Nos. 19-251

In The Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

Petitioner,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PACIFIC RESEARCH INSTITUTE AND PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest.

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INTEREST OF *AMICI CURIAE*[1]

The Pacific Research Institute (PRI) is a nonprofit nonpartisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free market policy solutions to the issues that impact the daily lives of all Americans. It demonstrates how free interaction among consumers, businesses, and voluntary associations is more effective than government action at providing the important results we all seek—good schools, quality health care, a clean environment, and economic growth. Founded in 1979 and based in San Francisco, PRI is supported by private contributions. Its activities include publications, public events, media commentary, invited legislative testimony, and community outreach.

The Project for Privacy & Surveillance Accountability (PPSA) is a nonprofit nonpartisan 501(c)(4) organization that advocates for greater protection of

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letter of Petitioner and written consent from Respondent. Counsel for the parties were notified 6 days prior to the filing deadline, admittedly less than the 10 days required by rule. The limited delay, however, was harmless in that Respondent had already sought and received an extension of time to file a brief in opposition, and hence the primary purpose of the 10-day notice rule was satisfied. Respondent will have ample time to address this *amicus* brief and others. Counsel for Respondent was candidly asked whether she "would be willing to grant consent notwithstanding and without objection to the slightly late notice," and replied that "Respondent consents to the filing of the proposed *amicus curiae* brief."

Americans' privacy and civil liberties from government surveillance programs. PPSA is concerned with a range of privacy and surveillance issues, from the monitoring and surveillance of American citizens under the guise of foreign intelligence gathering, to the monitoring and surveillance of domestic political activity and association under the guise of federal and state law enforcement. In both instances allowing the government to collect and access private information concerning political and other activities poses a tremendous danger of political abuse and should be carefully cabined both by statute and by the Constitution.

Neither of the above *amici* is publicly traded or has any parent corporations, and no publicly traded corporation owns 10% or more of either of the *amici*.

Amici are interested in this case both as a matter of constitutional principle and for organizational concerns regarding the confidentiality of their own donors. PRI's Center for California Reform develops policy solutions frequently at odds with those favored by California, and accordingly most of its donors seek anonymity. Although PPSA is not subject to California's current disclosure demands, the lax constitutional analysis by the Ninth Circuit could permit far more aggressive disclosure demands as well, imposed at the whim of the current or some future Attorney General.

SUMMARY OF ARGUMENT

Amici agree with Petitioner and others that the decision below applied a standard of review that conflicts with this Court's cases, ignored the lack of a genuine interest or need for wholesale collection of donor information, and ignored the significant adverse consequences of such donor disclosure becoming public.

Amici separately note that the decision does considerable damage to the First Amendment by applying a standard of review for infringements of the right to political and other protected association below even that applied to commercial speech. And the decision incorrectly credited the *ad hoc* views of the Attorney General as validly reflecting an "important" state interest.

Regarding the standard of review, even the more lenient intermediate scrutiny applied to restrictions on commercial speech is far more searching than the lax scrutiny applied by the court below. The restriction in this case would not survive even intermediate scrutiny because the Attorney General has not demonstrated that the harms he seeks to address are real, that the wholesale disclosure requirement directly and materially advances his claimed interest in combatting fraud, or that the infringement on associational privacy is reasonably tailored to that claimed interest. See *Edenfield* v. *Fane*, 507 U.S. 761, 770-71 (1993). Given that lower scrutiny of restrictions on commercial speech was adopted in part to avoid diluting the stronger First Amendment protections for

non-commercial speech, the decision below flips the entire regime of tiered scrutiny on its head.

Regarding the nature of the interest asserted, *amici* maintain that an important state interest must be reflected in and defined by state legislation, not by the *ad hoc* whims of the Attorney General exercising broad discretion. The very existence of such claimed discretion suggests indifference to the policy choices one way or the other, which is not the sign of an "important" interest. It is up to the courts to assign the appropriate *constitutional* weight to a claimed interest, not executive officers. Analogous examples such as the doctrine of constitutional avoidance, the rule of lenity, federal preemption, and *Chevron* deference all suggest that *ad hoc* agency choices to not have equal dignity or equal constitutional weight as legislative choices reflected in statutes. The sweeping and generic interest asserted in this case thus cannot be deemed "important" for First Amendment purposes.

Finally, *amici* wish to highlight the separate danger from compelled disclosure of political abuse by the government itself. While others will discuss the adverse consequences of public disclosure of donor information, the potential abuse by government officials themselves further highlights the importance of this case. The seminal case of *NAACP* v. *Alabama* is the obvious example of such government efforts to target those who associate with disfavored groups or views, but the evidence in this very case shows the danger from the California Attorney General's office as well. This Court thus should grant the Petition to correct the serious and dangerous flaws of the decision below.

ARGUMENT

I. The Decision Below Adopts an Erroneous Approach to First Amendment Scrutiny.

A. The Ninth Circuit Diluted Protection of Political Association Below the Intermediate Scrutiny that Protects Commercial Speech.

Despite purporting to apply "exacting scrutiny," App. 60a, the Ninth Circuit defined such scrutiny in a manner barely beyond rational basis and applied its diluted test in a manner that is unrecognizable as any form of "heightened," much less "exacting," scrutiny. Petitioner and other expected *amici* have or will discuss the inadequacies of the Ninth Circuit's lax standards and abandonment of the narrow tailoring requirement. See, *e.g.*, Pet. 17-33.

Amici here agree with Petitioner and others that the scrutiny applied below is constitutionally inadequate and conflicts with decades of precedent including *NAACP* v. *Alabama*, 357 U.S. 449, 460-61 (1958). They write separately, however, to note the additional discordance that the decision below actually reduces the level of protection for political association below the protection given to commercial speech.

In *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 564 (1980). this Court controversially applied a lower level of scrutiny to commercial speech than to political speech, adopting a so-called intermediate level of scrutiny. While such diluted protection has been much criticized, some have defended it as a way of

ensuring that First Amendment protection of core political speech and association remained strong and undiluted. Compare *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 518, (1996) (Thomas, J., concurring in part and concurring in judgment) (criticizing *Central Hudson* test as too lenient), with *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.").

Despite the concern to not dilute the stringent protection for non-commercial speech that gave rise to "intermediate" scrutiny for commercial speech, the decision below turns all of that on its head by reducing the level of protection for non-commercial expressive association well below that accorded to commercial speech. Indeed, even as intermediate scrutiny has proven itself a vigorous check on arbitrary and unsupported government encroachment on commercial speech, the supposedly "exacting" scrutiny applied by the Ninth Circuit has proven a toothless guardian of political and other expressive association.

In commercial speech cases, this Court has held that state burdens on First Amendment rights will be sustained only if the State asserts a "substantial interest" and its means are "designed carefully to achieve the State's goal." *Central Hudson*, 447 U.S.at 564. That "burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real

and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S.at 770-71.

In the decision below, by contrast, the Ninth Circuit failed virtually every aspect of even such intermediate scrutiny. For example, it failed to require a showing of real rather than speculative harms, or that wholesale donor disclosure would solve any speculative concern with fraud and ignored extensive evidence and findings to the contrary. See App. 45a (in 500 investigations over 10 years "only five instances involved the use of a Schedule B" and in each one the relevant information "could have been obtained from other sources"); *id*. (testimony that "[t]he Attorney General does not use the Schedule B [donor information] in its day-to-day business").[2] Such " 'ineffective or remote support for the government's purpose,' " is insufficient to uphold a restriction even under intermediate scrutiny. *Edenfiled*, 507 U.S. at 770 (citation omitted); *id*. at 771 (State presented "no studies that suggest * * * the dangers of fraud" that it claimed to fear.").[3] In this case, the restriction upheld is not based on even the slightest evidence that

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[2] See also App. 45a (evidence "demonstrated no harm" the State would suffer from not collecting donor information); App. 47a (donor disclosure requirement "demonstrably played *no role* in advancing the Attorney General's law enforcement goals for the past *ten years*") (emphasis added).

[3] The lack of need for wholesale information collection is reflected in the fact that the Attorney General only rarely seeks it through *ad hoc* requests and has neither sought broader legislation nor adopted a formal rule. See Pet. 9-11. Such an inconsistent approach to a claimed interest casts doubt on both its genuineness and its importance. See *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 189 (1999).

any particular donor (or any particular charity) is a fraud threat and thus represents no more than a generalized and prophylactic claimed interest.[4]

Also deficient is the Ninth Circuit's failure to require even a semblance of narrow tailoring. Rather, the court required only that the challenged disclosure demand be "substantially related" to "a sufficiently important governmental interest," and ignored evidence that "the Attorney General can achieve his goals through other means." App. 15a-23a. But once again, even intermediate scrutiny would reject such an approach. *Central Hudson*, 447 U.S. at 564 (if interest "could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive").

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[4] The Ninth Circuit's willingness to allow the creation of a huge data pool in which the California Attorney General can conduct fishing expeditions, without any individualized suspicion of particular charities or donors, raises not just First Amendment violations, but Fourth Amendment concerns as well. There is no search warrant authorizing such sweeping and continuous information collection, nor any basis for seeking or obtaining one. There is only a pool of ideology-matched donor information acting as a gigantic attractive nuisance waiting to be abused by a politically ambitious and/or ethically challenged politician in the Attorney General's office. See *infra* at 14. It also calls to mind the bulk collection, storage, searching, and unmasking of call data records incidentally involving American citizens even where such records have no genuine foreign intelligence purpose. See Charlie Savage & Jonathan Weisman, *N.S.A. Collection of Bulk Call Data Is Ruled Illegal*, NEW YORK TIMES, May 7, 2015, available at https://www.nytimes.com/2015/05/08/us/nsa-phone-records-collection-ruled-illegal-by-appeals-court.html.

Lacking sufficient support to satisfy even the intermediate scrutiny applied to commercial speech, the Ninth Circuit has reached its result only by severely weakening the protections for core First Amendment associational rights established in *NAACP* v. *Alabama* and its progeny. This Court should grant certiorari to correct the Ninth Circuit's erroneous and bitterly ironic dilution of First Amendment protection for political and other non-commercial association.

B. The Ninth Circuit Improperly Credits as an Important State Interest Discretionary Action by the Attorney General Not Supported by Clear Statutory Language.

In determining whether an interest asserted in litigation is an important, substantial, or compelling state interest, courts should be attentive to the source of the claimed interest and whether it genuinely represents the policy choice of the State, qua State, rather than the choice of individual politicians with their own agendas. The usual way to do that is to look to the legislature and any express statutory language asserting an interest and prioritizing it above potential constitutional concerns. That basic principle is the essence of the constitutional avoidance doctrine, the rule of lenity, the anti-delegation doctrine, and others.[5] Similarly, federal agency actions do not

[5] Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) ("in the absence of a clear expression of Congress' intent * * * we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive ques-

preempt state law when they are not pursuant to clear statutory authorization or rulemaking. See, e.g., *Wyeth* v. *Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring in the judgment).

While California, of course, is free to interpret its own laws and confer vast discretion on its law enforcement officers that might otherwise be improper at the federal level, such open-ended discretion and the policy choices made pursuant should not rise to the level of a "substantial" or "important" interest as a matter of federal constitutional law. Indeed, in conferring open-ended and unguided discretion on law enforcement, the legislature has effectively declared that it and the State as a whole do not have a significant interest in the outcome. Indeed, such discretion necessarily includes the option *not* to seek wholesale information, suggesting that the State is indifferent as to which choice the Attorney General might make. If the State is thus indifferent to the choices made by the Attorney General, those choices can hardly represent an important interest of the State itself.

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tions arising out of the guarantees of the First Amendment"); *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) (rule of lenity providing that "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language"); *Carter* v. *Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("Making something a crime is serious business. It visits the moral condemnation of the community upon the citizen who engages in the forbidden conduct, and it allows the government to take away his liberty and property. The rule of lenity carries into effect the principle that only the legislature, the most democratic and accountable branch of government, should decide what conduct triggers these consequences.").

Even assuming the Attorney General has general discretionary authority under California law to seek wholesale collection of donor records, that would at best make the claimed choice a *permissible* one but would say nothing about its weight. Rather than allow the constitutional weight of an interest to turn on the mere assertion of a single state officer, it is the responsibility of this Court to determine the constitutional nature and weight of any asserted interest for First Amendment purposes. This Court should not defer to the assertions of the Attorney General on such a constitutionally significant question, but should, at a minimum, demand stronger evidence that any asserted "important" interest is a choice made by the State itself through its legislature. In this case there was no such evidence of a legislative policy choice that would somehow support the wholesale invasion of First Amendment rights sought here.

Particularly inadequate was the Ninth Circuit's bald assertion that the wholesale donor disclosure requirement " 'clearly further[s]' the state's 'important government interests' in 'preventing fraud and self-dealing in charities * * * by making it easier to police for such fraud.' " App. 22a (quoting *Citizens United* v. *Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018)). Nowhere in the California Code is there express or even implied authorization to further such a generic law enforcement interest by encroaching on First Amendment rights. Indeed, despite its asserted "importance," the mandate was not divined from the language of one of the Attorney General's existing regulations until ten years after the regulation was

adopted.[6] And precisely because this claimed interest is not embodied in a statutory command, it may not even be the policy of the Attorney General tomorrow, or of the next Attorney General to inhabit the office. Such a discretionary and variable policy choice not supported by clear statutory language cannot possibly be counted as an "important" state interest, regardless whether it reflects a permissible exercise of discretion under California law.[7] Such amorphous, variable, and insufficiently established state interests provide an inadequate anchor for the narrow tailoring required under the First Amendment.

An analogous situation arises in cases involving constitutional avoidance, federal supremacy, or other instances that potentially encroach on important

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[6] See Pet. 8-10. The regulation at issue, 11 CAL. CODE REGS. § 301, requires charities annually to file IRS Form 990, but makes no mention of Schedule B, containing the names and addresses of donors. By federal statute, this information is nonpublic. With limited exceptions, it is a crime for the IRS to disclose it even to state regulators. 26 U.S.C. §§ 6104(b), 6104(c)(3).

[7] A better source for what interests the State deems "important" is the California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100 *et seq.* (the "Consumer Privacy Act"), which takes effect on January 1, 2020. The law will protect personal information such as names and addresses from unwanted storage in company databases. It is particularly telling that the two California Attorneys General who have successively been Respondents in this case show no concern for donor privacy yet have both publicly criticized the invasion of privacy by "Big Tech," including Google, Facebook, and others. Victoria Graham, *Taming Big Tech Is 'Balancing Act' for California's Top Enforcer*, BLOOMBERG LAW: BIG LAW BUSINESS, Aug. 28, 2019, available at https://biglawbusiness.com/taming-big-tech-is-balancing-act-for-californias-top-enforcer.

rights or interests. Thus, in the constitutional avoidance context, if a law can be read to avoid a constitutional encroachment it will be read in that manner and even agencies will lack discretion to force a constitutional showdown absent clear direction from the legislature. *Gutierrez* v. *INS*, 745 F.2d 548, 550 (9th Cir. 1984) (Kennedy, J.) (citation omitted) (constitutional avoidance doctrine "must bind not only the courts, but also the administrative agencies which they review, for if it did not, such agencies, 'by unnecessarily deciding constitutional issues, would compel the courts to resolve such issues as well.' "). Similarly, in the *Chevron* context, many expressions of administrative or executive policy will not be given substantial weight if they are not embodied in clear statutory language or at least in full-blown administrative rulemaking.[8] The *ad hoc* choices of an agency are not entitled to deference in general, much less deference that encroaches upon First Amendment protections.

While *Chevron* and its progeny do not, of course, bind the States, they are instructive of how one determines the genuineness of a position taken by an agent of the State rather than by the State (writ large) speaking in full throat through its legislature. Just as courts will not defer to *ad hoc* discretionary

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[8] *Chevron* deference typically applies only to statutory interpretations set forth in regulations formally issued after notice and comment. Informal interpretations, such as those "contained in policy statements, agency manuals, and enforcement guidelines," lack the force of statutory law, and "do not warrant *Chevron*-style deference." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000).

choices of federal executive agents seeking to force a constitutional conflict, they should not accord the constitutional significance of an "important" state interest upon the musings or mere desires of the Attorney General lacking express support of a specific statute.

Non-legislatively defined "governmental interests" should not be deemed sufficiently important to justify burdening the First Amendment rights of individuals and associations.

II. The Attorney General's Indiscriminate Collection of Donor Data Will Inevitably Be Abused for Political Purposes.

Apart from the violence the decision below does to the First Amendment, the Petition raises an important question that warrants this Court's review given the potential abuse of power in the data collection regime approved by the Ninth Circuit.

The Ninth Circuit erroneously deemed the data collection below to be only a "modest burden" on First Amendment rights. App. 104a, 109a. Others will discuss the dangers of disclosure, whether through bad luck or incompetence, and the threats to donors who are thus exposed.

Amici here instead highlight another serious threat from such infringement of associational privacy – the use of the information by government itself for political purposes. Apart from concerns with public disclosure and harassment or violence from members of the public, many donors have ample reason to fear retaliation or harassment directly from the Attorney General's office even without broader disclo-

sure. In this case, for example, there was evidence of potential retaliation against Petitioner for asserting its First Amendment rights in this very case. See Plaintiff's Proposed Findings of Fact and Conclusion of Law, Case 2:14-cv-09448-R-FFM, (M.D. Cal.), Pacer Doc. 177-1, Filed March 14, 2016, ¶¶418-20 (testimony regarding Attorney General's Office attitudes towards Petitioner in the wake of this lawsuit); see also *id*. at ¶¶ 405-417 (describing evidence of political bias of Attorney General, fear or retaliation, and political targeting of donors).

Such concern with political abuse is hardly novel or limited to the particulars of this case. Indeed, one of the very points of associational privacy is to protect people from a hostile government. The most obvious example is *NAACP* v. *Alabama* itself, as well as targeting of persons affiliated with communist groups. See, *e.g.*, *United States* v. *Robel*, 389 U.S. 258, 262-263 (1967) (attempt to penalize citizens associated with communist groups).

The Ninth Circuit failed even to address the risk of harassment and intimidation faced by donors to charitable organizations whose policy views are disfavored by the Attorney General and others in California government. And even if one were charitably to believe that past, present, or future California Attorneys General are above such political abuse of their perceived adversaries, one need only recognize that if the decision below is indeed the proper test for invasion of donor privacy, it will be the rule applied in other States as well, with political officers having a variety of views and a variety of opponents.

The protection of liberty requires recognition that jackboots come in all sizes and colors—black, red, blue, and many variations in between. At any given time, some groups will be out of favor with the current regime, and the temptation to abuse government power will always exist. Such abuses can be aimed at persons who support opponents, opposing viewpoints, or even nominally friendly rivals. Even if the donor information being collected by the Attorney General is not publicly disclosed, it can easily and quickly become fodder for a politician's enemies list.

The long roster of such abuses of power in the history of American government teaches that it is not unreasonable paranoia but constitutional prudence that should lead us to avoid, wherever possible, giving those in power weapons with which to intimidate or target those who disagree with them. The First Amendment is one important bulwark against such abuses and the decision below creates cracks in that bulwark that are worthy of this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

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