No. 19-251

In the
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

BRIEF OF THE PUBLIC INTEGRITY ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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RULE 29.6 STATEMENT

Public Integrity Alliance, Inc. is a non-profit corporation organized under the laws of Arizona. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTERESTS OF *AMICUS CURIAE*[1]

The Public Integrity Alliance ("PIA") is a government ethics watchdog that speaks truth to power and, in so doing, attracts very dangerous enemies. The PIA is a nonprofit corporation headquartered in Arizona that is organized and operated for the purpose of promoting social welfare, pursuant to section 501(c)(4) of the Internal Revenue Code of 1986, as amended. Because its issue advocacy and pursuit of the public interest frequently entails exposing corruption, official misconduct and improper uses of taxpayer money by powerful government officials, PIA's fundraising and operational viability depends directly and acutely on strong safeguards for donor privacy. Once itself the target of a vindictive Attorney General seeking political retribution, PIA is singularly cognizant of the perils to free association and robust advocacy that the Ninth Circuit's judgment portends.

SUMMARY OF THE ARGUMENT

Recognizing "the vital relationship between freedom to associate and privacy in one's associations," this Court in *NAACP v. Patterson*, 357 U.S. 449, 462 (1958), crafted a strong doctrinal bulwark against the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus*, its counsel, or its members made such a monetary contribution. Counsel for all parties received notice at least 10 days before the due date of *amicus*'s intention to file this brief and consented to the filing of the brief.

compelled disclosure of the confidential financial and non-financial relationships that undergird the activities of public interest organizations. Over the ensuing six decades, however, this constitutional barricade to governmental encroachments in associational activities has been steadily eroded by two inauspicious trends. First, some lower courts have held that nonprofits wishing to shield donor information make implausibly rigorous factual showings of tangible "burdens" on expressive and associational activities—a requirement that is both constitutionally unsound and untethered from practical realities. Second, while enhancing the evidentiary onus on those exercising First Amendment rights, these courts have concomitantly deferred to the dubious assertions of governmental parties concerning the ostensible "interests" animating their incursions on associational freedoms, and the fit between these objectives and the coerced disclosure of private information. Both defects of this jurisprudence are on full display in the Ninth Circuit's opinion. Having been targeted for retaliation—including lawsuits and regulatory efforts to force disclosure of its confidential donors—by a spiteful Attorney General angered by its public interest advocacy, PIA is keenly aware of the hazards to associational freedom that ensue when courts defer inordinately to the government at the expense of those exercising their First Amendment rights.

Informed by its own experience and drawing in part on the framework developed lower courts (including the Ninth Circuit) in formulating an evidentiary "First Amendment privilege," the PIA instead proposes that any organization subjected to a governmental demand

for its private associational information need only establish a *prima facie* showing of an "arguable First Amendment infringement." The burden then shifts to the government to prove both a compelling interest in the information and the absence of a more narrowly tailored or "less restrictive" means of advancing that interest. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1160-61 (9th Cir. 2010). This approach not only recognizes that the practical effects of coerced disclosure often are difficult to document and quantify, but vindicates the paramount importance of First Amendment freedoms in our constitutional pantheon, and restores the proper equilibrium established in *NAACP* between individual rights and legitimate regulatory imperatives.

More fundamentally, this case should serve as a catalyst for a broader reassessment of the nature and magnitude of the putative governmental "interests" that can sustain the coerced disclosure of internal associational information. Historically, this Court has countenanced burdens on First Amendment rights only when necessary to prevent or remedy real or perceived illicit conduct or other articulable injuries to the public welfare. Increasingly, however, courts have fashioned—most notably in the campaign finance context—an amorphous "informational interest" to justify compelled disclosures. Not only is this notion conceptually and empirically unsound, it improperly enhances government power at the expense of the individual freedoms the First Amendment exists to protect.

ARGUMENT

I. THE NINTH CIRCUIT'S ERRONEOUS FORMULATION OF "EXACTING SCRUTINY" IS INSUFFICIENTLY PROTECTIVE OF FIRST AMENDMENT RIGHTS AND UNDULY DEFERENTIAL TO THE GOVERNMENT

This Court's First Amendment jurisprudence is constructed on two foundational pillars. The first is that "[t]he whole point of the First Amendment is to afford individuals protection . . . The First Amendment does not protect the government." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 206 (2014). In securing expressive activities from governmental interference, the First Amendment's protections hence "do[] not leave us at the mercy of *noblesse oblige*" and are not limited "only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 480, 470 (2010). In other words, a citizen need not justify his expressive or associational activities to the government (or, for that matter, to the courts); rather, the government must prove that regulatory encumbrances on such activities are no greater than necessary to advance a compelling public interest.

The second is a recognition that the compelled disclosure of associational information can be just as pernicious to First Amendment freedoms as direct prohibitions on protected speech or conduct. *See NAACP*, 357 U.S. at 462 (acknowledging that "[i]nvioability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association"); *Talley v. California*, 362

U.S. 60, 64–65 (1960) ("There can be no doubt that" an ordinance requiring handbills to bear the names and addresses of their sponsors "would tend to restrict freedom to distribute information and thereby freedom of expression."); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (expressive and associational freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."); *Am. Fed'n of Labor & Cong. of Indus. Organizations v. Fed. Election Comm'n*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.").

The confluence of these two principles has impelled this Court to affirm that governmentally imposed burdens on the right of association may be sustained only by means "closely drawn to avoid unnecessary abridgement of associational freedoms." *In re Primus*, 436 U.S. 412, 432 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

Contrary to these settled precepts, the Ninth Circuit brushed aside sworn testimony from multiple witnesses attesting that the Petitioner has lost—and will continue to lose—financial support as a direct consequence of California's regulatory mandate that the Petitioner disclose to the state's Attorney General the identities of its major donors. *See Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000, 1013 (9th Cir. 2018). The fact that "*some* individuals who have or would support the plaintiffs *may* be deterred

from contributing" did not, according to the court, establish the requisite substantial burden on First Amendment rights. *See id.* at 1014. Similarly, the court discounted as insufficient specific evidence of retaliation and harassment directed at persons who are (or are perceived to be) affiliated with the Petitioner, to include death threats and boycotts. *See id.* 1015-16.

The rigorous evidentiary showing demanded of the Petitioner, however, contrasts notably with the court's solicitude of the government's stated desire to avoid supposed inefficiencies and bureaucratic nuisances. Although California's compelling interest in policing abuses and misconduct by charitable organizations could be easily advanced by deploying subpoenas or other investigatory tools directed specifically at charities suspected of engaging in such malfeasance, the Ninth Circuit credited California's assertions that such targeted tactics are "'not the best use of . . . limited resources'" and that its preference for indiscriminate compelled disclosure "'increases investigative efficiency.'" *Id.* at 1010. Further, despite insisting that the Petitioner should have furnished even more specific instances of foregone contributions or reprisals against donors, the court was content to credit the government's apparent mere say-so that compelling donor disclosures only from charities actually suspected of wrongdoing would risk "tipping . . . off" those entities. *Id.*

By dispensing with the requirement that California's disclosure mandate be "narrowly tailored" to achieve its purported objectives, the Ninth Circuit unilaterally excised an integral component of the

exacting scrutiny standard, in contravention of this Court's precedents and their application in other Circuits. In this respect, the Ninth Circuit's divergence from settled law is capably outlined in the Petition, and PIA will not reiterate those doctrinal arguments here. Instead, the PIA wishes to relate how its own experiences in high-profile advocacy activities underscore the insufficiency of the Ninth Circuit's approach for preserving core First Amendment rights. PIA respectfully contends that the correct framework for analyzing claims of First Amendment infringements in the compelled disclosure context—as informed by *NAACP* and its progeny—is that when a speaker makes a *prima facie* showing of an arguable First Amendment infringement, the burden shifts to the government to prove that its statutory or regulatory prescriptions are "narrowly tailored" and the "least restrictive means" of advancing a compelling state interest.

A. The Ninth Circuit's Flawed Approach Will Cause a Chilling of Constitutionally Protected Expressive and Associational Activities

The notion that government officials will faithfully safeguard private associational information as stewards of the public good may be a worthy aspiration —but it is ultimately a chimera that the Framers wisely rejected. PIA was established in 2012 for the primary purpose of promoting ethics and integrity in government. In furtherance of this mission, PIA regularly uses broadcast and social media, mailers, and other outlets of communication to alert the public to

instances of corruption, official misconduct and improper uses of taxpayer money. Its activities have directly led to several criminal and regulatory investigations and, more importantly, the resignation or electoral defeat of four state-level officials in two states. As a nonprofit organization without any business or revenue-generating activities, PIA depends entirely on third parties to fund its activities.

In approximately November 2013, PIA widely disseminated two mailers and a video that was aired on television and posted to the Internet website YouTube. The mailers and advertisement were critical of then-Arizona Attorney General Tom Horne, and publicly called upon him to return $400,000 in illegal campaign contributions. One of the mailers also encouraged citizens to contact their legislators to urge them to support ethics reforms in the Attorney General's office.

PIA's advocacy—which depended on the financial sustenance provided by confidential donors—precipitated a retaliatory onslaught by an enraged Horne. Shortly after the advertisement began airing, Horne's attorney sent a letter to media outlets demanding that they cease broadcasts of the ad and threatening to take legal action. In addition, Horne (through his attorney) also filed a campaign finance complaint with the Arizona Secretary of State, alleging that PIA constituted a "political committee" under Arizona law and thus must comply with the registration and reporting requirements—including the disclosure of all contributors—applicable to such

organizations.[2] Horne also enlisted the resources and prominence of his office to advance his crusade against the PIA; an official spokeswoman in the Arizona Attorney General's Office publicly assailed PIA as "cowardly" and "liars." *See* Jeremy Duda, *Group Runs TV Ads on Horne Campaign Finance Woes*, ARIZ. CAPITOL TIMES, Nov. 14, 2013, *available at* https://azcapitoltimes.com/news/2013/11/14/arizona-public-integrity-alliance-runs-tv-ads-on-horne-campaign-finance-woes/. Horne complemented these intimidatory tactics with a defamation lawsuit against PIA and its individual officers and directors, which he promptly used as a device to demand discovery into PIA's private internal communications and bank records. *See Horne v. Ariz. Public Integrity Alliance, Inc.*, Arizona Superior Court, CV2013-055021; *see also Tom Horne, Arizona AG, Files Lawsuit Over Alleged Defamatory Ads*, UNITED PRESS INT'L, Nov. 21, 2013, *available at* https://www.upi.com/Top_News/US/2013/11/21/Tom-Horne-Arizona-AG-files-lawsuit-over-alleged-defamatory-ads/17931385068937/?ur3=1.

It is difficult to envision a more paradigmatic illustration of constitutionally protected advocacy than PIA's advertisements, or a more convincing testament to the dangers of coerced disclosure than Horne's campaign of retribution. Yet it is doubtful that the Ninth Circuit's heavily diluted variant of "exacting scrutiny" would have secured PIA's exercise of its First Amendment rights, had Arizona enacted a disclosure

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[2] The Secretary of State subsequently determined that PIA was not a political committee and that there was no reason to believe PIA had violated campaign finance laws.

mandate comparable to the California regulation here. Like the Petitioner, PIA undoubtedly could have averred that such a disclosure requirement would have deterred one or more of its major contributors from furnishing financial support. According to the Ninth Circuit, however, such a showing is generally insufficient to establish the requisite substantial First Amendment burden. *See Americans for Prosperity Foundation*, 903 F.3d at 1014.

More fundamentally, the Ninth Circuit's myopic and unduly constricted understanding of the "substantial burden" concept exhibits a troubling disconnect from practical reality. While PIA can confirm with certitude that a compelled disclosure regime would cost it donations, this injury often is not susceptible to a linear causal narrative that links particular contributions from specific individuals to the presence or absence of a concrete disclosure requirement. Rather, disclosure mandates exert a general and pervasive chill across the advocacy landscape, and preemptively thwart associational activities that otherwise would have occurred. For example, many of PIA's donors—including some whose contributions underwrote its 2013 advertisements criticizing Horne—affirmatively approach the PIA with offers of support, aware of the organization's long track record of fighting corruption and holding elected officials accountable. Because a comparable disclosure mandate in Arizona likely would have deterred these donors from ever contacting PIA in the first place, it would have been effectively impossible for PIA to identify and quantify this loss to a court if it had wished to challenge such a hypothetical requirement in 2013.

Similarly, while Horne's response to PIA's advertisements unmistakably smacked of retaliation and harassment, it would have been difficult for PIA to prove *ex ante* that compelled disclosure of its finances would place its donors at risk of retribution by a vindictive Attorney General. In short, by demanding an implausibly rigorous evidentiary showing of a "substantial burden" on First Amendment activities, the Ninth Circuit not only deviated from the framework formulated in *NAACP*, but failed to heed the intrinsic chill of First Amendment activities embedded in every demand by the government for private associational information.

B. Upon a Showing of an Arguable First Amendment Infringement, the Government Must Establish that Coerced Disclosure Is the Least Restrictive Means of Advancing a Compelling Interest

The Ninth Circuit's eschewal of a "narrowly tailored" criterion from its putative "exacting scrutiny" analysis not only departs from this Court's precedents but also the Ninth Circuit's own articulation of the exacting scrutiny standard in similar contexts. Joining other courts nationwide, the Ninth Circuit has forged an evidentiary "First Amendment privilege" that curtails compelled discovery—whether by a governmental entity or a private party—into an organization's sensitive internal associational information. *See Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). Under this rubric, a party invoking the privilege "must demonstrate . . . a 'prima facie showing of arguable first amendment

infringement,'" in the form of, for example, threats of harassment, membership withdrawals, or similar chilling effects. *Id.* at 1160 (internal citations omitted). Upon such a showing, the burden shifts to the party seeking discovery to establish that it is not only "rationally related to a compelling governmental interest" but also constitutes "the least restrictive means of obtaining the desired information." *Id.* at 1161 (internal citation omitted). In this vein, the demand for disclosure "must . . . be carefully tailored to avoid unnecessary interference with protected activities, and the [requested] information must be otherwise unavailable." *Id.*

While it is not a perfect transposition of the *NAACP* framework and carries a risk of undisciplined application, this conception of exacting scrutiny at least retains two key attributes missing from the Ninth Circuit's opinion in this case. First, it acknowledges the practical reality that the chilling effects of compulsory disclosure often elude simple quantification on an *ex ante* basis; it hence is sufficient that a party seeking the protections of the First Amendment delineate some plausible and credible adverse impact—as the Petitioner has done here. *See id.* at 1163 (finding that declarations describing in general terms the anticipated effects of compelled disclosure were sufficient, explaining that "[a]lthough the evidence presented . . . is lacking in particularity, it is consistent with the self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery requests"); *Democratic Nat'l Comm. v. Arizona Sec'y of State's Office*, CV-16-01065-PHX-DLR, 2017 WL 3149914, at *2 (D. Ariz. July 25, 2017) (sworn

averment that ""[d]isclosure of [the requested] communication [by political party] risks revealing the viewpoints, political associations, and strategy of such partners,' and might chill such partners from associating with the [the party] in the future" constituted *prima facie* showing of First Amendment infringement); *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 210 (N.D. Cal. 1983) (holding that "the litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure. It need only show that there is some probability that disclosure will lead to reprisal or harassment." (internal citation omitted)); *The Ohio Org. Collaborative v. Husted*, 2:15-CV-01802, 2015 WL 7008530, at *3 (S.D. Ohio Nov. 12, 2015) (holding that political party satisfied threshold showing of potential First Amendment infringement, even absent specific evidence of harassment or retaliation risks, adding that "the compelled disclosure of such sensitive [financial and communications] information in the context of highly charged litigation involving issues of great political controversy would have a chilling effect on plaintiffs' freedom of association by adversely impacting their ability to organize, promote their message(s), and conduct their affairs.").

Second, *Perry* and other First Amendment privilege cases maintain fidelity to this Court's requirement that compelled disclosures must be not only premised on a compelling government interest, but also the "least restrictive means" of obtaining information that is "highly relevant" to a specific legal claim or defense. *See Perry*, 591 F.3d at 1161 (noting that, upon a *prima facie* showing of potential First Amendment

infringement, party seeking disclosure must demonstrate that the demand is "carefully tailored to avoid unnecessary interference with protected activities"); *Montanans for Cmty. Dev. v. Motl*, CV 14-55-H-DLC, 2015 WL 13716091, at *3 (D. Mont. Aug. 7, 2015) (government's discovery request for organization's "donor names and donation amounts, bank account information, internal communications, are not sufficiently tailored to protect" organization's First Amendment rights); *cf. In re Slack*, 768 F. Supp. 2d 189, 194–95 (D.D.C. 2011) (when confidential information is demanded of a journalist, First Amendment principles require the court to "consider whether the party seeking the information has exhausted all reasonably available alternative sources") (citing *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981)).

As distilled in this context, exacting scrutiny thus directs that the Respondent may compel disclosure of the Petitioner's internal associational information only if he can establish that such information is highly relevant to a specific underlying investigation or inquiry, and that compulsory disclosure is the only effective means of furthering this valid investigatory objective. Indeed, if anything, the First Amendment perils that inhere in the California regulation at issue here—*i.e.*, an indiscriminate demand by the government for sensitive donor information from all registered charities operating in the state, irrespective of whether they are suspected of any wrongdoing—are more acute than those presented in the typical First Amendment privilege case, which generally features a discrete demand by a private party for information that

has some articulable relevance to a live legal claim or defense. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351(1995) (state's "assuredly legitimate" interests in preventing fraud could not justify "extremely broad prohibition" on anonymous leafletting, which applied even in contexts that did not present a high risk of fraud). In devising a novel formulation of "exacting scrutiny" that affords *less* protection to organizations such as the Petitioner, the Ninth Circuit has inverted a foundational premise of this Court's First Amendment jurisprudence.

II. A GENERAL "INFORMATIONAL INTEREST" IS INSUFFICIENT TO SUSTAIN THE COMPELLED DISCLOSURE OF PRIVATE ASSOCIATIONAL INFORMATION

The PIA does not dispute that California's stated interest in "policing charitable fraud," *Americans for Prosperity Found.*, 903 F.3d at 1004, is compelling. Rather, as set forth in the Petition, the Ninth Circuit improperly abdicated its responsibility to require a narrowly tailored fit between this objective and the regulatory means employed to advance it.

That said, however, this case adumbrates a deeper error that has increasingly permeated the jurisprudence of the lower federal courts—namely, that a nebulous "informational interest" asserted by the government can justify the compelled disclosure by non-profit organizations of sensitive internal information, including the identities of their donors. Although the precise formulation varies somewhat among jurisdictions, this concept is generally framed by (1) appeals to the precedents of this Court, and

(2) conclusory and superficial assertions that coerced disclosure is conducive to more efficacious voter decision-making in candidate or ballot measure elections. *See, e.g.*, *Yamada v. Snipes*, 786 F.3d 1182, 1197 (9th Cir. 2015) (stating that "the reporting and disclosure obligations provide information to the electorate about who is speaking—information that 'is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment'" (internal citations omitted)); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 40 (1st Cir. 2012) (opining that "transparency is a compelling objective" for the government); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 480 (7th Cir. 2012) ("Because the issues can be complex and the public debate confusing, voters' interest in knowing the source of messages promoting or opposing ballot measures is especially salient in such campaigns."). Both underpinnings of this argument are incorrect.

A. This Court Has Never Recognized a Generalized "Informational Interest" That Can Justify Compelled Disclosure of Sensitive Associational Information

This Court's precedents do not sustain the amorphous "informational interest" devised by the lower courts. Cautioning that "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '(f)inancial transactions can reveal much about a person's activities, associations, and beliefs,'" *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (internal citation omitted), this

Court in *Buckley* identified three limited governmental interests that can support limited disclosure mandates.

First, "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 67. Second, and relatedly, "disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." *Id.* at 67-68.

Neither of these rationales, however, is germane to the activities of organizations that operate independently of candidates and their campaigns, which generally are not subject to limits on the amounts of contributions they can receive and the sources whom they can solicit. *See id.* at 47 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."). Indeed, if anything, financial opacity advances anti-corruption priorities; an elected officeholder necessarily cannot corruptly enrich those funding independent advocacy for his election if he does not know who they are.

Third, the *Buckley* Court observed that "disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office," *id.* at 66-67,

but this narrowly conceived "informational interest" is tethered closely to the nature and functions of candidate campaigns and political entities closely aligned with them (*e.g.*, political party committees). Nothing in *Buckley* extends its rationale to entities, such as nonprofits organized and operated pursuant to 26 U.S.C. § 501(c), that engage primarily in public policy advocacy or issue education.

While some lower courts have fixated on this Court's comment that "the public has an interest in knowing who is speaking about a candidate shortly before an election," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010), to justify their embrace of an indiscriminate "informational interest," a closer examination of *Citizens United* belies that contention. At issue were campaign finance laws that required Citizens United to identify itself in a disclaimer as the sponsor of public communications it disseminated and to report basic factual information about certain disbursements to the Federal Election Commission. There is an integral distinction, however, between mandates that a speaker simply identify itself and its activities, and the coerced divulgence of internal organizational information concerning confidential relationships between an association and its donors or members. *See generally Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." (quoting *Buckley*, 424 U.S. at 64)).

B. The Generalized "Informational Interest" Propounded by the Lower Courts Lacks Factual Support and Persuasive Force

More fundamentally, the lower courts' account of the expansive "informational interest" they have devised is empirically unsupported and logically unsound. As enunciated by the Ninth Circuit (in the context of ballot measure efforts), it consists of the idea that

> Knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.

California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 (9th Cir. 2003). At least three flaws, however, afflict this reasoning.

First, the notion that compelled disclosure qualitatively enhances electoral deliberation and decision-making finds limited sustenance in the political science literature. For example, one study endeavored to determine whether voters with access to campaign finance disclosures were better able to identify the positions of key interest groups on a ballot measure. The study found that mandated campaign finance disclosures provided few marginal informational benefits, explaining that voter cognition

already is heavily influenced by the manifold existing channels of voluntarily provided information. *See* David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 ELECTION LAW JOURNAL 114 (2013). Other studies are in accord. *See, e.g.*, Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 THE INDEPENDENT REVIEW 568 (2009) (concluding that its study results "question the notion that mandatory disclosure produces more informed voters. The vast majority of respondents have no idea where to find lists of contributors and never actively seek out such information before they vote."); David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION LAW JOURNAL 23, 34 (2006) (finding only a "modest" effect of public disclosure laws on certain measures of political efficacy). Any marginal and equivocal informational benefits that may redound from mandated disclosure are further diluted by the propensity of these laws to, in at least some circumstances, deter political participation. *See* Raymond J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, 36 POLIT. BEHAV. 753 (2014); Alexandre Couture Gagnon & Filip Palda, *The Price of Transparency: Do Campaign Finance Disclosure Laws Discourage Political Participation by Citizens Groups?*, 146 PUBLIC CHOICE 353 (2011) (finding evidence that campaign finance disclosure laws deterred electoral participation in Canadian elections).

Second, the notion that "by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation," *Getman*, 328 F.3d at 1106, is highly dubious. The objectives and motives underlying many donations to non-profits such as PIA are manifold and diverse. Some contributors seek to advance particular projects and issues, while otherwise merely wish to support PIA's overall organizational mission writ large. In addition, the content, timing and other attributes of PIA's public communications largely embody the independent decisions and judgment of its officers and consultants—not its donors. Thus, any person seeking to draw a linear inference between PIA's activities and communications and the personal opinion of any given PIA donor is as likely to end up misinformed as he is edified.

Finally, even if it were factually true that voters can and do glean accurate and material information from mandated disclosures that in turn influence their assessment of candidates or ballot measures or other public advocacy, it is not self-evident that this phenomenon is at all salutary to our political system. In a republic that depends on a thoughtful and engaged citizenry, the notion that important electoral decisions should be propelled by the mere identities of a politically active organization's members and donors—rather than a substantive evaluation of the speaker's arguments on their own merits—is troubling. To the contrary, "[a]nonymity . . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of

political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' the most effective advocates have sometimes opted for anonymity." *McIntyre*, 514 U.S. at 342–43 (internal citation omitted).

The point is not that there can never exist any cognizable government interest in the disclosure of information; rather, it is that before imbuing this elastic concept with a constitutional significance that can, at least in some circumstances, displace core First Amendment rights, a rigorous showing of its empirical veracity and conceptual validity is critical. Further, whatever persuasive force an "informational interest" carries in the campaign finance context dissipates when, as here, disclosure mandates are extended to organizations, such as the Petitioner, that do not engage in any electoral advocacy whatsoever.

In sum, there undoubtedly is an articulable public interest that can sustain certain discrete and limited mandated disclosures, particularly with respect to candidates and political parties. *See Buckley*, 424 U.S. at 66. The perpetually expanding and increasingly indeterminate "informational interest" accreting in the lower courts, however, is symptomatic of a broader distortion in First Amendment doctrine—underscored by the Ninth Circuit's judgment here—that risks improperly subordinating vital expressive and associational freedoms to government caprice. The Petition in this case offers an apt opportunity to begin correcting the course.

CONCLUSION

For the foregoing reasons, the *amicus* respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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