IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 14-15978

CENTER FOR COMPETITIVE POLITICS,
Plaintiff/Appellant

v.

KAMALA HARRIS,
Defendant/Appellee.

BRIEF OF AMICI CURIAE NATIONAL ORGANIZATION FOR MARRIAGE, INC., AND NATIONAL ORGANIZATION FOR MARRIAGE EDUCATIONAL TRUST FUND IN SUPPORT OF APPELLANT CENTER FOR COMPETITIVE POLITICS

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

No. 14-CV-00636-MCE
The Honorable Morrison C. England,
Chief Judge, U.S. District Court

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CORPORATE DISCLOSURE STATEMENT

National Organization for Marriage, Inc., hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Sources

INTEREST OF AMICUS CURIAE

Amici the National Organization for Marriage, Inc., ("NOM") and the National Organization for Marriage Educational Trust Fund ("NOM-Ed") have a significant interest in the outcome of this case. NOM is a Virginia nonprofit corporation exempt from taxation under 26 U.S.C. § 501(c)(4). NOM-Ed is a nonprofit trust controlled by NOM and exempt from taxation under 26 U.S.C. § 501(c)(3). As a 501(c)(4) organization, NOM is exempt from having to register as a charity before soliciting contributions in California. NOM-Ed, however, must register.

In January of 2014, NOM-Ed received a letter from the California Attorney General that was almost identical to the letter Center for Competitive Politics received that served as the impetus for this case. Exhibit A. Due to the unpublished rules being imposed by the Attorney General, NOM-Ed will be banned from speaking in California unless it discloses the names and addresses of its contributors, something it cannot do.

NOM-Ed received a similar notice in 2013, demanding NOM-Ed's donor list in order to maintain good standing for purposes of doing charitable solicitation. Exhibit B. This was the first year in which NOM-Ed had ever received such a notice, though it had been active for several years prior. Counsel for NOM-Ed responded to the California Registry of Charitable Trusts stating that there was no

statutory or regulatory authority for the demand for the Schedule B and that the Registry either provide such authority or consider NOM-Ed's filing complete and approved. Exhibit C. NOM-Ed received no response to this communication and therefore did not provide an unredacted Schedule B in 2013. It did provide a redacted Schedule B, which lists the amounts and dates of contributions received, just not the names and addresses. Nevertheless, NOM-Ed's status is presently listed as "Current" on the Registry of Charitable Trust online database. Exhibit D.

Furthermore, there is irrefutable evidence that donors to NOM-Ed's parent organization, NOM, and similar pro-marriage groups have been subject to harassment in the past when their names and addresses have been made public. In fact, NOM's Schedule B has been leaked from within the IRS itself and NOM suffered significant actual damages as a result, including loss of donations. Therefore, amici NOM and NOM-Ed are able to attest to the chilling effect and harassment that result from disclosure of donors through government registration and reporting requirements, even in the face of federal criminal statutes protecting that information from public dissemination.

Disclosure to the Registry of Charitable Trusts is especially problematic given that there is no civil or criminal protection against public disclosure under California law. Organizations are given a mere assurance by the Attorney General

that their information will be kept confidential. This is manifestly insufficient and directly chills protected speech.

Accordingly, amici have a significant interest in the outcome of this interlocutory appeal.

No party counsel authored any portion of this brief. No party, party counsel, or person other than each *amicus* or its counsel paid for this brief's preparation or submission. Both Appellant and Appellee have consented to the filing of this brief, and so no motion is necessary. Fed. R. Civ. P. 29(a); Circuit Advisory Committee Note to Rule 29-3.

ARGUMENT

I. Groups Such as Amici Have Been Subject to Harassment, Retaliation, and Reprisals in California and Elsewhere.

The names and addresses of donors to social welfare groups is extremely sensitive information. Indeed, for decades even the IRS did not require this information to be included on the tax returns filed by nonprofit organizations. Only starting in 1969 was the Internal Revenue Code amended to include the requirement to disclose names and addresses of contributors to the IRS on tax returns. Tax Reform Act of 1969; Conference Report on H.R. 13270, Nov. 1969, Senate Committee on Finance, at 53. According to the legislative history, the IRS needed this information to police charities and foundations to ensure that they were serving a public interest rather than the interests of private individuals. Tax Reform

Act of 1969; House Ways and Means Committee Report on Tax Reform Act of 1969, H.R. 13270 ("The present information return requirements are essentially the same as those imposed by the 1950 amendments to the charitable organization provisions of the code. . . . In addition to the information presently required there will have to be shown on each information return the names and addresses of all substantial contributors . . . ."). The Attorney General here does not serve the same functions and interests as the IRS, and so must show some other interest.

At the same time, however, Congress was equally aware that requiring such information would chill and discourage donating to nonprofit groups. *See e.g.* Summary of Tax Reform Act of 1969, Prepared by Staffs of Joint Committee on Internal Revenue Taxation and the Committee on Finance, Appendix A, Technical Memorandum of Treasury Position on H.R. 13270, at 785 ("The bill requires the Internal Revenue Service to make public, among other information, the names and addresses of all substantial contributors to exempt organizations. Treasury is concerned that this particular publicity will discourage contributions . . .). Accordingly, Congress protected the information from public disclosure and added criminal sanctions to enforce this protection. 26 U.S.C. §§ 6103, 7213(a)(1), (3). As the Supreme Court has acknowledged, disclosure of these names and addresses, even only to the government, infringes the right to freedom of association. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception

that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association.").

In NOM's case, though, even these precautions have not been sufficient to protect its information. In early 2012, its 2008 Schedule B was leaked from within the IRS to a political opponent who proceeded to spread it to other media outlets. *Nat'l Org. for Marriage, Inc. v. IRS*, 2014 U.S. Dist. LEXIS 77263, at *3-5 (E.D. Va. June 3, 2014). It was publicly disclosed in violation of federal law, resulting in damage to charitable giving and extensive actual damages. *Id*. at *27, *32. Congress provided a mechanism for relief in federal court for such disclosures, allowing for statutory damages and, in some cases, actual and punitive damages. 26 U.S.C. § 7431.

Yet California has provided no safeguards to deter or prevent such inadvertent or willful disclosure nor has it provided a cause of action in which to find relief in the event such disclosure occurs. In fact, it is unclear how the requested sensitive donor information would not be subject to disclosure simply through a Public Records Act request.

Disclosure of NOM's contributors in other contexts has also resulted in harassment, retaliation, and reprisals on those contributors. In fact, such harms resulted from disclosure in California. As the Supreme Court has acknowledged, contributors to groups supporting Proposition 8 in California in 2008 were subject

to such harassment when their names were disclosed by the California Secretary of State's office on campaign finance reports. *Citizens United v. FEC*, 558 U.S. 310, 481-82 (2010) (Thomas, J., dissenting in part) ("The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights."); *see also*, Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009), available at www. heritage.org/research/family/bg2328.cfm. Individuals whose associations with similar groups in other states have suffered the same fate. *Doe v. Reed*, 561 U.S. 186, 205 (2010) (Alito, J., concurring) ("The widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case."). These are the kinds of dangers involved when dealing with forced disclosure of donor identities.

California cannot simply impose a disclosure requirement without putting forward weighty government interests and without demonstrating how the specific disclosure of donor information will serve that interest. Furthermore, even with such a requirement, it is quite obvious, as recognized by Congress, that stringent procedures and penalties should be put in place in order to protect the information. The State here has done none of these things. Plaintiff-Appellant's Opening Brief 10-12.

II. The Unredacted Schedule B Requirement Impermissibly Burdens Protected Speech and Association.

Charitable solicitation is protected First Amendment speech. *E.g.*, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). Requiring registration before a group may engage in that speech is a prior restraint on the speech. Such a regulation must be "narrowly tailored" *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 784 (1988), to a "substantial governmental interest," *id.* The only interest the Supreme Court has recognized that could justify a charitable solicitation regulation is "preventing fraud." *Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 613 (2003).

Here, the State has made no showing as to how requiring Schedule B is narrowly tailored to the substantial governmental interest of combating the problem of fraudulent charitable solicitation. The State has made no effort to explain why the extensive information already provided is not sufficient to ensure that the charity in question is legitimate and not engaging in fraudulent solicitation, so that the additional requirement of an unredacted Schedule B is somehow necessary.

The chilling effects of disclosure of contributor information described above stand against this interest and outweigh it. Indeed, the effect is such that amici would forgo soliciting contributions in California rather than disclose their donors. This is especially true given that disclosure of this information to even the IRS,

with its confidentiality protections backed by criminal sanctions and mechanism for recovery of damages, has cost NOM dearly.

CONCLUSION

For these reasons, the Court should reverse the district court's denial of Center for Competitive Politics' motion for a preliminary injunction. Doing so will ensure that freedom of speech and association are protected while the legitimacy of the Attorney General's new and novel restriction is subject to proper scrutiny.

Respectfully submitted,

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Dated: June 18, 2014

STATEMENT OF RELATED CASES

NOM and NOM-Ed are unaware of any related cases presently before this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 1,652 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. Civ. P 32(a)(5) and the type style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: June 18, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2014, 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 further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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