Nos. 16-55727 & 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 CALIFORNIA,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Central District of California, Western Division
Case No. 2:14-cv-09448-R-FFM

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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The New Civil Liberties Alliance (NCLA) is a nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms against systemic threats, including attacks by administrative agencies and state attorneys-general on due process, jury rights, freedom of speech, and other civil liberties. We uphold these constitutional rights on behalf of all Americans, of all backgrounds and beliefs, and we do this through original litigation, occasional *amicus curiae* briefs, and other means.

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

NCLA therefore aims to defend civil liberties—primarily by asserting constitutional constraints on administrative and executive actors, including state attorneys-general. NCLA is particularly disturbed that a state attorney-general, without support from an act of the state legislature, has invented a new, binding obligation on charities that solicit donations in the State of California. Requiring these groups to turn over their donor or membership lists when they seek support for their various charitable endeavors violates the First Amendment of the U.S. Constitution as applied to the states by the Fourteenth.

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

The NCLA's principal interest as a civil-rights organization participating in this litigation is to vindicate the speech and associational freedom and anonymity principles enunciated in *NAACP v. Alabama*. When a state attorney-general imposes a disclosure requirement by administrative fiat, when he can "insist on a list" without reliance on any legislative command, it not only shifts far too much lawmaking from elected legislators to California's executive branch, it also turns back the clock to the pre-civil rights era when dissident organizations labored at the mercy and sufferance of hostile state attorneys-general.

NCLA is a relatively new 501(c)(3) organization, and we have not yet seen fit to solicit contributions in California. Moreover, it is unlikely that we will do so if this law's intrusive disclosure regime is upheld. It would be unfair to any of NCLA's donors from outside California who desire anonymity—and who have a limited ability to influence an attorney-general for whom they cannot vote—for the organization to subject them to California's disclosure regime, which the U.S. Court of Appeals for the Second Circuit has called out for its "systematic incompetence in

keeping donor lists confidential." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018). While we thus recognize that success in this litigation might someday allow NCLA to solicit contributions in California without jeopardizing the anonymity of any donors who desire it, we do not rely on such contributions now, and that prospect does not drive our involvement in this matter. NCLA fervently hopes that this Court will grant the petition, rehear this case en banc, and side with our nation's esteemed civil-rights legacy rather than the narrow-minded and liberty-killing balancing test contrived by the panel below.

Statement of Compliance with Rule 29

All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

Summary of the Argument

The plaintiff has capably and powerfully explained why rehearing en banc is warranted: The panel applied a diluted rendition of "exacting scrutiny" that cannot be reconciled with the "narrow tailoring" that other courts have required. *See* Pet. for Rehearing En Banc at 8–16. And even apart from that problem, the First Amendment issues at stake are sufficiently important to trigger en banc consideration. *See id.* at 16–19. Yet there are even more reasons for taking this case en banc—beyond what the plaintiff has already presented in its trenchant petition.

First, every member of this Court should be alarmed at the subtle erosion of the constitutional protections for privacy and associational freedom that the Supreme Court established in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). When the Supreme Court famously held that the Alabama Attorney General could not compel the NAACP to produce its membership list, the justices applied a simple and elegant test that bears no resemblance to the loose and indeterminate balancing standard that passes for "exacting scrutiny" in the panel opinion.

The Supreme Court first observed that the NAACP's members had been subjected to harassment when their membership had been revealed in the past; that *alone* was enough to show that disclosure to the state attorney-general could deter people from joining the organization. *See id.* at 462–63. Then the Court considered Alabama's purported "interest" in obtaining the membership list—to determine whether the NAACP was violating the

state's foreign corporation registration statute by conducting "intrastate business"—and held that the state's demand for the membership list had no "substantial bearing" to this putative state interest. *Id.* at 464.

The panel has replaced the straightforward *NAACP* test with a vague and jargon-riddled "exacting scrutiny" standard that offers little protection to unpopular minorities. *See* Op. at 15. There is nothing at all "exacting" about the panel's standard of review. Instead of applying *NAACP*, the panel borrowed a gestalt balancing test from cases involving compelled disclosures in the field of election law. *See* Op. at 15 (holding that the "exacting scrutiny" standard "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest" (quoting *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010))); *id.* (holding that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008))). A balancing "test" of this sort is impossible to refute, thus leaving the constitutional protections for privacy and associational freedom entirely at the discretion of individual judges. More importantly, this approach finds no support in the *NAACP* opinion, which the panel should have looked to for direct guidance.

Second, the panel opinion not only undermines the rights of privacy and associational freedom, it also impinges on the religious freedom of donors who want to give anonymously in accordance with the teachings of their religion.

Finally, the panel opinion continues the erosion of constitutional protections for political minorities. Much of the Constitution's structural provisions and individual-rights guarantees are designed to safeguard minority rights and create space for unpopular minority opinions. That cannot happen unless the courts protect dissident organizations from compelled-disclosure laws that intimidate their members and donors.

Argument

I. The Panel's Opinion Is Inconsistent With The Robust Protections For Privacy And Associational Freedom That The Supreme Court Established In *NAACP v. Alabama*

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), is one of the canonical rulings of the civil-rights era—and it protects the rights of *all* dissident organizations to keep their membership and donor lists private from government officials. *NAACP*'s holding is not limited to organizations that promote the cause of racial equality; it extends equally to other organizations whose beliefs may provoke hostility and opposition, or whose members or donors could be deterred from affiliating absent assurances of privacy and confidentiality.

The most striking aspect of the panel's so-called exacting scrutiny standard is how little resemblance it bears to the Supreme Court's approach in *NAACP*—a case that the panel barely mentions. *NAACP* never applied "exacting scrutiny," nor did it apply anything like the loose and indeterminate balancing approach that appears throughout the panel opinion. Instead, the

NAACP Court applied a straightforward and rigorous test that simply asks whether an organization's members have previously encountered "public hostility" when their membership has been revealed. *See id.* at 462–63. If so, then the state must show that disclosure has a "substantial bearing" on the state's asserted interest in obtaining the list of names. *See id.* at 464.

Consider the first part of the *NAACP* test and compare it to the approach of the panel opinion. Under *NAACP*, if an organization had shown that one or more of its members had encountered "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," that *alone* was enough to establish that disclosing the membership list to the state "may induce members to withdraw from the Association and dissuade others from joining it." *Id.* at 463. As the Court explained:

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

Id. at 462–63. Under this approach, an organization needs only to present evidence of past hostility encountered by its known members or affiliates on

account of their relationship with the organization. That by itself shows that disclosure will burden the organization's First Amendment rights, and that showing then requires the state to demonstrate that the forced disclosure of these names will have a "substantial bearing" on whatever interest the state asserts.

The panel opinion, by contrast, held that it was *not* enough for the plaintiffs to show that others had previously threatened and harassed their members and affiliates—even though the plaintiffs had produced extensive evidence of this in the trial court. *See* Panel Op. at 31–34; *see also id.* at 34 (acknowledging that "this evidence plainly shows at least the *possibility* that the plaintiffs' Schedule B contributors would face threats, harassment or reprisals if their information were to become public." (emphasis in original)). Instead, the panel opinion held that the plaintiffs must *also* show a "reasonable probability" that the Attorney General would somehow disclose the plaintiffs' Schedule B contributors to the public. *See* Panel Op. at 35. *NAACP* imposed no requirement of this sort; the mere fact that the NAACP's donor list would be in the hands of government officials was enough to establish a chilling effect that "may induce members to withdraw" or "dissuade others from joining." *NAACP*, 357 U.S. at 463. The probability or likelihood of public disclosure played no role in *NAACP*'s First Amendment analysis.

NAACP was correct to ignore the question of public disclosure. And the panel opinion was wrong to require the plaintiffs to show a "reasonable probability" that the Attorney General would disclose their Schedule B con-

tributors to the public. To begin, the risk of future disclosure is impossible to quantify, even though everyone agrees there is *some* risk of disclosure. *See* Panel Op. at 38 ("Nothing is perfectly secure on the internet in 2018"); *id.* at 38–39 ("[T]here is always a risk somebody in the Attorney General's office will let confidential information slip notwithstanding an express prohibition." (quoting *Citizens United v. Schneiderman*, 882 F.3d at 384). So how is a judge supposed to determine when the risk of public disclosure crosses the line from a "non-reasonable" probability to a "reasonable" probability? And how is a plaintiff supposed to demonstrate that a "reasonable probability" (as opposed to a "non-reasonable probability") of public disclosure exists? No expert could quantify this risk; there are too many variables and too many unknowns for any reliable calculation to be made.

More importantly, *any* risk of public disclosure is enough to deter some individuals at the margin from joining or donating to dissident organizations. Deterrence depends entirely on an individual's subjective perception of risk,[1] and someone who perceives a risk of public disclosure—or who perceives a risk of retaliation from hostile state officials even in the absence of public disclosure—will be dissuaded from joining or donating even if the actual risk of public disclosure is small. This chilling effect is what burdens the First

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

Amendment rights of organizations and their donors,[2] and a compelled-disclosure law produces this chilling effect whenever it demands a list from an entity whose members or donors have previously experienced retaliation for affiliating with the organization. *NAACP* correctly declined to consider whether the Attorney General of Alabama would actually disclose the NAACP's membership list to the public. Instead, the mere demand for the list created the chilling effect that burdened the members' First Amendment rights. Thus, *NAACP* requires the State of California to show that the compelled disclosure has a "substantial bearing" on the interests that it asserts. *See NAACP*, 357 U.S. at 462–63; 464–65.

The panel opinion, by contrast, diluted the protections established in *NAACP* by engaging in two specious doctrinal maneuvers. The first of these maneuvers has already been explained in the plaintiffs' petition for rehearing en banc: The panel relied on cases involving compelled disclosures in *election* law, where the Supreme Court has established a far more forgiving standard of review than the rigorous standard that governs non-election cases such as *NAACP* and this one. *See* Pet. for Rehearing En Banc at 2–3; 12–13. But the panel's second maneuver is more subtle and more pernicious. The panel

2. *See NAACP*, 357 U.S. at 462–63 ("[W]e think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.").

opinion—like the Second Circuit in *Citizens United v. Schneiderman*, 882 F.3d at 384—attempted to limit the holding of *NAACP* to situations in which an organization's members would face *violent* retaliation if their affiliations were disclosed. The Second Circuit, for example, tried to distinguish *NAACP* as follows:

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

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

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

Id. at 385 (emphasis added). The panel opinion likewise distinguished *NAACP* in a footnote by quoting this exact passage from *Citizens United*. *See* Op. at 29 & n.5.

The problem is that *NAACP* never limits its holding to situations in which an organization's members are subjected to physical violence. Quite the opposite, the Supreme Court said that the NAACP had:

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

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

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

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

Non-violent harassment is as capable of chilling First Amendment freedoms as physical force. Indeed, this has been shown recently in the State of California where activists who support same-sex marriage targeted the former CEO of Mozilla and forced him to resign his job after discovering that he had donated $1,000 to California Proposition 8. *See* Nick Bilton and Noam Cohen, *Mozilla's Chief Felled by View on Gay Unions*, New York Times (April 3, 2014), available at https://nyti.ms/2zQ1vu0 (last visited on October 5,

2018). Activists likewise targeted the Artistic Director of the California Musical Theater, who was forced to resign his job once his $1,000 donation to Proposition 8 was publicly disclosed. *See* https://www.wsj.com/articles/SB123033766467736451 (last visited on October 5, 2018). And those reprisals came in response to donations to an initiative that the voters had *approved*.

Donors to organizations that support unpopular causes are equally susceptible to non-violent bullying of this sort, and the fear of losing employment and business opportunities is no less menacing to First Amendment freedoms than the threat of physical violence. For the panel opinion to suggest that *NAACP*'s holding turned on the violence and brutality of white supremacists is to gut one of the canonical precedents of the civil-rights era, converting it into a one-off holding that protects only those who can show that their physical safety would be endangered by disclosing their association with a dissident organization.

The battle for civil rights protected racial minorities by securing them in constitutional freedoms that belong to all Americans, and it thereby established a heritage of civil liberties and equality that remains valuable for all. The panel's decision threatens the legacy of the civil-rights movement by diluting the protections for privacy and associational freedom that the Supreme Court established in *NAACP v. Alabama*, and by attempting to limit *NAACP*'s holding to situations involving the extraordinary acts of brutality that characterized the civil-rights era. The Court should grant rehearing en banc to reaffirm *NAACP* and apply its analysis to the facts of this case.

II. The Panel Opinion Threatens The Religious Freedom Of Those Who Wish To Practice Anonymous Charitable Giving

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

Jesus taught that "when you give to the needy, do not announce it with trumpets" and "do not let your left hand know what your right hand is doing, so that your giving may be in secret." Matthew 6:2–3. Maimonides set forth eight levels of charity or "Tzedakah," with two of the highest levels requiring anonymity. *See* https://www.chabad.org/library/article_cdo/aid/45907/jewish/Eight-Levels-of-Charity.htm (last visited on October 5, 2018). Islam similarly promotes voluntary gifts "in the name of Allah alone" with the Qur'an expressing a preference for concealed acts of charity. One study found that anonymity significantly increased the number of donations from 59% to 77%. *See* F. Lambarraa & G. Riener, *On the Norms of Charitable Giving in Islam: Two Field Experiments in Morocco,* 118 J. Econ. Beh. & Org. 69–84 (2015). The panel opinion makes anonymous giving impossible for adherents of at least three of the world's major religions—and this can deter their charitable giving by changing a crucial aspect of the charitable act, even when the donor has no fear of retaliation.

III. The Panel's Opinion Aggravates The Erosion Of Protections For Unpopular Minority Opinions In This Country

The Constitution does much to protect the rights of political minorities, but many of those protections are under assault by forces that want to impose their ideology on a nationwide basis and stamp out any remnants of dissent. Our system of constitutional federalism, for example, places all sorts of roadblocks in the path of those who seek to impose their will on a nationwide basis. The Constitution defines and limits the powers of the federal government. *See* U.S. Const. art. I, § 8. And Article I, section 7 prevents any bill from becoming law unless it obtains approval from three separate institutions—the House, the Senate, and the President—or unless it secures a two-thirds supermajoritarian approval in both the House and Senate after a presidential veto. *See* U.S. Const. art. I, § 7. But these structural constitutional protections for political minorities appear to have fallen by the wayside. Today, Congress asserts near-plenary powers under Article I, § 8. Worse, by blessing national *lawmaking* by administrative agencies, the Supreme Court circumvents the protections that Article I, § 7 confers on political minorities. In a world where bicameralism and presentment are respected, political minorities hold considerable power to block proposed legislation, which enables them to insist on compromise in the form of legislative protections in exchange for their assent. Administrative lawmaking guts these protections by empowering federal agencies to rule by unilateral decree.

But there is still the First Amendment—which the courts continue to enforce even as they have yielded to other modern-day power grabs by the national political branches. And the protection of First Amendment freedoms offers at least some space for unpopular minority and dissident opinion to survive and flourish. Federalism was designed to preserve local places where national political minorities can thrive and even push back against a prevailing practice or ideology. As these constitutional protections have eroded, it is all the more urgent for the First Amendment to do the work needed to preserve a nation in which dissent is tolerated. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462.

The First Amendment must do more than simply protect dissident organizations from direct government coercion. It must also stop government from enabling the bullying and intimidation of private citizens who join together to express their views through an organization. Members and donors of dissident organizations are vulnerable to peer pressure—as is everyone else. The compelled disclosure of their names facilitates peer pressure from those who oppose the organization's views and who are determined to use social pressure to stamp out its beliefs. The danger is that a state's compelled-disclosure laws can be used to coordinate legal and social pressure against a dissident organization, creating the same one-two punch that so troubled the Supreme Court in *NAACP*. *See* 357 U.S. at 462–64. Today, ra-

ther than burning a cross in someone's yard, the intimidation of organization members or donors might take the form of shouting that person down in a public restaurant and preventing them from enjoying a pleasant evening out with family—a tactic that has already been employed against politicians and appointed government officials who have expressed unpopular opinions.

Finally, the rise of the Internet and social media aggravates these modern-day threats to minority opinion and dissident organizations. Those who seek to render unpopular opinions anathema have ample means to coordinate their efforts, and the Internet makes it easy to spread the word by exposing a donor and encouraging retaliation. The ease by which information can now be shared makes compelled disclosures an even greater threat to First Amendment freedoms than they were at the time of *NAACP v. Alabama*.

Conclusion

The petition for rehearing en banc should be granted.

Respectfully submitted.

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Dated: October 5, 2018

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