No. 15-152

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

BRIEF OF *AMICUS CURIAE* AMERICAN TARGET ADVERTISING, INC., _____, ET AL., IN SUPPORT OF PETITIONER

MARK J. FITZGIBBONS*
AMERICAN TARGET ADVERTISING, INC.
9625 Surveyor Ct. #400
Manassas, VA 20110
mfitzgibbons@americantarget.com
(703) 392-7676

NAMES OF OTHER ATTORNEYS

*Counsel of record

Attorneys for Amici Curiae

August ____, 2015

TABLE OF CONTENTS

SUMMARY OF ARGUMENT

Certiorari should be granted to resettle the law that was misapplied by the court of appeals. Had the court of appeals applied the correct standard of review, it would have required the respondent Kamala Harris, Attorney General of California, to have the burden of establishing that the interest of disclosing donors as a condition of obtaining a license to engage in speech protected by the First Amendment was a paramount interest, and that the means used was not merely rationally related to that end. Had the court of appeals adhered to applicable First Amendment principles governing prior restraints, it would have ruled in favor of the petitioner, Center for Competitive Politics. Had the court of appeals adhered to the correct principle that the establishment of requirements for a license in areas protected by the First Amendment is a legislative act, and that the California statute giving unbridled discretion to the respondent to establish such conditions violates the First Amendment on its face, the California Constitution, and the guarantee of a republican form of government under the United States Constitution. Lastly, the court of appeals should have found the demands of the respondent for disclosure of confidential tax return information in the context of a license application to solicit charitable contributions violates federal law, and is an extortionate unconstitutional condition.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESETTLE THE LAW GOVERNING IMPORTANT CONSTITUTIONAL PROTECTIONS OF FREEDOMS

The petition for writ of certiorari filed by the Center for Competitive Politics (the "Petition") involves California's charitable solicitation law, the Supervision of Trustees and Fundraisers for Charitable Purposes Act. CAL. GOV'T CODE section 12580 *et seq*. (the "California Code"). The statute regulates "all charitable corporations, unincorporated associations, trustees, and other legal entities holding property for charitable purposes, commercial fundraisers for charitable purposes, fundraising counsel for

charitable purposes, and commercial coventurers." *Id.*, Sec. 12581. Under the statute, nonprofit organizations must register and obtain a license to communicate with citizens in ways that involve appeals (solicitations) for funds. *Id*., Sec. 12585.

Section 12585(b) reads: "The Attorney General shall adopt rules and regulations as to the contents of the initial registration form and the manner of executing and filing that document or documents." After initial registrations, entities must then file annually to maintain their licenses for charitable solicitation.

At issue is the demand by the respondent who administers this statute, the Attorney General of California, that nonprofit registrants file an un-redacted copy of Schedule B to Internal Revenue Service Form 990 listing and disclosing the names and addresses of the nonprofit organizations' top contributors. (As explained below, this demand violates federal law protecting the confidentiality of tax return information.)

The respondent is therefore doing through the annual licensing process and in a dragnet fashion what this Court prohibited being done by the State of Alabama, which sought to "compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 451 (1958). The respondent is violating the freedom of association guaranteed by the First Amendment under speculative and dragnet claims of a need to investigate (*see* Petition at 8 – 9), yet not even with the veneer of Fourth Amendment protections, but by a prior restraint licensing requirement. The violation of the First Amendment is not cured by violating equally or comprehensively the association rights among all nonprofits and their donors. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U. S. 415, 438 (1963) (citations omitted).

The amici agree with petitioner that the court of appeals misapplied the standard of review for the reasons set forth in the Petition for a Writ of Certiorari. The misapplication of the standard of review by the court of

appeals renders the standard of exacting scrutiny meaningless by lowering it to the standard of rational review.

Four times since 1980 this Court has needed to rebuff the over-aggressiveness of state charitable solicitation licensing laws, or the application of them, in order to protect the vital First Amendment interests of charitable speech. "Regulation of a solicitation 'must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . and for the reality that, without solicitation, the flow of such information and advocacy would likely cease." Riley v. National Federation of the Blind, 487 U.S. 781, 802 (1988), citing Schaumburg v. Citizens for Better Environment, 444 U.S. 620, 632 (1980), Secretary of State v. Munson, 467 U.S. 947, 959 - 960 (1984). *See also* Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003).

Charitable solicitations do not involve the same perceived danger of *quid pro quo* and corruption underlying the regulation of campaign finance laws (unless, perhaps, for charities established by politicians, which could be disclosed in ways other than by violating the First Amendment rights of all nonprofits). But even with regard to speech soliciting funds for advocating for the election or defeat of candidates for public office, exacting scrutiny is required. "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. Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny." Buckley v. Valeo, 424 U.S. 1, 64 (1976).

Nonprofit speech made through solicitations for funds involves issues far more comprehensive than speech advocating for the election or defeat of candidates for public office. They inform, advocate, and foster debates about many issues -- controversial and not -- such as medicine and science, religion and politics, public policy and private actions, and cumulatively they touch on every aspect of society. They are used to criticize large private institutions and even other nonprofit entities. Many are critical of the actions taken by the legislative, executive and judicial branches of government. They are used to inform citizens about civil

liberties, the Constitution, and the law. They are even used to hold law enforcement officials accountable. Unlike purely news organizations, they are used to interact with, and obtain the views of, citizens, even through more private methods and exchanges, and so are valuable means of both public and **private association** across communities, states and the nation. They are independent of the government and its officious views. Nonprofits are commonly referred to as the "Independent Sector."[1]

Whatever pretext offered by the government to justify its regulation of charitable solicitation, the standard of review must certainly be higher than what the court of appeals applied, and the burden of justification of the regulation must be on the state.

CALIFORNIA'S LAW IS A PRIOR RESTRAINT ON SPEECH PROTECTED BY THE FIRST AMENDMENT, WHICH FURTHER MERITS A STRICTER STANDARD OF REVIEW

The California charitable solicitation statute creates a prior restraint on speech, and is easily distinguishable from many forms of regulation of speech. It is unlike laws that prohibit and punish harms such as fraud in commercial solicitations, or regulations of election-related solicitations that have been justified to prohibit *quid pro quo* between donors and elected officials. Such laws are not prior restraints.

"Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976). "A system of prior restraint on expression comes to this Court bearing a heavy presumption against its constitutional validity." Carroll v. Princess Anne, 393 U. S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 70 (1963); Freedman v. Maryland, 380 U. S. 51, 57 (1965).

[1] About.com refers to the "Independent Sector" as "[a] term used to describe the nonprofit world. Made up of organizations that are neither governmental nor for-profit businesses. A coalition of nonprofit organizations." http://nonprofit.about.com/od/ij/g/

To put the prior restraint of the multiple state charitable solicitation laws into context generally, which must contemplate the effects of lacking a license to solicit contributions, consider whether a candidate could effectively run for office, and pay for ads and other campaign costs without being able to legally ask for contributions; or whether a publisher could print and distribute books or newspapers without charging a fee; or whether a ministry could finance a house of worship for preaching without passing the collection plate. Multiply the effect of these prior restraints by approximately 4/5 of the states in the union that have charitable solicitation licensing laws. Which is to say that over one-fifth of the states do not consider the prior restraint of charitable solicitation licensing laws as necessary (which is also to say that however vital and necessary this Court may believe charitable solicitation licenses are to protect citizens, eleven states do not agree).[2]

Consider also that nonprofits first qualify as nonstock corporations, similar to businesses, then go through the rigors of obtaining tax-exempt status from the Internal Revenue Service, which process has been in the news and subject to congressional investigations for delays and other malfeasance based on ideological prejudices at the IRS.[3]

Depending on their purposes, or perhaps because they receive substantial financing from government sources or well-endowed foundations (and hence solicitation from the general public is less significant for their existence), some nonprofits may be inclined to court favor with the government, public officials and large institutions, or at least temper their criticisms of them.

---

[2] The following states do not require charities to obtain licenses to solicit: Arizona, Delaware, Idaho, Indiana, Iowa, Montana, Nebraska, South Dakota, Texas (unless veteran's organization), Vermont, Wyoming.

[3] *See* "IRS Delays in Acting on Applications for 501(c)(4) Tax Exemption Persist," *The Nonprofit Quarterly*, February 27, 2015, http://nonprofitquarterly.org/2015/02/27/irs-delays-in-acting-on-applications-for-501-c-4-tax-exemption-persist/; "Senate Report: IRS Mismanagement Led to Targeting of Tea Party Groups," *Philanthropy News Digest*, August 8, 2105, http://philanthropynewsdigest.org/news/senate-report-irs-mismanagement-led-to-targeting-of-tea-party-groups.

Others that may be untethered from government financing sometimes are more candidly critical of powerful people and institutions, which in fact is often why citizens wish to contribute money to them. These, of course, are all-the-more susceptible to the desire to censor them. "Nonprofit leaders are some of the most effective critics of politicians and government policy. For that reason these organizations are especially vulnerable to government investigations used to intimidate and silence them." M. Fitzgibbons, "Rights Abuses: Investigations of charities must comply with the Fourth Amendment," *The NonProfit Times*, April 1, 2015.[4] Making for a worse mix with the important First Amendment rights at stake, charity regulators may be insensitive to these First Amendment concerns. For law enforcement they may be insufficiently trained in matters of legal and constitutional principles, and even the law of matters for which they have oversight in the licensing process, such as contracts or investigations. They may also be inefficient in their methods of regulation, raising costs of compliance. *See*, M. Fitzgibbons, "A lack of lawful and competent oversight of charities," *The NonProfit Times*, February 1, 2013. **ADD PIECE TO APPENDIX**

Then there are the costs of complying with these prior restraints, or the fines and other costs of non-compliance with the prior restraints even if no fraud or actual harm occurred, which are paid by the very donor dollars that these prior restraints purport to protect.

As this Court stated in Thornhill v. Alabama:

> Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. . . . The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments, but by the reason of the threat to censure comments on matters of public concern. It is not merely the

[4] http://www.thenonprofittimes.com/news-articles/rights-abuses-investigations-of-charities-must-comply-with-the-fourth-amendment/.

> sporadic abuse of power by the censor, but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.

Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (citations omitted).

Nonprofit appeals are also sometimes a necessary medium used for, and in conjunction with, the dissemination of petitions for redress of grievances, for the free exercise of religion and its expression, to print and publish news and information not found in corporate media reporting, and to obtain the views of citizens through interactive communications, hence they involve more rights protected by the First Amendment than just speech. For the free flow of valuable information, the prior restraint of these communications by charitable solicitation licensing laws poses as great a danger as -- or more than -- regulation of other classes of speech, including speech governed by campaign finance and election laws.

DISCRETION GIVEN BY THE STATUTE TO THE ATTORNEY GENERAL TO CREATE CONDITIONS OF LICENSURE AND DENIAL OF RIGHTS IS UNCONSTITUTIONAL ON ITS FACE

California Code section 12585(b) gives the Attorney General unfettered discretion to decide what nonprofit organizations must file with her before they may communicate with appeals to citizens for donations.

Life is certainly more downhill with the wind at the back of any state regulator or law enforcement official who may set the terms of what it is she may regulate, and how. However, in the context of laws regulating the exercise of rights protected by the First Amendment -- and particularly prior restraints where threats to the deprivation of First Amendment rights are even more pronounced and harmful -- the constitutional harm is not merely based in *ad hoc* or instance-by-instance decisions of a licensor, but in establishing blanket or dragnet conditions that could impede or chill speech of all speakers, or even just some groups or categories of speakers. *See* Thornhill, *supra*.

California Code section 12585(b) must be considered unconstitutional on its face for First Amendment reasons. In American Target Advertising, Inc. v. Giani, 199 F. 3d 1241 (10th Cir. 2000), the Utah charitable solicitation statute being challenged required a fundraising counsel to "first obtain[] a permit from the division by complying with all of the following application requirements * * * *" Former Utah Code section13-22-9 (emphasis added). The statute required that registration be done by "a written application, verified under oath, on a form approved by the division that includes" -- and then the statute listed 13 explicit requirements as mundane as name and phone number, plus a fourteenth requirement of "any additional information the division may require." *Id*., (emphasis added). That last "unbridled" delegation to the licensor of what to require in the application form was declared unconstitutional on its face. American Target Advertising, 199 F.3d, at ____. **Add Utah statute as Appendix**

The California statute is a broader, dragnet delegation of legislative authority than the statute upheld in Whitman v. American Trucking Assns., Inc., 531 U.S. 457 (2001) (Clean Air Act requiring the Environmental Protection Agency to promulgate national ambient air quality standards). Also, the statute is a complete delegation of discretion over a prior restraint on speech, not a regulation of acts of lesser constitutional protections such as pollutants emitted into the atmosphere, and merits no judicial deference under the Constitution. California Code section 12585(b), however, offends the Constitution on more than First Amendment grounds; it offends its republican structure. That structure, as this Court knows from its own writings and those of Montesquieu, Madison and others, is intended to protect the liberty and security of Americans.

"Whether [a] statute delegates legislative power is a question for the courts." Whitman, 531 U.S., at 473. Section 4 of Article IV of the Constitution guarantees a republican form of government within the states, which is to be enforced by the federal government if need be. The clause reads in relevant part: "The United States shall guarantee to every state in this union a republican form of government * * * *" Federalist 43 makes clear that this guarantee applies to how the states must govern themselves, and that the Constitution and the "interposition of the general government" may be needed to enforce this guarantee on the states.

Additionally, the California Constitution does not authorize the Attorney General to have any legislative power, but expressly vests it only "in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." Section 1 of Article IV of the California Constitution. Therefore, despite this Court's prudent reluctance to declare acts of state legislatures unconstitutional, this is an appropriate case for the Court to void this state statute.

In Loving v. United States, this Court said, "[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress." Loving v. United States, 517 U.S. 748, ___ (1996). "Congress as a general rule must also lay down an intelligible principle to which the person or body authorized to [act] is directed to conform * * * [which] seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." Loving, 517 U.S., at ___ (citations omitted).

California Code section 12585 is a standardless delegation of legislative authority to the respondent, the Attorney General, to make all of the conditions of licensure over rights guaranteed by the Constitution. It does not direct an exercise of policy judgment in administration or enforcement of a law, but authorizes the respondent to create entirely the application that nonprofits must file to be eligible to exercise constitutionally protected rights. When combined with respondent's power as the law enforcement official to issue or deny these licenses, the delegation to her clearly violates the basic constitutional guarantees of separation of powers in a republican form of government, which exacerbates the dangers of the statute's prior restraint. This has the effect of turning a right reserved to the people into a privilege that may (or may not) be granted by the government. It becomes a prior restraint not just created by the people's duly elected legislators -- which is already constitutionally suspect -- but of one law enforcement office within the government, making rights twice removed from constitutional protections in our republican form of government.

At what point does legislative delegation become anti-republican, and at what point does delegation of legislative authority become a subversion

to, or even disdainful of, the rights that the Constitution is structured to best protect? Will zoning officials get unfettered discretion to make zoning policy and law, police to make the laws of order in the community, and so on, with little or no regard for protection of constitutional rights? At what point does the constitutional rule of law over government, and notions of laws passed by the legislature under threat of executive veto become such a token concept that it is replaced by the prerogative not of monarchs and their councils, but of law enforcement officials and unelected civil servants? Even with needs to execute laws, at what point does exclusive power of the legislative branch delegated and ruled by the Constitution itself become corrupted by the "intelligent principle" doctrine, making it unintelligible and fostering constitutional neglect, sloppiness and laziness of legislatures? The Constitution is structured for effective governance, but certainly not to give government the path of least resistance, especially when rights are involved. This is certainly one case that this Court should accept, and restore some faith in the rule of law over government by saying this delegation has gone too far.

"Certainly all those who have framed written constitutions contemplate them as forming the **fundamental and paramount law of the nation**, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void." Marbury v. Madison, 5 U.S. 137, 177 (1803) (emphasis added). Unlike its unwritten predecessor English constitution, whereby the legislature could decide what was paramount law, the United States Constitution was an advancement in the rule of law over government by being supreme law over even legislatures. "To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states. 2 J. Elliot, Debates on the Federal Constitution 432 (2d ed. 1863); see also 4 id., at 63 (A. Maclaine) (contrasting Congress, which is to be guided by the Constitution and cannot travel beyond its bounds, with the Parliament described in Blackstone's Commentaries)." Department of Transportation v. Association of American Railroads, 575 U.S. ___, ___ (2015) (THOMAS, J., concurring) (emphasis added).

Indeed, the Constitution is the law that governs government itself,[5] and requires that California Code sec. 12585(b) be declared illegal, unconstitutional, and void.

THE DEMAND FOR DISCLOSURE OF DONOR NAMES IN THE LICENSING PROCESS VIOLATES FEDERAL LAW PROTECTING CONFIDENTIAL TAX INFORMATION, AND IS EXTORTIONATE

A bipartisan report of the Senate Finance Committee about the Internal Revenue Service's treatment of nonprofit organizations, issued August 5, 2015, references various unlawful disclosures of confidential tax information by the IRS, including the Form 990 Schedule B information of the National Organization of Marriage.[6]

Recent publicized violations of disclosure of confidential tax return information by the IRS -- and of course what is publicized is based only on the times that the IRS was caught -- demonstrate that even the federal service with its supposedly sophisticated guards of confidentiality is untrustworthy. It defies logic to believe that state attorneys general, a partisan elected position subject to the temptations and whims of partisan politics no matter how dedicated and professional, would have better safeguards of such confidential tax return information.

Whether or not state attorneys general could guarantee that confidential tax return information would not be leaked intentionally for nefarious reasons, or disclosed to third parties unintentionally, the fact that any would demand confidential tax information as a condition of a license --

---

[5] The Constitution is "The Law That Governs the Government," as described by Loyola Law Professor Aaron Caplan, *See*, An Integrated Approach to Constitutional Law, Chapter 2, at 13 (Foundation Press 2015), http://www.caplanintegratedconlaw.com/forms/SampleChapter2.pdf

[6] THE INTERNAL REVENUE SERVICE'S PROCESSING OF 501(C)(3) AND 501(C)(4) APPLICATIONS FOR TAX-EXEMPT STATUS SUBMITTED BY "POLITICAL ADVOCACY" ORGANIZATIONS FROM 2010-2013, at 136, http://op.bna.com/der.nsf/id/klan-9z4sa5/$File/FINAL%20Bipartisan%20Staff%20Report.pdf

never mind a license to engage in speech protected by the First Amendment -- must be deemed a violation of federal law.

Internal Revenue Code (IRC) sections 6103 and 6104 provide for the confidentiality of tax return information, and list the express and limited circumstances under which states may obtain confidential tax return information. The ban on unlawful disclosure applies to the IRS and state officials. IRC section 6103(a) states: "Returns and return information shall be confidential, and except as authorized [under Title 26] no officer or employee of any state . . . shall disclose any return or return information." (Emphasis added.)

The respondent has violated IRC sections 6103 and 6104 by demanding that charitable registrants file with her office, thereby creating disclosure within her office, names and addresses of their donors listed on Form 990 Schedule B. This is not merely a matter of whether this Court should find those extortive demands to be unacceptable in the charitable solicitation licensing process. This raises the issue of whether the respondent or any other such state official should be held accountable under the penalties for this type of unlawful disclosure of confidential tax information. Penalties are not a matter for this Court to decide in the present petition for a writ of certiorari, but certainly are relevant in the reasons why this Court should grant certiorari so others may be placed on notice that such conduct is reviewable as unlawful.

The respondent's demand that nonprofits file their partial donor lists is an unlawful form of disclosure. "The term 'disclosure' means the making known **to any person in any manner whatever** a return or return information." IRC section 6103(b)(8) (emphasis added). The demand for Form 990 Schedule B makes confidential tax return information "known" to the respondent and some unknown number of civil servants of unknown security clearances, legal training, or affiliations in her office who may not be suitably vetted or supervised for such sensitive matters. *See, for example*, "Kamala Harris aide arrested for allegedly running rogue police

force." *Politico*, May 6, 2015.[7]

As interpreted by the IRS, the federal statutes' ban on disclosure except as authorized by the statutes itself is clear: "For a disclosure of any return or return information to be authorized by the Code, there must be an affirmative authorization because section 6103(a) otherwise prohibits the disclosure of any return or return information by any person covered by section 7213(a)(1)." *Disclosure & Privacy Law Reference Guide*, IRS Publication 4639, 1-49.

Under the broad definition of "disclosure" in IRC section 6103(a), the demand for donor names and addresses by the respondent constitutes unlawful disclosure even if the confidential information were not subsequently disclosed to the general public, or obtained from the respondent by Freedom of Information Act requests. The plain meaning of IRC sections 6103 and 6104 is that confidential tax return information is guarded from states except under the express provisions of the federal statutes. The respondent's demands for such information are therefore foreclosed by federal law.

The respondent's demands are therefore unlawful no matter what claims the state may make that the information is kept "confidential." Congress wisely did not presume the benevolence of state officials that the court of appeals seemed to assume, and limited disclosure within states to expressly delineated circumstances.

States are not authorized to demand that nonprofit organizations file and disclose their donor names and addresses under IRC section 6104. Only "[u]pon written request by an appropriate State officer, the Secretary [of the Treasury] may make available for inspection or disclosure returns and return information of any organization described in section 501(c) (other than organizations described in paragraph (1) or (3) thereof) for the purpose of, **and only to the extent necessary** in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations." IRC section 6104(c)(3)

[7] http://www.politico.com/story/2015/05/brandon-kiel-kamala-harris-aide-arrested-117683.html.

(emphasis added). This demonstrates congressional intent that such information could be used only for limited circumstances, and with checks on such disclosure.

It should be noted that controversial former IRS official Lois Lerner collaborated extensively about Form 990 information and enforcement issues with state charitable solicitation officials and their umbrella organization, the National Association of State Charity Officials (NASCO), an affiliate of the National Association of Attorneys General (NAAG).

At the same time her Tax Exempt division at the IRS was engaging in ideologically discriminatory policies, Ms. Lerner was collaborating with state officials to help "ramp up" their regulation of nonprofit organizations. As reported in the *BNA Daily Tax Report* ("States Ramp Up Regulation of Nonprofits – With Help from the Feds"):

> The increase in federal-state cooperation is not imagined, but confirmed by both federal and state officials. According to both Lois Lerner, IRS Director, Exempt Organizations, and Mark Pacella, chief deputy attorney of the Pennsylvania Attorney General's Office, information sharing between the IRS and state AGs is ramping up. Over the past four years, Lerner said in April, state charity oversight officials referred 600 organizations to the IRS, and 90 percent of those referrals led to examinations.

And as reported at *CNSNews.com*:[8]

> In her Exempt Organizations 2011 Annual Report, Ms. Lerner touts a proposed rulemaking … to reduce barriers to states' participation in the [IRS'] information-sharing program * * * Lerner explained that the IRS expected to have regular interaction with NASCO about the new filing and monitor trends

[8] "CA, NY Attorneys General Accused of Violating Donor Confidentiality Laws," August 2, 2103, http://cnsnews.com/news/article/ca-ny-attorneys-general-accused-violating-donor-confidentiality-laws.

> that arise with the new Form 990 and hoped the feedback would help shape future adjustments.

Ms. Lerner collaborated with state charity officials on her office's redesign of IRS Form 990, noting their existing "compliance relationship" would increase. As reported in 2009 by *The NonProfit Times*:[9]

> Overall, the Form 900 is going to provide state charity regulators with a lot more information, "particularly in the areas of governance and also compensation issues because although the states and the IRS have two different jurisdictions, many of the things that we are looking at are important to the states for different reasons because of their areas of charitable oversight," said Lois G. Lerner, director of the Exempt Organizations (EO) Division of the IRS. "When you look at the facts we look at to determine whether an organization meets the requirements for tax-exemption, those same facts can also give rise to some of the violations at the state level."
>
> Lerner explained that the IRS expected to have regular interaction with NASCO about the new filing and monitor trends that arise with the new Form 990 and hoped the feedback would help shape future adjustments. The IRS and state regulators already have a compliance relationship — the IRS can give some information to state regulators about enforcement activities under the Pension Protection Act of 2006, while the state regulators can lead the IRS to potential tax violations. In 2008, EO disclosed nearly 200 enforcement activities to state agencies, including terminations and revocations, and state officials made 83 referrals to EO, including political activities, employment tax and failures in operating within designated exemption status.

[9] "Attorney General Focusing On Fiduciary Responsibilities," February 1, 2009, http://www.thenonprofittimes.com/news-articles/attorney-general-focusing-on-fiduciary-responsibilities/

The formerly accessible and collaborative Ms. Lerner has since been held in contempt of Congress for refusing to testify about her activities at the center of an IRS scandal involving its treatment of conservative nonprofit organizations and their donors ("House votes to hold Lois Lerner in contempt of Congress," *The Washington Post*,_ May 7, 2014).[10] Ms. Lerner remains in the news regularly, if not weekly, as information continues to come forth about IRS targeting groups and individuals for apparent ideological reasons ("Lois Lerner Wanted To Audit A Group With Ties To Bristol Palin," *The Daily Caller*, August 5, 2015),[11] crass partisan statements ("Lois Lerner Criticized GOP As 'Crazies,' 'Assholes' In Emails," *The Huffington Post*, September 29, 2014),[12] and various alleged lawless abuses of power.

Which is to say that the presumption of benevolence the court of appeals accorded the government is misplaced. Information continues to trickle out under congressional investigations,[13] inspector general investigations,[14] private lawsuits,[15] and threats of contempt[16] involving government malevolence towards conservative nonprofits.

---

[10] http://www.washingtonpost.com/blogs/post-politics/wp/2014/05/07/house-votes-to-hold-lois-lerner-in-contempt-of-congress.

[11] http://dailycaller.com/2015/08/05/lois-lerner-wanted-to-audit-a-group-with-ties-to-bristol-palin/.

[12] http://www.huffingtonpost.com/2014/07/30/lois-lerner-emails-_n_5634379.html.

[13] *See* Footnote ___, *supra*.

[14] "Treasury Inspector General: 'Potential Criminal Activity' Surrounding Lerner Emails," *Breitbat.com*, February 27, 2015, http://www.breitbart.com/big-government/2015/02/27/treasury-inspector-general-potential-criminal-activity-surrounding-lerner-emails/.

[15] "Pro-Israel Z Street Trumps IRS in Federal Appellate Court Ruling," *The Jewish Press*, June 21, 2015, http://www.jewishpress.com/news/breaking-news/pro-israel-z-street-trumps-irs-in-federal-appellate-court-ruling/2015/06/21/.

[16] "Federal judge threatens to hold IRS chief in contempt," *FoxNews.com*, July 30, 2015, http://www.foxnews.com/politics/2015/07/30/federal-judge-threatens-to-hold-irs-chief-in-contempt/.

The court of appeals erred in many ways by failing to find the respondent's demands for donor information unlawful. First of all, the charitable solicitation statute itself does not authorize the Attorney General to demand donor information in the licensing process. Secondly, even if authorized by statute, federal law already sets the conditions under which federal tax return information deemed confidential by federal law may be obtained by states for law enforcement purposes, even under state statutes.

A third reason is that the demand is an extortionate unconstitutional condition. The respondent's speculative, dragnet demands for disclosure of donors are certainly not "necessary" to the licensing of charitable solicitation,[17] nor did the court of appeals explain why such information, if ever relevant to an investigation of a particular nonprofit, could not be obtained by investigative methods consistent with the Fourth Amendment rather than through the dragnet licensing process.

Indeed, the demand for this confidential tax return information as a condition for nonprofits to obtain a permit to engage in speech protected by the First Amendment -- where the refusal of a nonprofit to provide confidential tax return information would foreclose its right to speech -- seems to be an unconstitutional condition. It is certainly akin to an "extortionate demand" of an unconstitutional condition to obtain a permit as described in Koontz v. St. Johns River Water Management District, where this Court held, citing other examples of unconstitutional conditions, that a permit may not be conditioned on the deprivation of the applicant's constitutional rights.[18]

---

[17] "Necessary" is a requirement under IRC section 6104(c)(3) for obtaining information related to state charitable solicitation law enforcement.

[18] As this Court said in Koontz:

> We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." Regan v. Taxation With Representation of

---

Wash., 461 U. S. 540, 545 (1983) . See also, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U. S. 47 –60 (2006); Rutan v. Republican Party of Ill., 497 U. S. 62, 78 (1990) . In Perry v. Sindermann, 408 U. S. 593 (1972) , for example, we held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration. And in Memorial Hospital v. Maricopa County, 415 U. S. 250 (1974) , we concluded that a county impermissibly burdened the right to travel by extending healthcare benefits only to those indigent sick who had been residents of the county for at least one year. Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.

* * * Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of- way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. * * * So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

Koontz v. St. Johns River Water Management District, 570 U.S. ___, ___ (2013).

Respondent's demand is of an extortionate nature precisely because it conditions the issuance of a permit to engage in constitutionally protected speech on the nonprofit's decision to either part with valuable and federally protected confidentiality of tax return information, or part with its constitutionally protected rights. Since the failure to comply with this extortionate condition results in a loss of constitutionally protected rights, this is not the same as, for example, a bank asking for tax return information as a condition to issue a loan, which is *quid pro quo*, but not based on deprivation of a constitutionally protected right. Nor is this like demands in other state charitable solicitation laws for mundane information such as name and address as a condition for such a permit.

Respondent's demands for donor names and addresses therefore breach the confidentiality and nondisclosure requirements under IRC sections 6103 and 6104, and are an extortionate unconstitutional condition. Further demands should be deemed illegal.

CONCLUSION

Nonprofits and states alike need this Court's judgment on these points of law, and we respectfully urge the Court to grant the petition for writ of certiorari.