NOS. 19-251 & 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

–v–

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

–v–

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE BUCKEYE INSTITUTE AND 34 PUBLIC POLICY RESEARCH ORGANIZATIONS AND ADVOCACY GROUPS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are The Buckeye Institute and 34 Public Policy Research Organizations and Advocacy Groups that seek to promote limited and effective government and individual freedom. The amici are non-partisan, non-profit, and tax-exempt organizations, as defined by section 501(c)(3) of the Internal Revenue code that engage in policy research and advocacy, often serve as government watchdogs, and—in some cases—litigate to defend constitutional rights. These organizations rely upon support from individuals, corporations, and foundations that share a commitment to individual liberty, free enterprise, personal responsibility, and limited government. The amici fear that if these donors are required to disclose their support, they will face reprisal, whether directly from state actors, or from members of the public which would create a chilling effect on the donors' and organizations' right to associate with one another.

A full list of amici and their interest in this case is set forth in the Appendix.

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[1] Petitioners filed a blanket consent with this Court. Respondent was given timely notice and consented in writing to the filing of this amici curiae brief under USSC Rule 37.2. No counsel for a party authored this brief in whole or in part, and no person other than amici curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Beginning in 2010, California's Attorney General announced that charities and tax-exempt organizations could not fundraise in California unless they first filed an unredacted Form 990 Schedule B— *i.e.*, a list containing the names and addresses of their significant donors. The regulation on which the Attorney General relies had been in force for at least ten years, does not require the Schedule B on its face, and had not been previously interpreted by the Attorney General to require this information. *See* Cal. Code Regs. Tit. 11, § 301(2005). The Attorney General now claims, however, that these disclosures are necessary to aid the office's purported general interest in "investigative efficiency."

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court applied the "exacting scrutiny" standard to associational privacy claims in the non-electoral context. Since then, this Court has described the "exacting scrutiny" standard in conflicting terms in the electoral context, equating it with strict scrutiny in some instances, and with intermediate scrutiny in others. This discrepancy has frequently led to confusion among the circuit courts in applying the standard to cases involving direct political or electoral activity.

Despite this ambiguity regarding how "exacting scrutiny" is applied in the electoral context, in non-electoral cases this Court has consistently applied the most stringent version of the exacting scrutiny test that was articulated in *NAACP*. Specifically, in non-electoral associational privacy cases, the Court

has required the government to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest" and has required that the compelled disclosure be "narrowly drawn." *Id.* at 460-461; *Gibson v. Fla. Legislative Investigation Comm'n*, 372 U.S. 539, 546 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (citation omitted).

The Ninth Circuit failed to apply the exacting scrutiny standard that this Court has prescribed since *NAACP* for associational privacy cases arising outside of the electoral context.

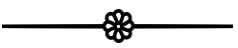
Under the Ninth Circuit's holding, the tens of thousands of charities and tax-exempt organizations that fundraise from any of California's nearly 40 million residents will have to choose between continuing those efforts and disclosing their significant donors. This ruling undeniably makes donating to these organizations less attractive, chilling the organizations' and their donors' First Amendment freedom to associate. And this issue is not isolated to California: Florida and New York also recently began demanding unredacted donor lists, and several other states have statutes or regulations that—like California's—may be "reinterpreted" to require such information.

California's statutory and internal safeguards to prevent the public release of confidential donor information are insufficient to prevent First Amendment harms. California's law provides no civil or criminal penalty for releasing the confidential information. Furthermore, the requirement to file the information with a government agency is likely to chill speech due to the fear and risk of government reprisal. Indeed, the protections enshrined in the First and

Fourteenth Amendments exist to protect citizens from the government.

Modern technology has only increased the force of the disclosure-driven chilling effects of California's policy.

The Court should therefore reaffirm that the version of "exacting scrutiny" in *NAACP* applies to non-electoral associational privacy claims.



ARGUMENT

I. THE EXACTING SCRUTINY STANDARD AS DEFINED BY THE NAACP COURT APPLIES TO ASSOCIATIONAL PRIVACY IN 501(c)(3) ORGANIZATIONS.

In recognizing the right to associate anonymously to advocate for societal change, this Court in *NAACP* noted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as direct prohibitions on association. *NAACP*, 357 U.S. at 464. The Court further recognized that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . " *Id.*, *citing De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

While much has changed since 1958, human nature—and consequently the nature of governments run by humans—remains the same. Americans disagree passionately with one another on many issues. This passion on occasion has erupted into violence—as we

have witnessed repeatedly this past year alone. It has also driven ideological combatants of all stripes to use modern technology and social media to pressure, embarrass, or intimidate those on "the other side." In this fraught atmosphere, groups like The Buckeye Institute and other co-amici are rightfully concerned that the confidential donor information included in their 990 Schedule B filings will be used improperly, whether directly by State governments or indirectly by the public, to discourage membership in, contributions to, and association with non-profit policy advocacy organizations. Indeed, this court has recognized that the First Amendment and all of its attendant protections are all the more necessary when political passions run high:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

De Jonge v. State of Oregon, 299 U.S. 353, 365 (1937). This Court should therefore apply the proper definition of "exacting scrutiny" set forth in *NAACP* to California's donor disclosure requirements.

A. The Proper Definition of Exacting Scrutiny in the Non-Electoral Context.

Since *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court consistently has applied exacting scrutiny to forced disclosures threatening freedom of association. To meet the burden of exacting scrutiny under *NAACP*, this Court has held that the government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson v. Fla. Legislative Investigation Comm'n*, 372 U.S. 539, 546 (1963), and any such compelled disclosure must be "narrowly drawn," *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) (citation omitted).

As Judge Ikuta noted in the dissent from the denial of *en banc* review in the instant case, this Court modified the tailoring prong of *NAACP's* exacting scrutiny test when applying it to the electoral context in *Buckley v. Valeo*, 424 U.S. 1 (1976). Pet.App.84a. In *Buckley,* the Court applied a *per se* rule deeming "the disclosure requirement to be 'the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.'" *Id.* (quoting *Buckley,* 424 U.S. at 68).

That said, this Court has inconsistently applied *Buckley's* modified exacting scrutiny standard in the electoral context, sometimes describing the exacting scrutiny test as being equivalent to strict scrutiny, while at other times describing the test like intermediate scrutiny. *Compare, e.g.*, *McCutcheon v. FEC*, 134 S.Ct. 1434, 1444 (2014) ("[u]nder exacting scrutiny," the government action is permissible only if it "promotes a compelling interest and is the least restrictive

means to further the articulated interest"), *with Citizens United*, 558 U.S. 310, 366-67 (2010) ("'exacting scrutiny requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest").

But this case is not about electoral spending. Nor are the governmental interests that exist in the electoral context present here. Moreover, regardless of the apparent inconsistency within the electoral context, this Court has consistently applied the *NAACP* exacting scrutiny standard to freedom of association claims outside of the electoral context. *See, e.g., In re Primus*, 436 U.S. 412, 432 (1978) (holding that where a state seeks to infringe upon a party's First Amendment freedom of association, the state must justify that infringement with "a subordinating interest which is compelling" and must use means that are "closely drawn to avoid unnecessary abridgment of associational freedoms"); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that infringement of the right to associate "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms").

B. The Ninth Circuit Erred in Failing to Apply This Court's *NAACP* Standard for Exacting Scrutiny.

The Ninth Circuit erred by importing a version of exacting scrutiny from the electoral context that requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest" outside of the context of election disclosure.

Pet.App.15a (quoting *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010)).

This error blurs the line between the test recognizing disclosure as the *per se* least restrictive means in the electoral context and this Court's requirement outside of the electoral context that the government demonstrate narrow tailoring. In other words, although donor disclosure has been recognized as the least restrictive means to address "sufficiently important governmental interest" of preventing the actual or apparent corruption of public officials in the electoral context, it does not follow that disclosure is the least restrictive means to prevent the potential charitable fraud that California's requirement purports to address.

Even where the governmental interest is compelling, this Court has been crystal clear that disclosure requirements that go "far beyond" the asserted governmental interest are improper. *See Shelton v. Tucker*, 364 U.S. 479, 489 (1960); *Talley v. California*, 362 U.S. 60, 64 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). In *Shelton*, for example, this Court invalidated a statute requiring public school teachers to disclose "without limitation every organization to which [they] ha[d] belonged or regularly contributed within the preceding five years." 364 U.S. at 480. Some of those associations may have been relevant to a state's "vital" interest in the fitness and competence of its teachers, but that did not justify a "completely unlimited" inquiry into "every conceivable kind of associational tie." *Id.* at 485, 487-88; *see also Talley*, 362 U.S. at 64 (ordinance that prohibited distribution of anonymous handbills could not be justified by concern with "fraud, false advertising and libel" because the ordinance was not "so limited");

McIntyre, 514 U.S. at 357 (state's interest in "preventing the misuse of anonymous election-related speech" does not justify "a prohibition of all uses of that speech").

Here, the Attorney General's compelled disclosure is not narrowly tailored, and goes "far beyond" what is necessary to vindicate the State's interest. This Court need look no further than recent history in California: The Attorney General fulfilled investigative functions for many years using a redacted Form 990 Schedule B until the relatively recent reinterpretation of the law. Moreover, the overwhelming majority of states have been able to fulfill their supervisory obligations without requiring foreign corporations to file Schedule B at all. *See, e.g.*, Illinois Form AG990-IL Filing Instructions ¶ 3 (directing charities to file "IRS Form 990 (excluding Schedule B"); Michigan Renewal Solicitation Registration Form at 2 ("if you file Form 990 . . . do not provide a copy of Schedule B); *cf. Randall v. Sorrell*, 548 U.S. 230, 252-53 (2006) (plurality op.) (citing as a "danger sign[]" that contribution limits are substantially lower than . . . comparable limits in other States," and concluding that "[w]e consequently must examine the record independently and carefully to determine whether [the] limits are 'closely drawn' to match the State's interests"). Yet despite evidence of less restrictive means of accomplishing the State's purpose, the Ninth Circuit condoned the State's efforts to force AFPF and other § 501(c)(3) organizations to either cease fundraising in California entirely or disclose their significant donors.

C. The Ninth Circuit's Error Has Effects Far Beyond California.

The breadth of the Attorney General's actions cannot be overstated. Approximately 1.56 million tax exempt charities are organized under § 501(c)(3). *See* Brice McKeever, *The Nonprofit Sector in Brief*, NATIONAL CENTER FOR CHARITABLE STATISTICS, Jan.3, 2019, https://nccs.urban.org/project/nonprofit-sector-brief. These organizations span nearly every industry, including education, health care, culture, religion, sports, foreign affairs, and the humanities. If these organizations wish to fundraise in California, then they must disclose their significant donors. There is no question that such disclosures—which reveal "every associational tie" of not only California residents, but also of the countless individuals outside of California who contribute to nonprofits that fundraise in California—"impairs . . . [the] right of association." *Shelton*, 364 U.S. at 485.

On its own terms, then, the Ninth Circuit's decision has a substantial impact beyond California. Perhaps more troubling, its reasoning is likely to influence other states. Like California, New York and Florida began demanding that organizations like AFPF and amici file an unredacted Schedule B before they can fundraise in those states. *See Citizens United v. Schneiderman*, 882 F.3d 374, 379-80 (2nd Cir. 2018); *see also* Fla. Stat. §§ 496.401, *et seq.* (West 2014).

The Ninth Circuit's expansive reasoning may also embolden additional states to shift their policies on reporting requirements for tax-exempt organizations. Indeed, several states have similar laws requiring charities to submit copies of their IRS Form 990 that arguably could be "reinterpreted" just as California

has done to require unredacted donor information. *See* Haw. Rev. Stat. Ann. § 467B-6.5 (2014); Ky. Rev. Stat. Ann. §§ 367.650-.670 (2014); Miss. Code Ann. § 79-11-507 (2014). And some other states already have considered enacting similar measures. *See* Matt Nese, Institute for Free Speech, *Three Primary Threats to 501(c)(3) Donor Privacy* (Jun. 16, 2015), *available at:* http://www.campaignfreedom.org/2015/06/16/three-primary-threats-to-501c3-donor-privacy/ (discussing legislative efforts in Arizona, Montana, and Texas).

II. California's Prohibition on the Public Disclosure of Schedule B Information Is Inadequate to Prevent First Amendment Harm.

The district court found that disclosure of the Schedule B information to the Attorney General could result in the information being released to the public. *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016). This finding was amply supported by the fact that state employees improperly posted 1,800 Schedule B forms on the Internet; and inadequate security precautions made 350,000 Schedule B forms accessible online by changing a single digit at the end of the website's URL. Pet.App.36a.

Nonetheless, the Ninth Circuit reversed the district court by "holding against all evidence that the donors' names would not be made public and that the donors would not be harassed." Pet.App.79a (Ikuta, J., dissenting from the denial of *en banc* review).

The Ninth Circuit relied upon internal safeguards implemented by the Attorney General's office to prevent inadvertent errors, as well as the passage of a

prohibition on the public disclosure of Schedule B information. Pet.App.35a (citing Cal. Code Regs. Tit. 11, § 310(b)). But neither the internal safeguards nor the statutory prohibition provided any protection from intentional or malicious dissemination of the confidential information. As such, the protections instituted by California are inadequate to prevent First Amendment harm.

A. California Law Lacks Civil or Criminal Sanctions for Violation.

Unlike federal law, California law imposes no civil or criminal sanctions for disclosing this confidential information; there is no meaningful repercussion, deterrent, or penalty for so doing. *Compare* Cal. Code Regs. Tit. 11, § 310(b); 26 U.S.C. § 7231(a)(1)-(2); 26 U.S.C. § 7213(A)(a)(2); 26 U.S.C. § 7213A(b)(1); 26 U.S.C. § 7216; 7431.

Even the federal prohibitions are not sufficient to protect against public disclosure in all cases. *See Nat'l Org. for Marriage, Inc. v. United States*, 24 F. Supp. 3d 518, 520-21 (E.D. Va. 2014) (Tax exempt organization's unredacted Schedule B was published by the Huffington Post after the IRS released it to a competing policy advocacy group in violation of federal law). Accordingly, a prohibition without any means for enforcement is hardly enough to offset the dramatic chilling effect of California's disclosure law.

B. Fear of Government Reprisal Chills Speech Even in the Absence of Public Disclosure.

The Ninth Circuit seems to assume that the only risk of reprisal could arise from the public, and thus from public disclosure. This assumption fails to consider

the possibility of government reprisal. Indeed, the First Amendment is "[p]remised on mistrust of government power." *Citizens United*, 558 U.S. at 340. Thus, disclosure to the Attorney General's office alone is sufficient to create a chilling effect.

Donors to think tanks or public policy organizations reasonably may fear reprisal not only from the public but also from state officials, including the Attorney General. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 200 (2010). Think tanks like AFPF, The Buckeye Institute, and co-amici routinely take positions opposing either direct action by a state's attorney general or state laws that the Attorney General's office is bound to uphold and defend. *Compare, e.g.*, Brief of 11 States as Amici Curiae in No. 11-400, *Florida v. Dep't of Health & Human Servs.*, 132 S.Ct. 2566 (2012) (arguing in favor of Medicaid expansion) *with* Brief of Amici curiae Center for Constitutional Jurisprudence, *et al.*, in No. 11-400, *Florida*, 132 S.Ct. 2566 (2012) (taking opposite position). For example, The Buckeye Institute is currently engaged in litigation with various Ohio cities and the Ohio Attorney General relating to municipal income taxation of nonresidents during the COVID-19 pandemic. The Buckeye Institute's donors would rightly be concerned about reprisal if the Attorney General was both the target of litigation and also warehousing lists of The Buckeye Institute's significant donors.

The chilling effect of requiring these same think tanks to disclose their donors is thus "readily apparent." *In re First Nat'l Bank*, 701 F.2d 115, 118 (10th Cir. 1983) (finding obvious chilling effect where IRS sought membership records of tax protester group). Loss of donor revenue stemming from donor decisions to stop

giving or to give smaller contributions in order to avoid disclosure quite effectively limits groups' ability to speak and to associate with like-minded citizens.

The Buckeye Institute experienced this chilling effect firsthand. In 2013, shortly after the Ohio General Assembly relied upon Buckeye's arguments rejecting Medicaid expansion, Buckeye learned that it would be audited by the Cincinnati office of the IRS. The audit notification came on the heels of widespread reporting and congressional investigations of wrongdoing by that very same IRS office. *See, e.g.*, Gregory Korte, *Cincinnati IRS Agents First Raised Tea Party Issues*, USA TODAY (Jun. 11, 2013), *available at* http://www.usatoday.com/story/news/politics/2013/06/11/how-irs-tea-party-targeting-started/2411515/.

Against that notorious backdrop, Buckeye's donors feared that this audit was politically motivated retaliation against Buckeye. These same donors expressed concern that, if their names appeared on Buckeye's Schedule B or other Buckeye records subject to disclosure in the IRS audit, they too would be subjected to retaliatory audits. Numerous individuals immediately began opting to make smaller, and fully anonymous, cash donations—foregoing a donation receipt and thereby their tax deduction altogether—in order to avoid any potential retribution based upon their financial contributions to and association with the organization. Thus, concerns about disclosure to a government agency fueling government retaliation had a demonstrable chilling effect on the freedom to associate, as supporters of Buckeye took extraordinary measures to avoid being identified and therefore targeted for political retribution for having engaging in protected First Amendment activity.

Buckeye's experience is not unique—as *co-amici* likewise have experienced firsthand instances of chilling effects arising from public and private reprisals. Funders of New Hampshire's Josiah Bartlett Center for Public Policy, have told the organization that while they continue to support its mission, they will donate only anonymously due to fear of harassment on social media. Similarly, a donor to the Rhode Island Center for Freedom and Prosperity was the subject of a smear campaign by a Rhode Island senior political party official because of that donor's financial contributions to a 501(c)(4). The former high-level party official falsely alleged that the donor and his company had been involved in criminal fraud. While that donor's personal information was subject to public disclosure because the 501(c)(4) organization engaged in electoral activity, there is no reason to believe that activists or government officials would not similarly misuse confidential donor information to silence and intimidate the supporters of 501(c)(3) organizations engaged in non-electoral public policy advocacy.

Organizations' fears of government retribution are real. On January 27, 2021, Freedom Foundation of Minnesota's CEO published an opinion piece in the Minneapolis Star Tribune regarding privately funded staffers embedded in and working for state agencies. Annette Meeks, *Agenda Dollars Are Buying State Government Jobs*, STAR TRIBUNE (January 27, 2021), available at https://www.startribune.com/agenda-dollars-are-buying-state-government-jobs/600015808/?refresh=true. Minnesota's Attorney General responded with a personal attack, implying—with no evidence—that the piece had been written at the behest of defen-

dants in consumer protection lawsuits who "happen to be the same as, or closely related to, donors that write checks" to Freedom Foundation of Minnesota. Keith Ellison, *Counterpoint from Keith Ellison: It's Critics Who Doing Big Money's Bidding*, STAR TRIBUNE (February 9, 2021), available at https://www.startribune.com/counterpoint-it-s-critics-who-are-doing-big-money-s-bidding/600021124/. Notably, Minnesota does not require the disclosure of Schedule B information, and it is unclear how that state's Attorney General obtained information about the identities of Freedom Foundation of Minnesota's donors. Regardless of how their personal information was obtained, asking donors to trust that government officials will limit of use collected private information to legitimate purposes flies in the face of political reality.

Wisconsin's "John Doe" investigations provide yet another troubling example of government-sanctioned harassment that individuals have faced based on the views espoused by organizations they financially support. "Initially a probe into the activities of Governor Walker and his staff, the ['John Doe'] investigation expanded to reach nonprofits nationwide that made independent political expenditures in Wisconsin, including the League of American Voters, Americans for Prosperity, and the Republican Governors Association." Jon Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving*, at 3 (Aug. 5, 2015), *available at* https://goldwaterinstitute.org/wp-content/uploads/2015/08/Dark-Money-paper.pdf. The raids targeted individuals associated with those organizations, some of whom were awakened in the middle of the night by "a persistent pounding

on the door," floodlights illuminating their homes, and police with guns drawn. David French, NATIONAL REVIEW, *Wisconsin's Shame: "I Thought It Was a Home Invasion*" (May 4, 2015). These individuals were then forced to watch in silence as investigators rifled through their homes, seeking an astonishingly broad range of documents and information, all because they supported certain political advocacy organizations. *Id.* The Wisconsin Supreme Court eventually put an end to these unconstitutional investigations, concluding that they were based on a legal theory "unsupported in either reason or law" and that the citizens investigated "were wholly innocent of any wrongdoing." *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 211-12 (Wisc. 2015).

In the face of these and other similarly politically-motivated-threats, there is no doubt that compelled disclosure will make donating to advocacy and public policy organizations like AFPF "less attractive," thereby interfering with "the group's ability to express its message." *Rumsfeld v. Forum for Academic and Inst'l Rights, Inc.*, 547 U.S. 47, 69 (2006).

III. MODERN TECHNOLOGY INCREASES THE CHILLING EFFECT OF CALIFORNIA'S POLICY.

Modern technology has only increased the force of the disclosure-driven chilling effects. After all, once donors' names and addresses become public, "anyone with access to a computer could compile a wealth of information about [them], including":

> the names of their spouses and neighbors, their telephone numbers, directions to their homes, pictures of their homes, information about their homes . . . , information about any

> motor vehicles they own, any court case in which they were parties, any information posted on a social networking site, and newspaper articles in which their names appeared (including such things as wedding announcements, obituaries, and articles in local papers about their children's school and athletic activities).

Doe, 561 U.S. at 208 (2010) (Alito, J., concurring).

And because modern technology "allows mass movements to arise instantaneously and virally," "[a]ny individual or donor supporting virtually any cause is only a few clicks away from being discovered and targeted" for harassment or worse. Nick Dranias, *In Defense of Private Civic Engagement: Why the Assault on "Dark Money" Threatens Free Speech–and How to Stop the Assault* at 16 (Apr. 2015), *available at* https://www.heartland.org/_template-assets/documents/publications/03-13-15_dranias_civic_engagement.pdf. Indeed, such harassment has already occurred, and in California no less. After California published the names and addresses of individuals who had supported Proposition 8, a ballot initiative that amended California's constitution to define marriage, opponents of the measure "compiled this information and created Web sites with maps showing the locations of the homes or businesses of Proposition 8 supporters." *Citizens United*, 558 U.S. at 481 (Thomas, J., dissenting); *see also Doe*, 561 U.S. at 208 (Alito, J., concurring) (describing similar efforts in Washington). Some individuals were harassed others: lost their jobs; others faced death threats—all because they supported Proposition 8 and California released their personal

information to the public. *See Citizens United*, 558 U.S. at 481-82 (Thomas, J., dissenting).

Compelled disclosure raises particularly troubling questions when combined with the intemperate statements arising in the political sphere. The Buckeye Institute's experience in the Medicaid expansion debate is instructive. Some proponents of Medicaid expansion charged that political opposition to the proposal was "killing people." *See, e.g.*, Jared Bernstein, *Life and Death . . . and Medicaid*, WASH. POST., Nov. 11, 2019, https://www.washingtonpost.com/outlook/2019/11/11/life-death-medicaid; *see also* DAILY KOS, *infra*. ("Florida Governor Rick Scott is now officially a killer, and Charlene Dill is one of his victims.") In fact, Ohio's former governor John Kasich, who also supported Medicaid expansion, speculated that those who opposed the policy would have to answer for it in the next life. *See* Joe Hallett and Cathryn Candisky, *Kasich Makes Faith Argument for Medicaid*, COLUMBUS DISPATCH (June 18, 2013) https://www.dispatch.com/article/20130618/NEWS/306189639. An anonymous blogger was more direct: "Burning in hell is a slap on the wrist compared to the punishment [Medicaid expansion opponents] really deserve." Formerly Apathetic, *Is Rick Scott Guilty of Murder?* DAILY KOS, (March 26, 2014). https://www.dailykos.com/stories/2014/3/26/1287489/-Is-Rick-Scott-guilty-of-murder. Political rhetoric has consequences, and those consequences can be unpredictable. Just as Henry II's lament—"will no one deliver me this turbulent priest?"—sealed Thomas à Becket's fate, partisans unfortunately do occasionally read fiery political rhetoric, and take aggressive action—either through virtual tools or in person—based upon this type of government-mandated disclo-

sure about supporters of those causes. *See* Robert Dodsley, THE CHRONICLE OF THE KINGS OF ENGLAND, FROM WILLIAM THE NORMAN TO THE DEATH OF GEORGE III (1821), J. Fairburn. P. 27 https://archive.org/details/chroniclekingse00saddgoog

In short, the "deterrent effect" that disclosure of membership and donor lists will have on "the free enjoyment of the right to associate" is even more significant in today's Internet age than it was when this Court decided cases like *NAACP*, *Shelton*, and *Talley*. *See NAACP*, 357 U.S. at 46.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for Ninth Circuit should be reversed.

Respectfully submitted,

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MARCH 1, 2020

APPENDIX

The Buckeye Institute is a non-partisan, non-profit, and tax-exempt organization, as defined by section 501(c)(3) of the Internal Revenue code. As such, it relies on support from individuals, corporations, and foundations that share a commitment to individual liberty, free enterprise, personal responsibility, and limited government. The Buckeye Institute vigorously defends the right of these donors to associate with Buckeye anonymously if they so choose, without subjecting their contribution to inclusion on a government list.

Buckeye does not engage in partisan political activity. It does not make campaign contributions, endorse candidates, or make independent expenditures for or against candidates for state, local, or federal office. Still, the policies that Buckeye advocates and the litigation it undertakes are not always politically popular, at least among governmental entities that Buckeye reproaches or sues and donors to Buckeye's efforts are rightly concerned that if required to disclose their support for the organization, they will face reprisal, whether directly from state actors, or from members of the public responding to inflammatory political rhetoric. Buckeye thus has a substantial interest in the important question presented in this case, namely, whether outside of the electoral context, a State may demand an unredacted list of all significant donors to a non-profit organization without narrowly tailoring such requirement to a specific showing of need.

Alaska Policy Forum is a non-partisan non-profit organization which works to empower and edu-

cate Alaskans and policymakers by promoting policies that grow freedom for all. Under Section 501(c)(3) of the Internal Revenue Code, it is a tax-exempt educational organization.

Citizen Action Defense Fund is a "watchdog" for all Washingtonians, helping to ensure that state and local governments play by the rules and that the public's constitutional rights are protected. It is currently seeking recognition as a 501(c)(3) tax-exempt organization from the IRS, and it has an interest in ensuring that it is not required to disclose confidential information about its donors.

The Commonwealth Foundation transforms free-market ideas into public policies so all Pennsylvanians can flourish. The Commonwealth Foundation's vision is that Pennsylvania once again writes a new chapter in America's story by ensuring all people have equal opportunity to pursue their dreams and earn success. Since the Commonwealth Foundation began fighting for freedom in Pennsylvania in 1988, it has saved taxpayers billions of dollars, brought greater knowledge of free-market principles and happenings in Harrisburg to millions of fellow citizens, and helped enable hundreds of thousands of families to choose a school for themselves.

The Commonwealth Foundation has closely followed the discussion around donor privacy and engaged with state lawmakers over legislative proposals relating to the treatment of non-profit organizations and their donors.

The Empire Center for Public Policy, Inc., is an independent, non-partisan, non-profit think tank based in Albany, New York. The Center's mission is to

make New York a better place to live and work by promoting public policy reforms grounded in free-market principles, personal responsibility, and the ideals of effective and accountable government.

Foundation for Government Accountability ("FGA") is a Florida nonprofit corporation organized under Section 501(c)(3) of the Internal Revenue Code that works to eliminate dysfunctional public policies that trap individuals in cycles of dependency and prevent them from experiencing the dignity, self-sufficiency, and empowerment of work. FGA is supported by voluntary donations from dozens of individuals and private foundations, many of whom expressly ask FGA to keep private their identify and giving history.

Freedom Foundation of Minnesota is an independent, nonprofit educational and research organization dedicated to supporting free market principles and liberty-based public policy initiatives for a better Minnesota. As a donor-supported 501(c)(3) organization, it has an interest in opposing donor disclosure requirements like the one at issue in this case.

The Georgia Center for Opportunity is a 501(c)(3) nonprofit, non-partisan organization that seeks to remove barriers to ensure that every person, no matter their race, past mistakes, or the circumstances of their birth, has access to a quality education, fulfilling work, and a health family life. As a donor-supported organization, it opposes the donor disclosure requirements at issue in this case, which it believes violate the First Amendment.

The Illinois Policy Institute is a nonpartisan, nonprofit public policy research and education organ-

ization that promotes personal and economic freedom in Illinois, funded by the voluntary contributions of its supporters. The Institute's policy work includes budget and tax policy, labor policy, good government, and jobs and economic growth.

The Institute believes its donors' First Amendment right to freedom of association would be threatened by the required disclosure of their donations to state governments. Moreover, the Illinois Policy Institute has supporters that include foundations and donors who are former or part-time Illinois residents who now are based in or reside in California. To solicit those persons for support, the Institute is required to provide California the Institute's Schedule B. The Illinois Policy Institute believes these donors have the right to associate with the Institute anonymously. They should not be forced to submit their information to any state government bodies. Such mandatory disclosure threatens donors' and the Institute's rights to freedom of association and the ability of the Institute to raise funds to support its work.

Independence Institute is a nonpartisan public policy research organization founded on the eternal principles of the Declaration of Independence. The Institute's scholarship, including articles by Research Director David Kopel and Senior Fellow Robert Natelson, was cited last term in *New York State Rifle & Pistol Association v. City of New York* (Alito, J., dissenting); *Espinoza v. Montana Dept. of Revenue* (Alito, J., concurring); and *Rogers v. Grewel* (Thomas, J., dissenting from denial of cert.).

Additionally, Senior Fellow Natelson was previously cited in *Upstate Citizens for Equality, Inc v. United States* (2017) (Thomas, J., dissenting); *Arizona*

State Legislature v. Arizona Independent Redistricting Com'n (2015) (Roberts, C.J., dissenting); *N.L.R.B. v. Noel Canning* (2014) (Scalia, J., concurring); *Town of Greece, N.Y. v. Galloway* (2014) (Thomas, J., concurring in part); *Adoptive Couple v. Baby Girl* (2013) (Thomas, J. concurring); and *Arizona v. Inter Tribal Council of Arizona, Inc.* (2013) (Thomas, J., dissenting).

The Institute's amicus briefs in *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010) (under the name of lead amicus Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (Heller), Alito (McDonald), and Stevens (McDonald).

The James Madison Institute is a Florida-based research and educational organization that advocates for policies consistent with the framework set forth in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility. The Institute is a non-profit, tax exempt organization under Section 501(c)(3) of the IRC based in Tallahassee, Florida. It opposes any attempt by government to force nonprofit organizations to reveal their donors, and it believes that such disclosure requirements chill the exercise of important First Amendment rights.

The John Locke Foundation was founded in 1990 as an independent, nonprofit think tank. We employ research, journalism, and outreach to promote our vision for North Carolina—of responsible citizens, strong families, and successful communities. We are committed to individual liberty and limited, constitutional government.

The John Locke Foundation has advocated donor privacy for many years, not just because we want to protect the privacy of our own donors and ensure that they are safe from harassment, but because attacks on donor privacy are attacks on free expression. Freedom of speech, freedom of the press, the right to assemble, and the right to petition the government for a redress of grievances are vitally important, fundamental rights that are essential for the operation of our Republican system of government and for the survival of our free society. All four are guaranteed by the U.S. Constitution and by the constitutions of most states, including North Carolina. Regulations that force nonprofits to disclose the names of their donors make people afraid to exercise those important, fundamental rights, which is why we oppose them.

The John K. MacIver Institute for Public Policy is a Wisconsin-based nonprofit organization that promotes free markets, individual freedom, personal responsibility, and limited government. As a 501(c)(3) organization, it is concerned with any attempts by the government to force such organizations to disclose confidential donor information.

The Josiah Bartlett Center for Public Policy is a non-profit educational organization whose mission is to develop and advance practical, free market policies that promote prosperity and opportunity for all. As 501(c)(3) organization that has been the subject of malicious and knowingly false attacks about its work, we've experienced attempts by political activists to discredit and damage our organization with lies and baseless smears. Activists have attempted to smear our founders, board members, former board members, and known donors. Without donor privacy protections,

there is no doubt that activists would go after every one of our donors in an attempt to defund our organization. Given our experience, we strongly oppose any requirement that non-profits disclose confidential information about their donors.

Kansas Justice Institute is a non-profit, public-interest litigation firm committed to defending against government overreach and abuse. KJI believes the First Amendment protects against government compelled disclosure of a group's membership and contributor lists.

The Kirkwood Institute, Inc. is a nonprofit corporation formed under the laws of the State of Iowa. Its mission is, in part, to advance constitutional governance in the State of Iowa by advocating for the enforcement of rights guaranteed to all Iowans by the Constitution of the State of Iowa and the Constitution of the United States. The Kirkwood Institute solicits donations from individuals who wish to advance constitutional governance, individual liberty, and the separation of powers. Many of these individuals fear retaliation from members of the public, including elected officials, due to their engagement in policy issues.

Landmark Legal Foundation is a national public interest law firm with offices in Kansas City, Missouri, and Leesburg, Virginia. Thousands of private individuals and charitable foundations from every state in the union support Landmark through charitable contributions. Landmark defends the Constitution's separation of powers; promotes free, fair, and secure elections; supports the enforcement of immigration laws; and represents families who have lost loved ones at the hands of individuals illegally present in the United States. Donor privacy secures fundamen-

tal First Amendment rights and in the current political climate is essential to protect Landmark's supporters from intimidation, threats, and potential violence.

Libertas Institute is a Utah-based 501(c)(3) nonprofit "think tank" and educational organization. Its mission is to change hearts, minds, and laws to build a freer society by creating and implementing innovative policy reforms and exceptional educational resources. Libertas has supported state-level donor privacy legislation in the past, and it was a party to *Utah Taxpayers Association v. Cox*, a successful challenge to a Utah law that would have required nonprofits to disclose confidential donor information to state regulators.

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

The Mackinac Center fundraises in 49 states and has for decades had to file a Schedule B with its IRS Form 990."

The Maine Policy Institute is a 501(c)(3) nonprofit, tax-exempt educational organization that works to advance individual liberty and economic freedom in Maine. Maine Policy conducts detailed and timely research, develops public policy solutions, educates the public, and engages with lawmakers to foster a greater sense of liberty in Maine. It opposes any state law or regulation requiring nonprofits to reveal

their donors, as such requirements chill the exercise of protected First Amendment rights.

The Nevada Policy Research Institute ("NPRI") is a nonpartisan education and research organization dedicated to advancing the principles of economic and individual freedom. The Institute's primary areas of focus are education, labor, government transparency and fiscal policy. NPRI is a non-profit, tax exempt organization under Section 501(c)(3) of the IRC based in Las Vegas, Nevada, and it opposes attempts by government to require it to disclose confidential donor information.

Palmetto Promise Institute is a 501(c)(3) nonprofit organization that promotes policy solutions to advance a free and flourishing South Carolina. It seeks to protect the First Amendment rights of its donors and supporters.

The Pelican Institute for Public Policy is a non-profit and nonpartisan research and educational organization, and the leading voice for free markets in Louisiana. The Institute's mission is to conduct scholarly research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government. The Institute has an interest in protecting Louisiana citizens' First Amendment rights.

The Public Trust Institute (PTI) is a Colorado-based, non-profit, public-interest law firm with a particular focus on free speech and free association, taxpayers' rights, open and accountable government, and educational opportunity. PTI represents all of its clients on a pro bono basis. It pursues cases where the legal issues at stake are important to the public

interest but fee-based representation from private counsel is not viable. PTI is funded entirely by private donations and is only able to provide these important services because of the generosity of its donors. Given the sometimes-controversial issues involved in PTI's litigation, the organization closely guards its donors' privacy, and some of its donations are given on explicit promises of anonymity.

The Rhode Island Center for Freedom and Prosperity is a 501(c)(3) nonprofit organization that educates the public about, and recommends policy solutions concerning, public sector unions, the right to earn a living, government spending, and other issues. The organization is concerned with the "cancel culture" on the rise in Rhode Island and around the country, and it has first-hand experience with donor harassment.

The Rio Grande Foundation is New Mexico's free market public policy think tank. The Foundation has long engaged in a variety of public policy and ballot issues. Those issues are often controversial and could create significant obstacles for supporters of economic freedom in our State. We are currently in litigation over the City of Santa Fe's extremely strict $100 limit on engagement in a "readily-identifiable" ballot issue.

The Roughrider Policy Center is North Dakota's leading advocate for free markets and educational choice. It opposes attempts by government to force nonprofit organizations, like itself, to disclose confidential information about their donors.

The Show-Me Institute is a 501(c)(3) research and educational organization dedicated to improving the quality of life for all citizens of Missouri by advancing sensible, well-researched solutions to state

and local policy issues. The work of the Institute is rooted in the American tradition of free markets and individual liberty. The Institute's scholars offer private-sector solutions to the state's social and economic challenges, presenting policies that respect the rights of the individual, encourage creativity and hard work, and nurture independence and social cooperation. The Show-Me Institute has published commentaries and sponsored presentations emphasizing the importance of guarding against the erosion of the First Amendment, so this case is of significant interest.

The Texas Public Policy Foundation (the "Foundation") is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically sound research and outreach. Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans.

The Maryland Public Policy Institute is a research and educational organization that focuses on public finances, education, governmental transparency, public pensions, and tax reform. A 501(c)(3) tax-exempt entity, MPPI opposes any donor disclosure requirements that chill the exercise of nonprofit organizations' First Amendment rights.

The Thomas Jefferson Institute for Public Policy ("TJPP") is a Virginia-based nonprofit whose mission is to craft and promote public policy solutions that advance prosperity and opportunity for all Virginians.

As a 501(c)(3) organization, it has a direct interest in attempts by government to force nonprofits to release confidential donor information.

Upper Midwest Law Center ("UMLC") is a 501(c)(3) nonprofit organization and sometimes represents other nonprofits organizations. It shares the concerns of the Petitioner about donor disclosure.

The Virginia Institute for Public Policy seeks to lay the groundwork for a society dedicated to individual liberty, entrepreneurial capitalism, and a constitutionally-limited government. As a 501(c)(3) donor-supported nonprofit organization, it has a direct interest in protecting confidential information concerning its financial supporters.

Washington Policy Center ("WPC") is an independent, nonprofit think tank that promotes sound public policy based on free market solutions. As a 501(c)(3) organization, it opposes government attempts to force nonprofits to disclose confidential donor information. It believes that such disclosure requirements are both unconstitutional and bad policy. Forcing it to report private identification information about its members to the government will have a chilling effect on our members' right to free speech and on their innate freedom of association.

Amicus Wisconsin Institute for Law & Liberty is a public interest law firm dedicated to advancing the principles of limited government, free markets, individual liberty, and a robust civil society. It is a 501(c)(3) donor-supported nonprofit, and it opposes any regulatory requirements that would require groups like itself to disclose sensitive donor information.