling the proper standard "exacting scrutiny" or the "most exacting scrutiny" – but clearly applied a form of strict scrutiny. *Alvarez*, 132 S. Ct. at 2551; *281 Care Comm. v. Arneson*, 766 F.3d 774, 783 n.7 (8th Cir. 2014).

Similarly, in *McCutcheon v. FEC*, the Chief Justice's controlling opinion noted that "[u]nder exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest." 134 S. Ct. at 1444; *see also McCullen*, 134 S. Ct. at 2530 (describing "strict scrutiny" as an "exacting standard"). This Term, the Chief Justice's controlling opinion adopted a similar formulation of exacting scrutiny in *Williams-Yulee*, 135 S. Ct. at 1664-65 (interchangeably referring to "exacting scrutiny" and "strict scrutiny," and holding that "[a] State may restrict the speech of a judicial

candidate only if the restriction is narrowly tailored to serve a compelling interest"); *id.* at 1673 (Ginsburg, J., concurring) ("I would not apply exacting scrutiny . . . "); *id.* at 1676-77 (Scalia, J., dissenting) ("We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny . . . Canon 7C(1) fails exacting scrutiny and infringes the First Amendment").

Understanding exacting scrutiny as a form of strict scrutiny is especially appropriate in cases such as this, where the government seeks to pierce associational privacy as a condition of engaging in pure speech. This Court has made it perfectly clear that charitable solicitations are "characteristically intertwined with informative and perhaps persuasive speech," and that limits on that speech are subject to exacting scrutiny. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). In that context, again, exacting scrutiny is equivalent to strict scrutiny: such regulations are upheld only if "narrowly tailored to serve a compelling interest." *Williams-Yulee*, 135 S. Ct. at 1664.

These recent applications of "exacting scrutiny" as "strict scrutiny" have not gone unnoticed in the circuit courts. In 2012, the Fourth Circuit observed that "[t]he Supreme Court has equated the phrase 'most exacting scrutiny' with its frequently-used term 'strict scrutiny'." *United States v. Hamilton*, 699 F.3d 356, 370 n.12 (4th Cir. 2012); *also 281 Care Comm.*, 766 F.3d at 783 n.7 ("In *Alvarez*, though, no matter the cloudiness of its usage in prior case law, the

plurality's application of 'the most exacting scrutiny' is interchangeable with strict scrutiny"); *Minn. Citizens*, 692 F.3d at 876 (exacting scrutiny is "possibly less rigorous than strict scrutiny"); *see also Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 413 (6th Cir. 2014) ("'Exacting scrutiny,' despite the name, does not necessarily require that kind of searching analysis that is normally called strict judicial scrutiny; although it may").

2. By contrast, courts have sometimes concluded that exacting scrutiny, at least in the context of compelled disclosure cases, is a form of intermediate review. *Tennant*, 706 F.3d at 282 ("In *Citizens United*, the Supreme Court specified that courts should apply 'exacting scrutiny' to evaluate . . . disclosure provisions . . . [t]his standard requires the government to show that the statute bears a 'substantial relation' to a 'sufficiently important' governmental interest") (quoting 558 U.S. at 366-67); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 229 n.9 (2d Cir. 2010) ("the Supreme Court has recently clarified . . . [that strict scrutiny and exacting scrutiny] are different"); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2010) (describing exacting scrutiny as an "intermediate level" of review); *Vt. Right to Life Comm., Inc.*, 758 F.3d at 133 n.13 (noting the Second Circuit once believed that "mandatory disclosure requirements may represent a greater intrusion into the exercise of First Amendment rights of freedom of speech and association than do reporting provisions . . . [but t]his view now appears inconsistent

with *Citizens United*") (citation and quotation marks omitted); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 787 (9th Cir. 2006) (observing that *McConnell v. FEC*, 540 U.S. 93 (2003) applied a lighter version of exacting scrutiny than the *Buckley* Court).

This confusion as to the proper understanding of exacting scrutiny, especially when applied to an area of central concern to First Amendment interests, can only be resolved by this Court. Thus, this case offers an excellent vehicle, in a case uncluttered by dueling factual or statutory interpretations, to precisely state the level of "exactness" required of courts when applying exacting scrutiny in the compelled disclosure context.

CONCLUSION

Compelled disclosure constitutes a First Amendment injury, which must be justified under the "strict test" of exacting scrutiny. The Ninth Circuit's sharp departure from this rule ought to be swiftly reversed, and the appropriate standard of review in compelled disclosure cases announced. Accordingly, this Court ought to grant the petition for a writ of *certiorari.*

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Respectfully submitted,

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