No. 16-3310

In The United States Court of Appeals
for the Second Circuit

CITIZENS UNITED and CITIZENS UNITED FOUNDATION,
Plaintiffs-Appellants,
v.
ERIC SCHNEIDERMAN, in his official capacity as N.Y. Attorney General,
Defendant-Appellee.

On Appeal from the U.S. District Court for the Southern District of New York

Brief *Amicus Curiae* of Free Speech Defense and Education Fund, Free Speech Coalition, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, U.S. Justice Foundation, Public Advocate of the United States, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Coalition for a Strong America, The Jesse Helms Center, Americans for Constitutional Liberty, CatholicVote.org, Eberle Communications Group, Inc., ClearWord Communications Group, and Davidson & Co. in Support of Appellants and Reversal

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DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Free Speech Defense and Education Fund, Free Speech Coalition, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, U.S. Justice Foundation, Public Advocate of the United States, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Coalition for a Strong America, The Jesse Helms Center, Americans for Constitutional Liberty, CatholicVote.org, Eberle Communications Group, Inc., ClearWord Communications Group, and Davidson & Co. through their undersigned counsel, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. All of these *amici curiae* except Eberle Communications Group, Inc., ClearWord Communications Group, and Davidson & Co. are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. Eberle Communications Group, Inc., ClearWord Communications Group, and Davidson & Co. have no parent company and are privately held corporations none of whose stock is publicly traded.

/s/ William J. Olson
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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Amici Free Speech Defense and Education Fund, Free Speech Coalition, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, U.S. Justice Foundation, Public Advocate of the United States, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Coalition for a Strong America, The Jesse Helms Center, Americans for Constitutional Liberty, and CatholicVote.org are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Eberle Communications Group, Inc., ClearWord Communications Group, and Davidson & Co. are for-profit firms which assist nonprofit organizations in their programs and fundraising. Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. Many of these *amici* have filed *amicus curiae* briefs in other cases involving the important First Amendment principle of anonymity, including:

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[1] No party's counsel authored this brief in whole or in part. No person, including a party or a party's counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this Brief *Amicus Curiae*.

- Watchtower v. Village of Stratton, Brief *Amicus Curiae* of RealCampaignReform.org, *et al.* (November 29, 2001) http://www.lawandfreedom.com/site/constitutional/ Watchtower.pdf.

- Madigan (Ryan) v. Telemarketing Associates, Inc., Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.* (January 23, 2003) http://www.lawandfreedom.com/site/nonprofit/Ryan.pdf.

- AFPF v. Harris, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.* (January 21, 2016) http://lawandfreedom.com/wordpress/wp-content/uploads/2016/01/AFPF-Brief-in-support-of-rehearing.pdf.

- Independence Institute v. FEC, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.* (June 24, 2016) http://lawandfreedom.com/wordpress/wp-content/uploads/2016/06/Independence-Institute-Amicus-Brief-as-filed.pdf.

- Independence Institute v. FEC, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.* (January 9, 2017) http://lawandfreedom.com/wordpress/wp-content/uploads/2017/01/Independence-Institute-amicus-brief.pdf

STATEMENT OF THE CASE

Many states have charitable solicitation laws that require nonprofit organizations initially to register, and then file annual renewals prior to, and as a condition of, conducting charitable solicitations in those states. New York Charitable Solicitation Law requires every "charitable organization" to register with the New York Attorney General, who is politically elected, and who is responsible for administering the charitable solicitation registration laws in that

state. *See* N.Y. Exec. Law § 171-a, *et seq*. The New York Attorney General interprets this law to apply to social welfare organizations exempt from federal income taxation under Internal Revenue Code ("IRC") § 501(c)(4) as well as charities exempt under IRC § 501(c)(3). *See* Appellants' Opening Brief ("C.U. Br.") at 7-8.

Recently, the new New York Attorney General began to demand that registering nonprofit organizations must submit to him an unredacted confidential list of their large donors' names, addresses, and contribution amount (IRS Form 990 Schedule B) — a new requirement imposed unilaterally by the Attorney General without any change having been made in the authorizing statute. *See id*. at 9. Failure to submit this confidential information subjects a nonprofit organization to punishment by imposing a ban on making charitable solicitation mailings as well as email, telephone, and personal solicitations to that organization's members, supporters, and others who live in New York, as well as monetary fines. This new requirement is a departure from the long-standing policy of the Attorney General's Office, and the practice in almost every other state which, if it is required at all, permits the filing of a redacted IRS Form Schedule B, from which the names and addresses of these large donors is removed.

Appellant Citizens United, exempt from federal income taxation under IRC § 501(c)(4), and Appellant Citizens United Foundation, exempt from federal income taxation under IRC § 501(c)(3), have for many years filed annual registrations with New York, and never had an objection to the filing of a redacted Schedule B, in which the names and addresses of donors were redacted. *See* C.U. Br. at 8-9. This changed in 2012, and in 2014, Appellants sought an injunction against the Attorney General Eric Schneiderman to prohibit him from demanding the complete and unredacted Schedule B as a precondition to soliciting contributions in New York. *See id*. at 10-11. Appellants alleged that the Attorney General's new requirement violates the First Amendment and the Due Process Clause of the U.S. Constitution, as well as federal and state statutes. *See id*.

The U.S. District Court for the Southern District of New York rejected all of Appellants' claims, granting the Attorney General's motion to dismiss their complaint without discovery or a trial, and this appeal followed. Citizens United v. Schneiderman, 2016 U.S. Dist. LEXIS 115495 (S.D.N.Y. August 29, 2016).

ARGUMENT

I. THE NEW YORK CHARITABLE SOLICITATIONS LAW IS AN UNCONSTITUTIONAL PRIOR RESTRAINT.

A. Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton Governs This Case.

In 2002, the United States Supreme Court decided Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002), in which it laid down First Amendment press and speech principles, which the court below either ignored or misapplied, but which nevertheless govern this case.

In Watchtower, a Jehovah's Witness engaged in door-to-door canvassing, distributing handbills advocating his cause to "anyone interested in reading it" (*id.* at 153) and seeking donations to forward their religious cause. Similarly, here, Citizens United and Citizens United Foundation "reach out by mail, phone, and even in person" seeking funds to advance their educational and social welfare causes. C.U. Br. at 5-6.

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 "Solicitation Permit." *Id.* at 155, n.2. Similarly, here, before soliciting New York residents to advance their cause, Citizens United

and Citizens United Foundation must, pursuant to statute, complete and file with the State's Attorney General a "prescribed registration form." *See* N.Y. Exec. Law § 172.1.

In Watchtower, the "Solicitor's Registration Form" required the canvassing Jehovah's Witness to furnish, *inter alia*, detailed information, including the name and address of the proselytizing Witness and the name and address of his "employer or organization ... showing the exact relationship and authority of the Applicant." Watchtower at 155, n.2. Similarly, here, Citizens United and Citizens United Foundation are required by law to furnish on the New York registration form, *inter alia*, not only their organization's names and addresses, but also the names and addresses of their "officers, directors, trustees, and executive personnel," but also by regulation now must disclose the names and addresses of their largest donors. *See* N.Y. Exec. Law § 172.1(a) - (j) and Schneiderman at *6.

Additionally, in Watchtower, the mayor was authorized to require "[s]uch other information concerning the Registrant ... as may be **reasonably necessary** to accurately describe the nature of the privilege desired." Watchtower at 155, n.2 (citing § 116.03(6)) (emphasis added). Likewise here, the New York Attorney General is authorized by statute to require information, in addition to that required

by statute, by "rules and regulations **necessary** for the administration of this article ...." *See* N.Y. Exec. Law § 177.1 (emphasis added).

In Watchtower, upon satisfactory completion of the "Solicitor's Registration Form," permits were "issued routinely," *id.* at 154; and here too, the Attorney General's regulations "set forth a 'closed set' of required documents" after which, if filed, "the attorney general **must** grant that charity a license to solicit donations in New York." Schneiderman at *7 (emphasis added).

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. So too here, the New York state charitable solicitation act purportedly was designed to "'directly promote [New York's] substantial interest in fighting fraud.'" Schneiderman at *13.

The Supreme Court found the Village of Stratton registration ordinance to be unconstitutional under the First Amendment on the ground that:

> It is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech

> constitutes a dramatic departure from our national heritage and constitutional tradition. [*Id*. at 165-66.]

Although the New York Attorney General might argue that the rule in Watchtower applies only to door-to-door canvassers who do not "solicit contributions," but, like the Jehovah's Witnesses, only passively accept donations (*id.* at 153), that argument has long been foreclosed by the Supreme Court in a line of cases (*see* Section I.D., *infra*) beginning with Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), in which the Court ruled:

> It is urged that the ordinance should be sustained because it deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money. But this represents a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations.... Prior authorities ... clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment. [*Id.* at 628, 632.]

The New York charitable solicitation act violates these principles and is unconstitutional.

B. As a Prior Restraint, the New York Solicitation Law *Per Se* Violates the Freedom of the Press.

As the Watchtower Court noted, "the doctrine of the freedom of the press embodied in our Constitution [was] engendered [by] the struggle in England" (*id.*

at 162), over the licensing system that prevailed in that country until 1694, the year in which Blackstone declared that the "press became properly free." *See* IV W. Blackstone, Commentaries on the Laws of England 152, n. a (Univ. Chi. Facsimile ed. 1769.) Not only did Blackstone celebrate the "liberty of the press" as "indeed essential to the nature of a free state," but he also declared that, "properly understood," the liberty of the press "consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." *Id.* at 151 (italics original). Freed from the shackles of the power of the licensor to censure, Blackstone summarized: "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." *Id.* at 151-52.

169 years after Blackstone penned these immortal words, the U.S. Supreme Court ruled "invalid on its face" an ordinance that required a permit before a person could "distribute literature in the City of Griffin." *See* Lovell v. Griffin, 303 U.S. 444, 451 (1938). The Court explained:

> **Whatever the motive** which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish '*without* a

> license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the **prevention of that restraint was a leading purpose** in the adoption. [*Id.* (emphasis added).]

In lock-step with Blackstone, the Supreme Court initially appeared to hold that the "no licensure" principle of the freedom of the press was absolute — no exceptions. As the Court put it in Lovell, the permit requirement was unconstitutional — "[w]hatever the motive ...." *Id.* In the 1971 Pentagon Papers case, this absolutist view commanded the concurrence of only two justices then on the Court — Hugo Black and William O. Douglas. In a joint concurring opinion, Justice Black, echoing the voice of James Madison, wrote "that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *See* New York Times v. United States, 403 U.S. 713, 717 (1971). Otherwise, Justice Black continued, the press would serve the governors, and cease to serve the governed: "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *Id.*

However, the two justices were outvoted, and the Pentagon Papers case was resolved by a *per curiam* decision coalescing around the view that "'[a]ny system of prior restraints of expression comes to this Court bearing a **heavy presumption**

against its constitutional validity.'" *Id.* at 714 (emphasis added). Instead of applying Lovell's *per se* rule, the Pentagon Papers Court opted to follow Near v. Minnesota, 283 U.S. 697 (1931), decided seven years before Lovell, in which the Court ruled that, while "the chief purpose of the [press] guaranty [was] to prevent previous restraints upon publication[,] the protection even as to previous restraint is not absolutely unlimited." *Id.* at 713, 716.

Although the district court below concluded that a system of prior restraints is not "'unconstitutional per se,'" it did not come to that conclusion after a careful study of relevant precedents. Rather, it dismissed the *per se* rule entirely, citing an opinion of this Court concerning the licensing power of a city over a public park, not over private communications. *See* Schneiderman at *6. As Appellants have pointed out, though, "government regulation of competing uses of public forums ... has nothing to do with the issue here — which is whether it is constitutional for the government to require charities to disclose their donors before they are permitted to speak." C.U. Br. at 15.

Entirely overlooked by the district court is the Watchtower opinion which does deal with communications on private property and which, upon careful analysis, does apply the historic *per se* rule. The exact question, as stated by the Court, was:

> Does a municipal ordinance that requires one to obtain a permit prior to engage in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded to anonymous pamphleteering or discourse? [Watchtower at 160.]

After review of its relevant precedents, the Court endorsed the English historical view of the "doctrine of the freedom of the press," concluding that "[t]o require a censorship through license which makes impossible the *free and* ***unhampered*** distribution of pamphlets strikes at the very heart of the constitutional guarantees." *Id.* at 162 (emphasis added). Then, in a telling summation, the Court refused to apply, or even state, a "standard of review [to] use in assessing the constitutionality of this ordinance ... to resolve th[e] dispute because [of] the breadth of speech affected by the ordinance and the nature of the regulation...." *Id.* at 164. For these reasons, balancing of interests is inappropriate as the New York statutes and regulations, like the Stratton ordinance, constitute a *per se* violation of the freedom of the press.

C. As a Prior Restraint, the New York Solicitation Law Presumptively Violates the Freedom of the Press.

Instead of conforming to the Pentagon Papers' "heavy presumption" that "[a]ny system of prior restraint" is constitutionally invalid, the district court

opined that "[p]rior restraints are **generally disfavored.**" Schneiderman at *6 (emphasis added). This statement is just plain wrong.

In his concurring opinion in the Pentagon Papers, Justice Brennan identified the kind of evidence that the government must submit in order to satisfy the "heavy presumption." New York Times at 714. Declaiming there to be "a single, extremely narrow class of cases," Justice Brennan observed that: "Our cases have thus far indicated that such cases may arise only when the Nation 'is at war.'" *Id.* at 726. Reaching all the way back to Near v. Minnesota, Justice Brennan emerged with only three specific examples of prior restraints that fit within the exception: "'[N]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.'" *Id.*

Having misstated the rule as one of general disfavor, not one of "heavy presumption," the district court below not only evaded the severe limitation laid down in the Pentagon Papers case, but in the process, invented its own idiosyncratic rule governing the presumption against prior restraints. Relying primarily on City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988), and Forsyth Cty. Ga. v. Nationalist Movement, 505 U.S. 123 (1992), the district court asserted that the prior restraint doctrine applies only in those cases

that confer "'unbridled discretion in a government official over whether to permit or deny expressive activity.'" Schneiderman at *6. But, as Citizens United and Citizens United Foundation demonstrate in their opening brief, the two cases cited concern the constitutionality of regulatory systems designed to "control access to public forums," not to control access to private homes through door-to-door, mail, or telephone solicitations by a charitable organization. C.U. Br. at 25-27.

Indeed, in Watchtower, the Village of Stratton ordinance provided its residents with a "No Solicitation Registration Form," enabling those residents who did not want to be bothered by door-to-door solicitations to decide for themselves whether to respond to such entreaties. *See id.* at 156. After all, by 2002 it had long been established in America that it is a violation of the freedoms of the press and speech for the government to usurp the authority of a private "householder," by depriving such residents of their First Amendment "right to receive" communications at their door steps. *See* Martin v. City of Struthers, 319 U.S. 141, 143 (1943). This right to decide for oneself to receive a communication extends to solicitations by mail, email, telephone, and other means of communication. As the Supreme Court observed in Struthers, the government cannot constitutionally "substitute[] the judgment of the community for the judgment of the individual." Struthers at 144.

Yet, that is exactly what the New York charitable solicitation law does, prohibiting communications from soliciting charitable organizations unless those organizations satisfy the Attorney General's regulations requiring disclosure of the names of the organizations' donors. And in doing so, it discriminates against secular organizations in favor of "religious corporations..., other religious agencies and organizations, and charities, agencies, and organizations operated, supervised, or controlled by or in connection with a religious organization." *See* N.Y. Exec. Law § 172-a.1. But the rule against prior restraints set by Watchtower "not only ... applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills." *See* Watchtower at 153.

D. As a Prior Restraint, the Demand for Disclosure of the Donor Information Violates the First Amendment.

The district court conceded that New York's "charitable solicitation scheme," including the forced disclosure of the names and contributions of Citizens United's donors, "is plausibly a prior restraint," citing Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

Schaumburg is the first of a line of cases — including 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 culminating in Madigan v.

Telemarketing Associates, 538 U.S. 600 (2003) — in which the Supreme Court reaffirmed a broad First Amendment right of charities to solicit funds and make communications. *Id.* at 611. Despite continuing efforts by states and their political subdivisions to restrict those solicitations, this line of cases has established that broad "prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation" unconstitutionally abridge the freedom of speech. *See* Madigan at 612. These cases leave only "a corridor open for fraud actions ... trained on representations made in individual cases..." *Id.* at 617. *See also* Schaumburg at 628-32; Munson at 959-64; and Riley at 787-88. The district court mistakenly reads this line of cases too broadly, allowing the Attorney General, in the name of New York's "'substantial interest in fighting fraud,'" to add to the list of statutorily required documents containing confidential information about the largest donors of nonprofit organizations. *See* Schneiderman at *11-*17.

However, even if the Schaumburg line of cases opens the door to such a prophylactic measure, the court's analysis still falls short of the mark. The court's opinion is based upon the assumption that the Attorney General's authority to add the donor document is constitutionally permissible because it is a "'narrowly tailored regulation'" directed to prevent fraud. *See id.* at *12. *See* C.U. Br. at 39-

40. But it is not enough that the regulation be narrowly tailored. As the court below ruled, in order to survive as a constitutional prior restraint, the power to promulgate regulations cannot be the product of "unbridled discretion." Thus, the Attorney General's authority to promulgate the regulation requiring disclosure of Citizens United donors must meet "'narrow, objective, and definite standards.'" *See* Schneiderman at *6-*7.

According to N.Y. Exec. Law § 177.1, however, the Attorney General is empowered to "make rules and regulations **necessary** for the administration of this article including, but not limited to regulations and waiver procedures...." (Emphasis added). Does this language adequately "fetter" the Attorney General's discretion by providing "'narrow, objective, and definite standards'" limiting the Attorney General's discretion to require additional documents to the list of documents required by N.Y. Exec. Law § 172.1?

The answer to that question is no. As Chief Justice John Marshall famously wrote in McCulloch v. Maryland, 17 U.S. (Wheat) 316 (1817), the word "necessary ... frequently imports no more than that one thing is convenient, or useful, or essential to another":

> To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be

> entirely unattainable.... It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary.... [*Id.* at 413-14.]

Indeed, in City of Lakewood — a case heavily relied upon by the Attorney General (Schneiderman at *6-*7) — the term "necessary and reasonable" was found not to be constitutionally sufficient to overcome the First Amendment claim that a city ordinance was infected by "unbridled discretion" and, therefore, constituted an unconstitutional prior restraint.

II. AS APPLIED HERE, THE REQUIRED DISCLOSURE OF THE NAMES AND ADDRESSES OF DONORS TO CITIZENS UNITED AND CITIZENS UNITED FOUNDATION VIOLATES THE FIRST AMENDMENT PRINCIPLE OF ANONYMITY.

The court below assumed that the objection of Citizens United and Citizens United Foundation to the disclosure of the names of their donors raised only a First Amendment claim of freedom of association, since the exposure of the names could expose donors to reprisals, harassments, and retaliations. *See* Schneiderman at *17-*21. To be sure, Citizens United and Citizens United Foundation did make such a claim, as articulated on pages 40 through 42 of their opening brief. But they also claimed that the compelled disclosure of the donor names violated the anonymity principle laid down in Talley v. California (*id.* at 40), a principle

governing the freedom of the press and, thus, a claim independent from the freedom of association rule in NAACP v. Alabama, 357 U.S. 449 (1958), only the latter of which was discussed and applied by the court below. *See* Schneiderman at *20-*21. The failure of the district court to understand this distinction led it to disregard completely the claim that the New York donor disclosure requirement deprived Citizens United and Citizens United Foundation of their free press rights.

In Talley v. California, 362 U.S. 60 (1960), Justice Hugo Black explained why First Amendment press principles cannot give way to government demands to know the identity of the speaker. Talley involved a criminal prosecution for violation of a Los Angeles municipal ordinance which restricted the distribution of hand-bills:

> "No person shall distribute any **hand-bill in** any place under any circumstances, which does not have printed on the cover, or the face thereof, the **name and address** of the following:
> "(a) [t]he person who printed, wrote, compiled or manufactured the same" [and] "(b) [t]he person who caused the same to be distributed...." [*Id.* at 60-61 (emphasis added).]

Hand-bills were defined broadly to include "any hand-bill, dodger, commercial advertising circular, folder, booklet, **letter,** card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract

attention of the public." *Id*. at 63, n.4 (emphasis added). The Court struck down the ordinance, based on the principle of anonymity.

Of course, in the present case, the organization sending the solicitation letter has been identified, but yet the government demands the right to know more — to learn the identity of those large donors who support that organization financially and make the sending of those letters possible. Therefore, the Attorney General's demand for information in this case is even more intrusive than was the Los Angeles municipal ordinance struck down in Talley.

The Talley case is instructive in at least two respects: first, for the approach taken by the Court to reach its result, and second, for the historical analysis applied to better understand the interests that the First Amendment was intended to protect.

First, the Talley Court reviewed the state of the law, noting that its decision in Lovell v. Griffin "held void on its face an ordinance that comprehensively forbade any distribution of literature ... without a license."[2] Talley at 62. The Talley Court then discussed Schneider v. State, 308 U.S. 147 (1939), which rejected efforts by Irvington, New Jersey; Milwaukee, Wisconsin; Worcester,

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[2] As noted above, the requirement that a charity must maintain "membership" on the list of approved charities maintained by the New York Attorney General is tantamount to requiring charities to obtain a license before communications may be sent. *See* Section I.B., *supra.*

Massachusetts; and Los Angeles, California, to find a way around Griffin, arguing that those "ordinances had been passed to prevent either frauds, disorder, or littering...." However, the result in the Supreme Court was the same. As the Court explained:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin*, 303 U.S., at 452. [Talley at 64.]

Applied here, the nonprofit's right to mail into New York to spread its message and solicit contributions cannot be conditioned on a state's demand for information about the persons responsible.[3] Freedom of the Press is wholly inconsistent with any form of government licensure.[4]

The Talley Court also considered and rejected Los Angeles' rationale for its ordinance, explaining that the real threat presented by the ordinance was not so

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[3] Based on the principles articulated herein, *inter alia*, these *amici* have long believed that the entire scheme of state charitable solicitation laws cannot withstand a proper constitutional challenge, but that challenge is not before this Court, and resolution of that issue will need to await another day.

[4] The Attorney General's requirement harkens to the "Decree of Star Chamber of July 11, 1637" and the "Licensing Order of June 14, 1643," which required, *inter alia*, pre-publication application by and licensing of publishers, provoking John Milton's monumental defense of freedom of the press. J. Milton, *Areopagitica* (Liberty Fund: 1999).

much in the public knowing the identity of the person putting out the hand-bill, but in the government having that information.

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to **criticize oppressive practices and laws** either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of **literature critical of the government**. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for **books that were obnoxious to the rulers**. [Talley at 64-65 (emphasis added).]

Lastly, if Talley stands for the proposition that Appellants could mail letters into California without identifying that they came from Appellants — and it does — it also stands, and even more strongly, for the proposition that New York cannot demand the names of those who made the mailing of those letters financially possible.

III. FEDERAL LAW PROHIBITS THE NEW YORK ATTORNEY GENERAL FROM REQUIRING ORGANIZATIONS TO DISCLOSE THEIR CONFIDENTIAL DONOR INFORMATION AS A CONDITION OF SOLICITING CHARITABLE CONTRIBUTIONS.

A. IRS Form 990 Schedule B Is a Protected Federal Form.

Although the IRS Form 990 is a public information form, and taxpayers are generally required to make a copy publicly available upon request, the specific tax return information required by the Attorney General — confidential donor

information at issue in this case — is the exception to that rule.[5] Indeed, the IRS Form 990 Schedule B "Schedule of Contributors"[6] is robustly protected from disclosure outside the IRS. On this form, the nonprofit must submit to the IRS the "Name, address, and ZIP+4" of all "Contributors" over a certain threshold (generally those who contributed $5,000 or more in one fiscal year), their "Total contributions" for the year, and certain other information about the type of contribution. As to nonprofit organizations other than private foundations or IRC section 527 political organizations, the General Instructions which accompany Schedule B state: "the names and addresses of contributors aren't required to be made available for public inspection."[7] For as many years as the filing of a Schedule B has been required by the IRS, no state with a charitable solicitation law requiring registration and reporting required an unredacted Schedule B, until demands made recently by the Attorney General of New York (and the Attorney

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[5] The IRS Form 990 Schedule B donor information is expressly exempted from the federal requirement that organizations must provide their IRS Forms 990 for public inspection. *See, e.g.*, IRS, "Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors' Identities Not Subject to Disclosure," https://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations-Returns-and-Applications:-Contributors'-Identities-Not-Subject-to-Disclosure.

[6] This Schedule B form is required by federal law to be filed with the IRS by many nonprofit organizations that file IRS Form 990, 990-EZ, or 990-PF.

[7] *See* https://www.irs.gov/pub/irs-pdf/f990ezb.pdf at 5.

General of California). Contrary to the letter and spirit of the statutory scheme enacted by Congress in the Internal Revenue Code, this requirement violates federal law.

B. Federal Law Prohibits the Disclosure of Schedule B Donor Information Except as Lawfully Authorized by the IRS.

The Internal Revenue Code establishes strict rules in IRC § 6103 protecting "returns" and "tax return information" (defined in IRC § 6103(b)(2) and (3)) from disclosure. IRC § 6103's statutory scheme has broad proscriptions against disclosing federal tax returns and tax return information, and specifically lists the circumstances under which such disclosure is permissible. IRC § 7213 prescribes harsh penalties for "willful" violation of IRC § 6103, which is a felony.[8] Incoming IRS employees are trained to protect such tax return information from public disclosure — including to state officials. By law, state officials may have limited access to such tax returns, but only through requests made to the IRS, providing sufficient justification for law enforcement purposes. There is no provision of federal law which sanctions the demands of the Attorney General to taxpayers to

[8] It is also a felony under the Internal Revenue Code to solicit "any return or return information" in exchange for "any item of material value." Such a violation is punishable by up to five years in prison, fines up to $5,000, or both. *See* IRC § 7213(a)(4).

provide these returns to state officials, and penalize those who choose to keep their donor information confidential.

These *amici* submit that the Attorney General is attempting an end-run around the strictures of IRC § 6103 in demanding from public charities what the Attorney General is not entitled to obtain directly from the IRS. A public charity's Form 990 Schedule B information constitutes a "return" under IRC § 6103(b)(1), and donors' identities and addresses constitute tax "return information" under IRC § 6103(b)(2). Such tax return information was required, collected and filed for federal purposes, not to comply with any state requirement. And, in the absence of an actual valid law-enforcement purpose, no Attorney General may obtain such information from the IRS, either under IRC § 6103 or under IRC § 6104. The Attorney General has not attempted to avail himself of access to these forms through the IRS — and for good reason. He would not be able to obtain this donor information under Section 6103. Nor would the Schedule B information be available by resort to IRC § 6104, despite the fact that that section requires mandatory disclosure of certain tax items — including Form 990 information — because it expressly exempts Schedule B donor information from the reach of the statute. Not only is confidential donor information exempted from the provision

requiring public disclosure of recent Forms 990, such information is also beyond the reach of the States — except for an investigation for cause.[9]

C. The Federal Statutory Scheme Protects the Records the Attorney General Demands.

Clearly, therefore, the Form 990 Schedule B information (setting forth the names and addresses of contributors) not only is not required to be disclosed by the exempt organizations, but it is also to be kept confidential by the IRS. Indeed, IRC § 6103 underscores the fact that return information is confidential.

The intent of Congress in developing its statutory scheme to protect confidential donor information is expressly revealed by two IRC sections. IRC § 6104(b) governs disclosure of Form 990 information by the government:

> The information required to be furnished by sections 6033, 6034, and 6058, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe. **Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization** or trust (other than a private foundation, as defined in section 509 (a) or a political organization exempt from taxation under section 527) which is required to furnish such information.... [26 U.S.C. § 6104(b), (emphasis added)]

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[9] The Internal Revenue Code authorizes the New York Attorney General to request the Schedules B from the IRS, but only pursuant to a specific investigation for cause, subject to the approval of the United States Secretary of Treasury. *See* IRC § 6104(c)(2)(D). Absent such cause, there is no authority for the IRS to disclose donor information to State officials.

And IRC § 6104(d) governs disclosure of Form 990 information by the exempt organization itself:

> In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, paragraph (1) shall not require the disclosure of the **name or address of any contributor** to the organization. In the case of an organization described in section 501(d), paragraph (1) shall not require the disclosure of the copies referred to in section 6031(b) with respect to such organization. [26 U.S.C. § 6104(d)(3)(A) (emphasis added).

It is in the face of those very clear provisions of the Internal Revenue Code that the Attorney General devised a method of circumventing the federal statutes by demanding the confidential information from the tax-exempt organizations themselves, as a prerequisite to conducting charitable solicitations in the State of New York. The Attorney General's demand for confidential donor information violates the carefully constructed statutory scheme set forth in the Internal Revenue Code.

D. The Attorney General's Demand Also Violates IRC § 7213(a)(4).

Such State action appears to these *amici* to also violate section 7213(a)(4) of the IRC, as the statute provides:

> It shall be unlawful for any person willfully **to offer** any **item of material value** in exchange for any **return** or return information (as defined in section 6103(b)) **and to receive** as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount

> not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution. [26 U.S.C. § 7213(a)(4) (emphasis added).]

Although no judicial decision on point has been identified, the actions of the Attorney General appear to fall within the prohibition of the statute. Certainly, it would be difficult to argue that the Attorney General's approval of a charity's application, which is required to solicit contributions in New York, does not constitute an "item of material value." By holding out its permission in exchange for an organization's return information, the Attorney General's actions would appear to fit squarely within that statute's prohibition.

It is not an overstatement to view the demands of the Attorney General as a form of extortion — by conditioning permission to solicit funds (the lifeblood of any organization) upon "voluntary" disclosure of protected confidential donor information. In so doing, the Attorney General is violating the protections for such return information crafted by Congress in enacting IRC § 6103, and, moreover, appears to be in specific violation of IRC § 7213(a)(4).

CONCLUSION

For the reasons stated herein, the decision of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of Amicus Curiae of Free Speech Defense and Education Fund, *et al.* in Support of Appellants and Reversal complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 6,382 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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 18.0.0.200 in 14-point Times New Roman.

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Dated: January 13, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.*, in Support of Appellants and Reversal, was made, this 13th day of January 2017, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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