No. **19-251**

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.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

Founded in 1989, The Buckeye Institute is an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.

The staff at Buckeye accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those solutions for implementation in Ohio and replication across the country.

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.

Among Buckeye's key programs is an Economic Research Center that provides dynamic economic models, independent research, and empirical analysis in states across the country on a spectrum of public

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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 *amicus 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 *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

policy issues, including taxation, budget, energy, and health care.

Buckeye has a substantial interest in the important question presented in this case, namely, whether 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. As Buckeye seeks to expand its operations in California, the Ninth Circuit's decision presents a significant barrier. Under that holding, Buckeye must either forego operating and fundraising in California or else disclose the names and addresses of its significant donors. Either choice will inflict irreparable harm upon Buckeye's and its supporters' freedom to associate.

## 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 general interest in "investigative efficiency."

This case implicates a split of authority regarding the standard for evaluating associational privacy claims. Government actions compelling disclosure of members or donors must satisfy "exacting scrutiny."

This Court has described that standard in conflicting terms in the electoral context, equating it with strict scrutiny in some instances, and with intermediate scrutiny in others. Not surprisingly, then, the circuits also are of different minds in applying this "exacting scrutiny" standard in the electoral context. Even so, this Court has consistently applied a more stringent exacting scrutiny test outside the election context. The Ninth Circuit's decision adds error to the confusion of the circuit courts by failing to apply the exacting scrutiny standard that this Court has prescribed since *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) outside of the electoral context.

Under the Ninth Circuit's holding, the tens of thousands of charities and 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 penalties 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.

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

The First Amendment harms of the decision below, if left to stand, cannot be undone later. This Court should intervene now.

## ARGUMENT

### I. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE A WIDENING CONFLICT REGARDING THE MEANING OF EXACTING SCRUTINY.

Despite consistently requiring a version of exacting scrutiny akin to strict scrutiny in non-election associational privacy cases, this Court has articulated differing standards for what constitutes exacting scrutiny within the context of election-related disclosure requirements. These disparate standards regarding what constitutes exacting scrutiny in the election context have caused confusion and conflict in the courts of appeals. The Ninth Circuit's decision below adds error to this confusion by applying the less stringent version of exacting scrutiny reserved by this Court for election-related disclosure in the context of non-election related associational privacy. This case provides an excellent vehicle for clarifying the meaning of the "exacting scrutiny" standard in associational privacy cases.

#### A. Lower courts face confusion concerning the proper definition of exacting scrutiny.

Since *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court consistently has held forced disclosures that threaten freedom of association to exacting scrutiny. 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, 297 (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 equivalent to strict scrutiny, while at others 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").

Despite the apparent inconsistency within the electoral context, this Court has continued to consistently apply 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").

This Court's disparate statements about what constitutes exacting scrutiny in the electoral context has generated significant confusion among the courts of appeal. *Compare, e.g.*, *Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) ("The strict or exacting scrutiny standard requires that a state must show the regulation in question is substantially related to a compelling government interest and is narrowly tailored to achieve that end."), *with Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 282 (4th Cir. 2013) (under "exacting scrutiny," the government must "show that the statute bears a

'substantial relation' to a 'sufficiently important' governmental interest").

### B. The Ninth Circuit erred in failing to apply this Court's *NAACP* standard for exacting scrutiny.

The Ninth Circuit's decision now adds error to this confusion. The Ninth Circuit purported to apply a version of exacting scrutiny 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.

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 his 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 *all* of 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 may well reveal "every associational tie" of not only of 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 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 other states to shift their policies on reporting requirements for tax-exempt organizations. Indeed, several other 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 other states have considered enacting similar measures. *See* Matt Nese, *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 supported in that 1,800 Schedule B forms were improperly posted to the Internet; and inadequate security precautions made 350,000 Schedule B forms accessible 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. 79 (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, and 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 provides 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 purportedly confidential information. *Compare* Cal. Code Regs. tit. 11, § 310(b); 26 U.S.C. §§ 7231(a)(1)-(2); 7213(A)(a)(2); 7213A(b)(1); 7216; 7431.

Even these 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) (National Organization for Marriage's unredacted Schedule B was published by the Huffington Post after the IRS released it to the Human Rights Campaign 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 may chill 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 take into account the possibility of government reprisal.

Disclosure to the Attorney General's office alone is sufficient to trigger 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 himself. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 200 (2010). Think tanks like AFPF 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). 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).

The Buckeye Institute has experienced this chilling effect firsthand. In 2013, shortly after the Ohio General Assembly relied upon Buckeye's arguments in 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 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 donors expressed concern that, if their names appeared on Buckeye's Schedule B or other Buckeye records subject to disclosure in the audit, they too would be subjected to retaliatory audits. Numerous individuals therefore opted to make smaller, anonymous, cash donations—foregoing a donation receipt—in order to avoid any potential retribution based on their contributions. Thus, concerns about disclosure to a government agency fueling government retaliation had a demonstrable chilling effect on the freedom to associate.

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://goldwater-media.s3.amazonaws.com/cms_page_media/2015/8/12/Dark%20Money%20Flipbook.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 similar 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/sites/default/files/03-13-15_dranias_-_civic_engagement.pdf. Indeed, such harassment has already been experienced, 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 as between a man and a woman, 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 lost their jobs; others faced death threats—all because they supported Proposition 8 and California released their personal information. *See*

*Citizens United*, 558 U.S. at 481-82 (Thomas, J., dissenting).

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 petition for a writ of certiorari should be granted.

Respectfully submitted,

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