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 the Attorney General of California,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Central District of California

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, Free Speech Defense and Education Fund, and Free Speech Coalition in Support of Petition for Rehearing *En Banc*

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DISCLOSURE STATEMENT

The *amici curiae* herein, Citizens United, Citizens United Foundation, Free Speech Defense and Education Fund, and Free Speech Coalition, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1, 29(a)(4)(A).

All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, William J. Olson, Jeremiah L. Morgan, and Robert J. Olson of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amici curiae* Citizens United and Citizens United Foundation are also represented herein by Michael Boos, 1006 Pennsylvania Avenue SE, Washington, D.C. 20003.

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INTEREST OF *AMICI CURIAE*

Citizens United, Citizens United Foundation, Free Speech Defense and Education Fund, Inc., and Free Speech Coalition, Inc. are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code ("IRC"). Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. Their interest also includes protecting the constitutional rights of their donors.[1]

Some of these *amici* previously filed an *amicus* brief in this case:

- AFPF v. Becerra, Nos. 16-55727 & 16-55786, Ninth Circuit, Brief *Amicus Curiae* in Support of Plaintiff-Appellee and Affirmance (January 27, 2017).

Some have also filed *amicus* briefs in other cases in this Circuit addressing similar issues.

- AFPF v. Harris, Nos. 15-55446 & 15-55911, Ninth Circuit, Brief *Amicus Curiae* in Support of Petition for Rehearing *En Banc* (January 21, 2016); and

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[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

- Institute for Free Speech v. Becerra, No. 17-17403, Ninth Circuit, Brief *Amicus Curiae* in Support of Plaintiff-Appellant and Reversal (March 16, 2018).

Two of these *amici*, Citizens United and Citizens United Foundation, were the plaintiffs challenging a similar requirement in another Circuit, and the two other *amici* on this brief filed an *amicus* brief in that case.

- Citizens United v. Schneiderman, No. 16-3310, Second Circuit, Brief *Amicus Curiae* in Support of Appellants and Reversal (January 13, 2017).

ARGUMENT

I. THE PANEL ERRONEOUSLY DISREGARDED THE SUPREME COURT'S FIRST AMENDMENT PRECEDENTS THAT GOVERN CALIFORNIA'S CHARITABLE SOLICITATION LAWS AND PRACTICES.

A. The Panel Misstated California's Interest Justifying Its Donor Disclosure Regulation.

Twice, in the first and third paragraphs of its opinion, the panel substantially overstated — indeed, misstated — California's interests in this case, which the panel claims justifies the State's new regulation requiring the filing of detailed information on the organization's large donors. Americans for Prosperity Foundation v. Becerra, 2018 U.S. App. LEXIS 25700 at *5-7 (9th Cir. 2018) (hereinafter "AFPF"). The panel passively accepted California's

unsupported assertion that the regulation was necessary to prevent and police "**charitable fraud**." AFPF at *5. But this requirement is not the type of narrow, targeted action of the sort the Supreme Court has allowed to be aimed at charitable solicitation fraud. Rather, it is a broad prophylactic measure of the sort that has been consistently and repeatedly ruled against by the Supreme Court. *See* Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 619 (2003).

In fact, the requirement imposed here is even worse than a cap on fundraising costs like those involved in many earlier cases, as it is designed to give incumbent office holders detailed private, proprietary information about the financial inner workings of nonprofit organizations involved in the same public policy process in which incumbent office holders live and work. While information on nonprofit organizations of all ideological stripes is required by such laws, the information most useful to incumbent politicians is information on their political opponents. In California or New York, liberal office holders may seek such information to chill donations to conservative organizations, but, if allowed in these two "blue" states here, a dangerous precedent would be established. In a state like Alabama or Texas, conservative office holders may

impose an identical requirement on all nonprofits for a somewhat different purpose — to chill donations to liberal organizations. If this trend is allowed to continue, the loser would not just be the plaintiffs below, but the American people.

Unconcerned about the dangerous precedent it was establishing by permitting California's exaggerated "prophylactic" claim of fraud prevention, the panel has unjustifiably disregarded nearly 40 years of Supreme Court precedents governing the application of the First Amendment to charitable solicitors such as AFPF and Thomas More Law Center. As the Supreme Court recalled in 2003:

> The Court has … three times considered prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level. Each time, the Court held the prophylactic measures unconstitutional. [Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 612 (2003).]

Having completely failed to consider these three Supreme Court First Amendment rulings is reason enough for the petition for rehearing to be granted.

B. This Case Concerns Charitable Solicitations, Not Charitable Fraud.

As the panel opinion notes, this case concerns the application of the First Amendment to two nonprofit organizations registered with the state and thus

permitted "[t]o solicit tax-deductible contributions from California residents." AFPF at *7. Pursuant to Cal. Gov. Code § 12585, AFPF and Thomas More Law Center had been registered and in good standing until 2012 when their registrations were ruled to be deficient for failure to file with their IRS Forms 990, the Schedules B which contains the names and addresses of their major donors. *Id.* at 11.

According to the panel, this change came about to aid the **Registry Unit** of the Charitable Trusts Section of the California Attorney General, whose authority is "process[ing] annual registration renewals and maint[enance] [of] the **public-facing** website of registered charities." *Id.* (emphasis added). While the Registry Unit also maintains "the confidential database used for enforcement," it is the **Investigative Unit** within the Charitable Trust Section that "analyzes complaints of unlawful charity activity and conducts audits and investigations based on those complaints." *Id.* Thus, the Registry Unit's decision to require the production of the Schedules B by nonprofits was just that — a decision pursuant to the Registry Unit's oversight of annual renewals and public inspections, not pursuant to the Investigative Unit's responsibility regarding the enforcement of actions against charitable fraud.

Despite this administrative record, the panel affirmed an earlier Ninth Circuit panel's[2] conclusion that the Schedule B requirement furthers California's compelling interest in **enforcing** its laws." *Id.* at *12 (emphasis added); *see also id.* at *18. The panel continued to rely on an earlier panel decision that the "'disclosure of the names of significant donors [served] a compelling law enforcement interest … to determine whether a charity is actually engaged in a charitable purpose, or is instead violating California law by engaging in self-dealing, improper loans, or other unfair business practices." *Id.* at *18-19.

Although, according to Madigan, the Supreme Court's charitable solicitation precedents have "repeatedly recognized the legitimacy of government efforts to enable donors to make informed choices about their charitable contributions" (*id.* at 623), the California Attorney General's decision to keep the Schedule B filing confidential cannot be justified as an aid to donors, but constitutes an unconstitutional prophylactic measure to combat fraud. *See id.* at 612.

[2] *See* AFPF v. Harris, 809 F.3d 536 (9th Cir. 2015).

C. Conditioning the Right to Engage in Charitable Solicitations Upon the Annual Filing of the IRS Form 990 Schedule B Violates the First Amendment.

During the 23-year period from 1980 to 2003, the United States Supreme Court repeatedly addressed the constitutionality of state statutes and city ordinances governing charitable solicitors under the First Amendment.[3] On three of those four occasions, the Court found that such legislative efforts — all of which were purportedly designed to prevent fraud — were unconstitutional.[4] Only once, in 2003, did such an effort pass constitutional muster. However, in that case, the Court only permitted the Illinois Attorney General to bring a complaint against a "for-profit fundraising corporation … for fraudulent charitable solicitations," based upon "intentionally misleading statements designed to deceive the listener" as to the "percentage of charitable donations retain[ed] for themselves." Madigan at 605-06.

Distinguishing the three previous charitable solicitation cases in which the Court had "invalidated state or local laws," the Court explained that those laws

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[3] Village of Schaumburg v. Citizens for a Better Envt., 444 U.S. 620 (1980); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988); and Madigan v. Telemarketing Associates, 538 U.S. 600 (2003).

[4] *See* Village of Schaumburg, Munson, and Riley.

had "categorically restrained solicitation by charities or professional fundraisers if a high percentage of the funds raised would be used to cover administrative or fundraising costs." *Id.* at 609-10. In contrast, the Court continued, "unlike Schaumburg, Munson, and Riley, [Madigan] involves no prophylactic provision proscribing any charitable solicitation if fundraising costs exceeded a prescribed limit. Instead, the Attorney General sought to enforce the State's generally applicable antifraud laws against Telemarketers for 'specific instances of deliberate deception.'" *Id.* at 610.

Unlike the Attorney General of Illinois in Madigan, the Attorney General of California has chosen to exercise his "broad powers" to require production of the donor information on the IRS Schedule B, expanding the prophylactic reach of the California Trustees and Fundraisers for Charitable Purposes Act purportedly "to police and prevent charitable fraud." Appellant-Cross Appellee's Opening Brief ("Cal. A.G. Br.") at 5-6. To be sure, as the Madigan Court put it, "the First Amendment does not shield fraud" (Madigan at 612), but the Amendment does shield charitable solicitors from "'unduly burdensome' prophylactic rule[s] [that are] unnecessary to achieve the State's goal of preventing donors from being misled." *Id.* at 616.

To guard against such government overreach, the Madigan Court tellingly summarized its "opinions in Schaumburg, Munson, and Riley" as having taken "care to leave a **corridor** open for fraud actions to guard the public against false or misleading charitable solicitations." Madigan at 617 (emphasis added). To that end, the Madigan Court spelled out a very narrow constitutional passageway, allowing for "a properly tailored fraud action [in which] the State bears the full burden of proof," including proof that the solicitor "made a false representation of a material fact knowing that the representation was false" and that the representation was "made … with the intent to mislead…." *Id.* at 620.

If, as the Madigan Court has ruled, the First Amendment allows for only a narrow passageway to vindicate the State's interest in "preventing fraud," *a fortiori*, the pathway to Schedule B donor information must, likewise be "'narrowly tailored to the State's interest.'" *Id.* at 615. Not only is the demand for major donor information **not** narrowly tailored, but it is not tailored at all. It sweeps up a multitude of donor names to be used at the Attorney General's discretion, solely because the IRS Form 990 Schedule B contains the names and addresses of Petitioners' "relatively few largest contributors." AFPF at *6. There is not even a smidgeon of evidence that these donors pose a greater threat

of charitable fraud than smaller donors who do not appear on a Schedule B. Yet, the panel held that the "Schedule B requirement … survives exacting scrutiny as applied to the plaintiffs because it is substantially related to an important state interest in policing charitable fraud." *Id*. After all, the panel concluded, the "Attorney General's Schedule B requirement … obligates charities to submit the very information they already file each year with the IRS." *Id*. To be sure, the Supreme Court has recognized "the legitimacy of government efforts to enable donors to make informed choices" about whether to contribute. Madigan at 623. Ironically, however, the Attorney General's Schedule B requirement does not inform the public, but only the Attorney General. If it has any effect, then, it would operate as an unconstitutional First Amendment "prior restraint on [charitable] solicitation." *See* Madigan at 620.

D. The Panel Ignored the Supreme Court Jurisprudence on Prior Restraint.

Although the panel addressed Plaintiffs' claim that the Schedule B disclosure requirement would operate as a deterrent on contributions, and found the Plaintiffs' evidence insufficient, it so ruled because Plaintiffs failed to establish a "substantial burden on First Amendment rights." AFPF at 33. However, under the prior restraint doctrine, as recognized by the Supreme Court

in Madigan, "imposing prior restraints on solicitation when fund raising fees exceeded a specified reasonable level" were unconstitutional "prophylactic measures." Madigan at 612.

California takes the position that if a nonprofit organizations should decline to include with its filing its confidential and proprietary donor information, it would be precluded from soliciting charitable funds in California. As such, solicitation requires the equivalent of a license. Thus, the disclosure requirement imposes a prior restraint on charitable solicitations by those organizations who have a deep conviction, supported by the constitutional text and First Amendment jurisprudence, that such a requirement is unconstitutional. Such requirements are highly similar to what Justice Stevens described as "a law requiring a permit to engage in such speech [which] constitutes a dramatic departure from our national heritage and constitutional tradition." Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 166 (2002). To illustrate his principle, he described a class of persons which would appear to include plaintiffs below:

> [R]equiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views.... There are no doubt ... patriotic citizens, who have such firm convictions about their

> constitutional right to engage in uninhibited debate … that they would prefer silence to speech licensed by a petty official. [Watchtower at 167.]

Adopted in the landmark case of Near v. Minnesota, 283 U.S. 697 (1931), this doctrine has been applied to limit state regulation of charitable solicitation. Justice White explained why the bar on prior restraints also has come to be applied to "soliciting funds [which] involves interests protected by the First Amendment guarantee of freedom of speech." Schaumburg at 629. Justice Brennan discussed how a state law that restrained the freedom of the press "has been applied to cases involving expression generally." Riley at 797. Justice Blackmun discussed restrictions on charitable solicitation which "impose a prior restraint on protected activities…." Munson at 968. And Justice Ginsburg's opinion described the Schaumburg trilogy as involving a class of statutes which "effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment." Madigan at 606. Nevertheless, the panel gave no consideration as to how California's requirement operates as a prior restraint on charitable fundraising.

II. THE PANEL UTTERLY FAILED TO APPLY THE LONG-ESTABLISHED FIRST AMENDMENT DOCTRINE OF ANONYMITY TO THE CASE.

When this case was briefed to the panel, AFPF cited Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002), for the proposition that, implicit in the freedom of speech, and the right of the people peacably to assemble, and the derivative right of expressive association, is "the right to speak and associate anonymously." Brief of Plaintiff-Appellee/Cross-Appellant Americans for Prosperity Foundation ("AFPF Br.") at 41-42. Also cited by AFPF for this proposition was a string of venerable precedents on this very point: Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999); McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995); Talley v. California, 362 US. 60 (1960); and ACLU v. Heller, 378 F.3d 979 (9th Cir. 2004).

This issue and line of cases were also addressed by the Attorney General, albeit for a different reason. Indeed, the California Attorney General cited Watchtower as the State's primary support for the claim that "[t]he State's interest in performing [its] regulatory and oversight function and securing compliance with the law is compelling … and of far more than adequate strength

to justify any minimal burden on plaintiff's First Amendment rights." *See* Cal. A.G. Br. at 47.

The panel's opinion, however, paid no heed to Watchtower, nor to any of the other four anonymity cases relied on by Plaintiff. Indeed, the panel uses the word "anonymity" only once, in a footnote, in the context of criticizing the plaintiffs for not providing additional evidence of retaliation: "Although we understand the plaintiffs' interest in protecting their contributors' identities from disclosure," they should have put on more evidence of retaliation which they "could have accomplished without compromising their contributors' anonymity." AFPF at *38, n.7.

Yet the issue of anonymity is not peripheral to this case. Whether the California Attorney General may demand plaintiffs compromise the anonymity of their donors as a condition of being able to solicit donors in California bears a strong similarity with the demand of the Village of Stratton in Watchtower[5]:

- In Watchtower, pursuant to § 116.03 of the Village of Stratton ordinances, before distributing his handbills door-to-door to Village residents, the Jehovah's Witness was required to complete and file with the Village mayor a "Solicitor's Registration Form" to obtain a

[5] These striking similarities were set out in the brief filed by these *amici*, but were ignored by the panel. *See* Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.* at 12-13.

"Solicitation Permit." *Id.* at 155, n.2. Here, before soliciting California residents to advance their cause, AFPF must, pursuant to statute and regulation, complete and file annually with the State's Attorney General the prescribed registration form, including "its annual IRS Form 990 and all schedules and attachments, including Schedule B." *See* Cal. A.G. Br. at 7.

- In Watchtower, the registration ordinance purportedly was designed to protect the people of the Village of Stratton from "'flim flam' con artists who prey on small town populations" and to prevent "fraud." Watchtower at 158-59. Here, the California charitable solicitation act purportedly was designed to "prevent charitable fraud." Cal. A.G. Br. at 6.

In Watchtower, the Supreme Court reviewed its well established anonymity jurisprudence, articulating the considerations and principles to be evaluated and applied not just to individual door-to-door solicitation, but to challenges to state statutes, such as the challenge to the California statute now before the court.

> [T]here are a significant number of persons who support causes anonymously. 'The decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.' *McIntyre v. Ohio Elections Comm'n,* 514 U.S. at 341-42. [Watchtower at 166.]

And the Watchtower Court was careful to distinguish two areas where anonymity principles might yield, contrasting anonymity in a political context as

here, from "commercial transactions" or "protecting the electoral process." *Id.* at 167. Neither of those special cases applies here.

Had the panel even considered the Supreme Court's anonymity cases, it would have found it impossible to reach the conclusion that it did.

III. THE PANEL IGNORED THE VERY REAL RISK OF RETALIATION BY HIGHLY POLITICAL STATE ATTORNEYS GENERAL.

The panel correctly explained that a challenge to a state-imposed disclosure requirement would need to show "a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from **either** [i] Government officials **or** [ii] private parties." AFPF at *28, *35 (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976)) (emphasis added).

Nevertheless, the panel focused only on the threat from private parties, leaving completely unaddressed the issue of the inherent risk of "threats, harassment, or reprisals" from the **Government** itself. The panel focused only on "two questions: (1) what is the risk of **public disclosure**; and (2), if **public disclosure** does occur, what is the likelihood that contributors will be subjected to threats, harassment or reprisals?" *Id.* at *35-36 (emphasis added). Answering the question "whether the plaintiffs have shown that contributors are likely to be

subjected to threats, harassment or reprisals if Schedule B information were to become public" (*id*. at 36), the panel concluded that there was only a "slight risk of public disclosure." *Id*. at 45.

The panel ignored the reality that with advocacy organizations and ambitious politicians both contending in the marketplace of ideas, political conflict can be anticipated. Some politicians may not appreciate certain wealthy people funding causes with which they disagree. Politician officeholders can contrive high-sounding reasons to gather intelligence on those with wealth who may oppose them or bring government pressure to bear on those who oppose their agenda.[6] Others may wish to make a name for themselves by vilifying nonprofit organizations under the guise of protecting the public. Yet wholly ignored in the panel's opinion is the real possibility that the California Attorney General, or a future Attorney General, as well as persons who work in that office, could misuse highly sensitive donor information.

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[6] As one commentator notes, "there is no guarantee that such disclosure policies (whether codified or not) will not change in the future…." "Court Reaffirms CA Attorney General's Demand for Donor List," Seyfarth Shaw, LLP (Jan. 13, 2016).

There are only two states in the country that currently require an organization to file an unredacted Schedule B: California and New York.[7] As it just so happens, those two states imposed the Schedule B disclosure requirement administratively, during the terms of two of the most political attorneys general in the country, who were not shy to use their public office to further their activist agendas.

Former New York Attorney General Eric Schneiderman[8] held what can only be called a radical view of governmental power over nonprofits, viewing them as little more than arms of the state — bestowed by government with tax-exempt status and some with public funding — and thus seemed to believe that their boards of trustees are not really in charge of their organizations, but merely operate under the supervisory control of the State acting through the Attorney General.[9]

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[7] *See* Citizens United v. Schneiderman, 882 F.3d 374 (2d Cir. 2018).

[8] Attorney General Schneiderman was forced to resign earlier this year after reports that he was abusive to his employees. *See* D. Hakim & V. Wang, "Eric Schneiderman Resigns as New York Attorney General Amid Assault Claims by 4 Women," *The New York Times* (May 7, 2018). Is it really that hard to believe that such a person also could have been abusive in his regulation of nonprofits with whom he disagreed?

[9] F.A. Monti, "What Kind of Watchdog? The Role of the State Attorney General in Nonprofit Oversight," *Inside Philanthropy* (July 28, 2015).

Likewise, former California Attorney General Kamala Harris profited by her six years in office, as she began her term as a U.S. Senator in January of 2017, and reportedly is considering a run for the presidency.[10] She has been fundraising heavily during the current Supreme Court nomination proceedings, even though her term does not expire for another four years.[11] California's current Attorney General Xavier Becerra has manifested his political agenda through filing around 40 lawsuits against the Trump Administration since his appointment.[12]

State Attorneys General are often some of the most inherently political office holders, and the panel did not even pause to consider the possibility of, and indeed likelihood of, the threat they can pose to donors to groups they oppose. Donors are certainly concerned that their identities will be made public, but there is just as much, if not more concern, that politically motivated individuals holding seats of discretionary power will use that information to

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[10] M. Curnutte, "U.S. Sen. Kamala Harris, potential presidential candidate in '20, to speak in Cincinnati," *The Cincinnati Enquirer* (Sept. 30, 2018).

[11] A. Damron, "Democratic Senators Send Fundraising Emails During Kavanaugh Hearing," *The Washington Free Beacon* (Sept. 4, 2018).

[12] "California attorney general seeing gains in war on Trump policies," *Marin Independent Journal* (July 22, 2018).

target them for governmental retribution. This risk has been made even more real in this country's growing political divide, including with invasions of privacy, threats, and actual instances of violence. Just this week, a congressional intern[13] was arrested for posting private information (home addresses and telephone numbers) for three senators of the opposing party.[14] This is not a hypothetical, but a real-life example of how those entrusted with access to information can misuse that information for harmful political purposes.

In sum, the panel's decision wholly ignored the real and inherent threat of retaliation by government officials.[15] Accordingly, the petition for rehearing *en banc* should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing *En Banc* should be granted.

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[13] The panel explained that the highly confidential donor information filed by nonprofits is being processed by "temporary workers and student workers." AFPF at *42.

[14] B. Everett and K. Cheney, "Ex-Democratic staffer charged with posting senators' private info," *Politico* (Oct. 3, 2018).

[15] While not appreciating the inherent problem, the Ninth Circuit previously at least mentioned the possibility of "threats, harassment, or reprisals" coming from "Government officials." AFPF v. Harris, 809 F.3d 536, 539 (9th Cir. 2015) (emphasis added).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Citizens United, *et al*. in Support of Petition for Rehearing *En Banc* complies with the word limitation set forth by Circuit Rule 29-2(c)(2), because this brief contains 4,109 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 17.0.0.366 in 14-point CG Times.

/s/ Herbert W. Titus

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Herbert W. Titus
Attorney for *Amici Curiae*

Dated: October 5, 2018

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Citizens United, *et al.*, in Support of Petition for Rehearing *En Banc*, was made, this 5th day of October, 2018, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ Herbert W. Titus

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