Nos. 16-55727 and 16-55786

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff - Appellee - Cross-Appellant,

v.

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

Defendant - Appellant - Cross-Appellee.

On Appeal from the United States District Court
for the Central District of California, Los Angeles
Honorable Manuel L. Real, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNATION IN SUPPORT OF PLAINTIFF - APPELLEE'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST AND IDENTITY OF AMICUS CURIAE[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Plaintiff - Appellee's Petition for Rehearing En Banc.

Pacific Legal Foundation (PLF), founded in 1973, is a nonprofit public interest foundation dedicated to litigating matters of the public interest. PLF defends individual liberty, limited government, and property rights in state and federal courts. Individual donations give PLF the ability to fulfill its mission to protect countless individuals whose liberty is threatened by burdensome laws. PLF, like many nonprofits, is threatened by rules that violate the privilege of our donors to remain anonymous. Thus, PLF has an interest in ensuring free association and owes its donors a duty to defend their constitutional right to speak freely and confidentially.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under Rule 35 of the Federal Rules of Appellate Procedure, an *en banc* hearing is appropriate when: "(1) en banc consideration is necessary to secure or

[1] In accordance with Fed. R. App. P. 29(c)(5), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amicus Curiae, its members, or its counsel have made a monetary contribution to this brief's preparation or submission. All parties, through their attorneys, have consented to the filing of this brief.

maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." The Panel's decision departs from controlling Supreme Court precedent and involves issues of exceptional importance including substantial First Amendment harm to both donors and nonprofits nationwide.

Under the First Amendment, disclosure requirements in non-election cases are subject to exacting scrutiny and must be narrowly drawn. *See Louisiana ex rel. Gremellion v. NAACP*, 366 U.S. 293, 297 (1961). The Panel incorrectly held that exacting scrutiny does not require California's disclosure law be narrowly drawn. The Panel failed to distinguish the application of exacting scrutiny in non-election disclosure requirement cases from its application in election and campaign finance cases.

The Panel's decision also fully credited government assertions of a compelling interest and assurances that donor lists would be kept private, despite substantial evidence established at the district court to the contrary. The Panel opinion reduced exacting scrutiny to little more than rational basis review—effectively closing the courthouse doors to future as-applied challenges by affected organizations.

California's disclosure requirement also has nationwide impacts; all nonprofits that seek to solicit in California will be forced to violate their donors' rights to anonymously associate. Because this raises issues of exceptional

importance, this Court should grant the Petition for Rehearing *En Banc* to correct the Panel's failure to follow important and well-settled precedent.

ARGUMENT

I

THE REMOVAL OF THE NARROW TAILORING REQUIREMENT IN DISCLOSURE CASES IS INCOMPATIBLE WITH SUPREME COURT PRECEDENT AND CONFLICTS WITH OTHER CIRCUITS

California's disclosure requirement is subject to exacting scrutiny under the First Amendment and must be narrowly drawn. The Supreme Court has repeatedly held that restraints on freedom to associate implicate the First Amendment. *See, e.g.*, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). To justify the compelled disclosures' curtailment of associational freedom, "the State may prevail only upon showing a subordinating interest which is compelling." *Bates*, 371 U.S. at 524. Moreover, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Louisiana v. NAACP*, 366 U.S. 293, 297 (1961) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

The Panel failed to follow controlling precedent requiring laws abridging free association protected by the First Amendment to be narrowly drawn and use less

restrictive means. *Americans for Prosperity Found. v. Becerra*, No. 16-55727, 2018 WL 4320193, at *5 (9th Cir. Sept. 11, 2018) (hereinafter *AFPF*). But this only compounds the earlier error of *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015) (hereinafter *CCP*), in which another panel appeared to abandon that requirement—at least where a "chilling risk" had not been established. *CCP*, 784 F.3d at 1314 and n.7. The panel in *AFPF* then cited to the single sentence in *CCP* discussing narrow tailoring to establish that donor disclosure was subject only to the "ordinary 'substantial relation' standard that both the Supreme Court and this court have consistently applied in disclosure cases such as *Doe* and *Family PAC v. McKenna*, 685 F.3d 800, 805-06 (9th Cir. 2012)." *AFPF*, 2018 WL 4320193, at *5. But the disclosure requirements upheld in *Doe* and *Family PAC* both involved election law, while the disclosure requirements struck down in *Louisiana* and *Shelton* both involved disclosing organization affiliation and membership (non-election cases). The most reasonable conclusion is that exacting scrutiny functions differently in election cases and non-election cases. Exacting scrutiny in non-election cases requires the law to be narrowly drawn and use less restrictive means.

Even in the election campaign context, the circuits remain split on the narrow tailoring requirement. *Compare Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (striking down campaign disclosure law as not narrowly tailored); *and Citizens for Responsible Gov't State Political Action*

Comm. v. Davidson, 236 F.3d 1174, 1196 (10th Cir. 2000) (same); *with N. Carolina Right To Life Comm. Fund For Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008) (upholding disclosure law and stating that "narrow tailoring is not required" under *Buckley*'s "sufficient relationship" test).

The petition for rehearing *en banc* should be granted to give this Court the opportunity to correctly apply the standard of review in accordance with controlling precedent.

II

THE DISCLOSURE REQUIREMENT RAISES ISSUES OF EXCEPTIONAL IMPORTANCE INCLUDING DONOR HARASSMENT, CHILLED SPEECH, AND HARM TO NONPROFITS NATIONWIDE

Nonprofits play an important role in society. Nonprofits not only provide a platform for donors to advocate their political, philosophical, and philanthropic beliefs, but also provide communities with important resources to cultivate growth, stability, and opportunity. *See* Stuart C. Mendel, *How Nonprofit Organizations Create Public Value* (Cleveland State Univ. Urban Publications ed. 2013). In addition, nonprofit organizations contribute to the common good by encouraging a more engaged citizenry and acting in a stewardship role for societal resources. *Id.* The negative impact California's disclosure law poses to the First Amendment rights of donors and nonprofits nationwide carries exceptional importance and warrants this Court's reconsidering its constitutionality.

The constitutionality of California's disclosure requirement is particularly important because it will have nationwide impact. As the largest and wealthiest state, nonprofits across the country target California donors. Moreover, the Schedule B forms contain the personal information of donors outside of California. While disclosure to government itself is a cognizable First Amendment injury, the risk of donor harassment posed by intentional or inadvertent public disclosure makes the impact of California's mandate reverberate nationwide. Given the vital role nonprofits play in American society, any decision that could seriously hamper their ability to collect and solicit funds should be decided by the full court.

A. The Panel's Decision Reduces Exacting Scrutiny to Little More Than Rational Basis

The panel relied heavily on the previous Ninth Circuit opinion in *CCP*, and asserted that the previous decision foreclosed any facial challenge to the disclosure requirement. *AFPF*, No. 16-55727, 2018 WL 4320193, at *4. But the opinion in *CCP* came before the Ninth Circuit on appeal of a motion for denial of a preliminary injunction. *CCP*, 784 F.3d at 1310. At that time, the Ninth Circuit panel took the government's asserted compelling interest in enforcing California law at face value. *Id.* at 1311. It also credited fully assertions by the attorney general that all Schedule B forms were to be kept confidential. *Id.* at 1316. But the panel in *CCP* left open the possibility that a litigant could provide evidence in an as-applied challenge

establishing true risk of retaliation—either by government or inadvertent public disclosure—or rebutting the government's asserted interests. *Id.* at 1316–17.

The panel's decision credits entirely the government's asserted interests while discrediting the substantial evidence collected by the Americans for Prosperity Foundation (AFPF) at trial establishing both a significant risk of public retaliation from disclosure and the high likelihood of public release of the otherwise confidential Schedule B forms. But where laws have significant widespread impact, the government is entitled to "considerable less deference that a predicted harm justifies a particular impingement on First Amendment rights." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2472 (2018).

On remand, the district court found that the state was unable to provide a single witness that could establish a legitimate investigatory purpose for requesting the Schedule B form. *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1053-54 (C.D. Cal. 2016), *rev'd and vacated sub nom. Americans for Prosperity Found.*, 2018 WL 4320193. The district court also found substantial evidence that AFPF employees, supporters, and donors had all faced "public threats, harassment, intimidation, and retaliation." *Harris*, 182 F. Supp. 3d at 1055. Instead of deferring to the lower court's fact finding, the panel substituted its opinion, holding that "[s]uch harassment . . . is not a foregone conclusion" simply because some contributors had faced public disclosure in the past, and the panel "would

expect . . . evidence to show that . . . its contributors were harassed or threatened." *AFPF*, 2018 WL 4320193, at *12. The panel's rejection of the substantial evidence collected in the district court in favor of judicial speculation appears more in line with the presumption of validity used in rational basis review. *See, e.g.*, *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) ([T]hose attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it . . . ."). Litigants in the Ninth Circuit seeking review of disclosure requirements—implicating core First Amendment association rights—will be faced with an exacting scrutiny that is practically indistinguishable from the deferential review provided under rational basis.

The panel decision in *AFPF* slams shut the courthouse doors by establishing a nearly insurmountable bar to as-applied challenges to such laws. Simply put, if the substantial evidence produced before the district court by AFPF may be so casually disregarded on appeal while the government's purported interests are accepted at face value, the possibility for as-applied invalidity of the disclosure requirement left open by *CCP* is effectively and entirely foreclosed.

B. Donor Disclosure to Government Is a First Amendment Injury and Creates Significant Risk of Harassment

The disclosure requirement poses a significant risk of harassment for donors. The fear of potential harassment certainly includes private harassment. *See* Jennifer Mueller, *The Unwilling Donor*, 90 Wash. L. Rev. 1783 (Dec. 2015). Indeed, AFPF

provided substantial evidence before the district court that disclosure of its donors' identities could lead to public retaliation. *Harris*, 182 F. Supp. 3d at 1055-56. While a substantial First Amendment injury occurs through the "initial exertion of state power" in seeking disclosure, significant deterrent effects are caused by fear of later private community action. *See Patterson*, 357 U.S. at 462.

Donor concern is not limited to the risk of public disclosure. Government assurances that donor lists will be kept confidential do nothing to alleviate legitimate fears of government harassment. For example, the IRS admitted to subjecting conservative political groups applying for tax-exempt status to heightened scrutiny in 2013. Peter Overby, *IRS Apologizes for Aggressive Scrutiny of Conservative Groups*, NPR (Oct. 27, 2017). Additionally, some individuals may simply place a high value on their right to anonymity. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Consequently, it is widely acknowledged that disclosure requirements chill and deter individuals from exercising their constitutionally protected right to voluntarily associate. *See, e.g.*, *Patterson*, 357 U.S. at 462.

C. California's Disclosure Requirement Harms Nonprofits and Donors Nationwide

Given California's size and wealth, the disclosure requirement will harm nonprofits and donors across the nation. The disclosure requirement enables California to require nonprofits who solicit donations in California to disclose the identity of all donors who give over $5,000. In 2013, California donations

represented 13.7% of charitable donations in the United States, totaling over $27 billion. The Urban Institute, *Profiles of Individual Charitable Contributions by the State, 2013* (Feb. 10, 2016). But Schedule B forms are not limited to California donors, and disclosure may chill donations from individuals in other states that prefer anonymity. Since the panel decision effectively renders as-applied challenges to the disclosure requirement impossible—*see supra*, Part II.A—charities will be left with the choice of violating donor privacy or foregoing solicitation within California. The disclosure requirement therefore has great reach outside California, coupled with the potential for substantial First Amendment injury to both donors and nonprofits.

CONCLUSION

Because the panel opinion diminishes exacting scrutiny to a lower standard of review, the Ninth Circuit opinion in *AFPF* will have substantial negative impacts on the First Amendment rights of donors and nonprofit organizations nationwide. This Court should grant the petition for rehearing *en banc* to hold that California's

disclosure requirement violates the freedom to associate protected by the First Amendment.

DATED: October 5, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Form 11: Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Numbers 16-55727 & 16-55786

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer*.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

[✔] Contains 2,230 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

[ ] Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

DATED: October 5, 2018.

s/ Jeremy Talcott
JEREMY TALCOTT

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using 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/ Jeremy Talcott
JEREMY TALCOTT