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 *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether a blanket governmental requirement that private nonprofit organizations disclose the names and addresses of major donors can survive the exacting scrutiny that the Court's precedents require of laws that abridge the freedoms of speech and association outside the election context absent any showing that the requirement is narrowly tailored to achieve an asserted law-enforcement interest.

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## INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The disclosure requirements at issue in this case threaten to stifle robust political debate. The NAM can thus offer the Court a distinct perspective on the burden that disclosure laws such as those here

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[1] Pursuant to Rule 37.2(a), timely notice of intent to file this *amici* brief was provided to the parties, Petitioner has lodged with the Court a "blanket consent" and Respondent has consented to the filing of this brief.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or their counsel made a monetary or other contribution to the preparation or submission of this brief.

place on trade associations and the small businesses they speak for.

## INTRODUCTORY STATEMENT

The California Attorney General requires that thousands of registered charities disclose with their annual registration as qualified charities in California the names and addresses of their major donors. Petitioner challenged this requirement as a violation of the First Amendment guarantees of free speech and free association. The Ninth Circuit upheld the California requirement.

In doing so, the court held that Respondent need not show such a blanket demand is narrowly tailored to advance the government's purported law-enforcement interests, contrary to long-standing precedent.

Five members of the Ninth Circuit (Ikuta, J., joined by Callahan, Bea, Bennett, and R. Nelson, JJ) dissented from denial of rehearing *en banc*. App. 74a-112a. They recognized that the Ninth Circuit's rejection of any narrow tailoring requirement eviscerated First Amendment protections. App. 96a.

The dissenters also criticized the "equally egregious" "factual errors" made by the panel, which "not only failed to defer to the district court, but also reached factual conclusions that were unsupported by the record." App. 91a.

## SUMMARY OF ARGUMENT

The Petition should be granted because this case involves fundamental First Amendment rights of speech and association and because the Court of Appeals failed to apply the correct level of scrutiny to the California Attorney General's sweeping program of collection of information about donors to non-profit organizations, which the State admits is confidential, but which the State repeatedly failed to protect. This has led to the potential and actual harassment of donors to "controversial" causes and the suppression of speech and association.

Fear of becoming a target for harassment and retaliation will deter individuals and small businesses from supporting "controversial" political, religious, cultural, business, community or fraternal groups that are the bedrock of a healthy and vibrant civil society.

## ARGUMENT

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

Nonprofit associations have a constitutionally protected right to speak on behalf of their members, and their members have a constitutionally protected right to associate with each other and with the association. An important corollary to these rights to speak and associate is the right to do so anonymously. The right to associate privately is especially important for those who may take unpopular political positions. Without anonymity,

speakers face boycotts, harassment, and even threats of violence, all for engaging in activity "at the heart of the First Amendment's protection." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

The Supreme Court has accordingly insisted that when the government attempts to force disclosure – either of the identity of an individual speaking anonymously or of an organization or association's members – it must have a good reason, and then some. The State must survive "exacting scrutiny," which requires the State to show a "substantial relation" between a "sufficiently important government interest" and the information that must be disclosed. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366 (2010) (internal quotation marks omitted).

The Court of Appeals below did not hold California to this high standard. The record showed that the Petitioner's supporters had endured boycotts, death threats, and harassment. The specter of that harassment forces businesses – particularly small businesses – to choose between advocating for their own interests and enduring backlash, or remaining silent. This has the effect of stifling core political speech – a consequence that is at odds with the First Amendment's preference for more, not fewer, viewpoints in the "marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

The Ninth Circuit's holding chills the exercise of freedoms of speech and association and conflicts

with this Court's precedents. As this Court has long recognized, the First Amendment guarantees the "right to associate with others in pursuit of political, social, economic, educational, religious, and cultural ends," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984), and the right to support causes anonymously, *see Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002).

In the seminal case *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court struck down the Alabama Attorney General's demand that the NAACP publicly disclose the names of its members. Recognizing that "privacy in group association" is "indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs," the Court held that compelled disclosure of an expressive group's supporters must satisfy exacting scrutiny. *Id.* at 462-63. Government requirements of disclosure of the names of a charity's supporters are subject to exacting scrutiny and the government must "show a substantial relation between the information sought and a subject of compelling state interest." *Gibson v. Fla. Legislative Investigation Comm'n*, 372 U.S. 539, 546 (1963). Compelled disclosure must be "narrowly tailored to that compelling interest." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (citation omitted). "[E]ven if the governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle

fundamental personal liberties when the purpose can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). A government agency cannot interfere with associational rights unless it uses 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, at 25 (1976)(per curiam).

Although the Ninth Circuit purported to apply "exacting scrutiny," App. 15a, it failed to require California to "narrowly tailor" the means chosen to fit the alleged purpose. App. 22a. The court sought to justify its holding by citing cases upholding disclosure requirements for political election contributions, where public disclosure of donors is recognized as the "least restrictive means of curbing corruption." *Buckley v. Valeo*, 424 U.S. at 68. The Ninth circuit failed to recognize the distinction between the political campaign contributions and the non-election context, where compelled disclosure can suppress speech and association.

This Court has consistently recognized the "strong interest in preserving and protecting the privacy of membership lists in the non-election context," *Gibson*, 372 U.S. at 555-56, holding governmental demands for disclosure of a group's anonymous supporters to be unconstitutional. This case has nothing to do with political campaigns.

California can achieve its claimed law enforcement interests without forcing charities to

disclose to the Attorney General the names and addresses of their donors. California lacks any satisfactory explanation for why it is not sufficient to send individualized, targeted requests for such information to the few charities it actually investigates each year.

California acknowledges that the donor information at issue should remain confidential, yet, as the district court found, and the Petition details, Respondent has failed to implement robust confidentiality protections before collecting such information and has "systematically failed to maintain the confidentiality." App. 51a.

The Ninth Circuit's decision thus fails to adhere to well-settled constitutional protections for the right of association. California's required disclosure of names, addresses and other information about major donors to thousands of charities will chill speech and association.

This Court should grant the petition and decide that the government may not demand identification of donors because that requirement will chill speech, association, and donor contributions, in violation of the First Amendment.

## II. THIS CASE RAISES IMPORTANT FIRST AMENDMENT ISSUES

Upholding the State's required disclosures will chill the willingness and ability of businesses, especially small businesses, and others to advocate for their interests.

Anonymous and pseudonymous political speech is an important part of the American political tradition. Alexander Hamilton, James Madison, and John Jay wrote the Federalist Papers under the pseudonym "Publius" to advocate for the constitution's ratification. See Bradley A. Smith, In Defense of Political Anonymity, City (2010), https://tinyurl.com/yyafwotm. John Marshall wrote as "a Friend of the Union" and "a Friend of the Constitution" to elaborate on his opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819). Thomas Jefferson and Abraham Lincoln published political writings anonymously throughout their careers. See *id*.

Anonymous political speech allows an argument's substance to matter more than the speaker's identity. See *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 990 (9th Cir. 2004) ("Anonymity may allow speakers to communicate their message when preconceived prejudices concerning the message-bearer, if identified, would alter the reader's receptiveness to the substance of the message."); Smith, *supra* ("[D]isclosure fosters . . . the . . . idea[] that the identity of the speaker matters more than the force of his argument.").

Keeping a speaker's identity private also allows her to avoid harassment, reprisal, and violence based on her views. See, *e.g.*, Sidney Blumenthal, A SELF-MADE MAN: THE POLITICAL LIFE OF ABRAHAM LINCOLN 1809-1849, at 264-266 (2016) (explaining how a political foe

challenged a young Abraham Lincoln to a duel after Lincoln was revealed to be the writer of a pseudonymous column mocking him).

The harms from disclosure are felt most keenly by those taking unpopular political positions. For example, as *NAACP v. Alabama,* 357 U.S. 449 (1958), illustrates, several States attempted to require local NAACP chapters to disclose member and donor rolls in an effort to intimidate members and donors. See Lloyd Hitoshi Mayer, Disclosures About Disclosure, 44 Ind. L. Rev. 255, 272 (2010). During the Cold War, donors to and members of the Communist and Socialist parties were retaliated against when their political affiliations were made public. See *Brown v. Socialist Workers'74 Campaign Comm'n (Ohio)*, 459 U.S. 87, 99 (1982) (noting that members of the Socialist Workers Party (SWP) endured "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office").

The forced revelation of political positions today can also impose serious personal, professional, and financial consequences. Nominees can be grilled about their donations. See Mayer, *supra*, at 273 & n.93 (discussing how Senator Kerry questioned an ambassadorial nominee regarding donations to Swift Boat Veterans for Truth). Reporters' and investigators' objectivity can be challenged. See *id.* at 267 & n.61 (detailing how one media outlet used disclosure databases to publish the political affiliations of journalists who made federal political contributions);

Marshall Cohen, Special Counsel Team Members Donated to Dems, FEC Records Show, CNN, June 13, 2017, https://tinyurl.com/y4vylbu3 (objectivity of the Mueller investigation challenged based on disclosures showing team members contributed to Democrats).

Businesses can come to fear that if they support particular candidates or positions they will be a target for regulators. See *Citizens United v. Federal Election Commission*, 558 U.S. 310, 483 (2010), (Thomas, J., concurring in part and dissenting in part) (businesses feared opposing former New York Attorney General Elliot Spitzer); *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., dubitante) ("Disclosure also makes it easier to see who has not done his bit for the incumbents . . . .").

The Internet has magnified the potential for harassment. Websites that aggregate donors' names make identifying and locating donors easier. See Mayer, *supra*, at 276; see also Kenzie Bryant, Equinox, Trump, and the Embarrassment of Being a Consumer in 2019, Vanity Fair, Aug. 9, 2019, https://tinyurl.com/yyv9sesa (discussing the #GrabYourWallet movement, which catalogues companies that have profited from or support the Trump administration).

Social media sites allow boycotts to spring up overnight and go viral. See, *e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 185 (2010) (per curiam) (noting how opponents of a California ballot initiative allegedly "compiled Internet blacklists" of supporter businesses and "urged others to boycott those

businesses in retaliation for supporting the ballot measure") (internal quotation marks omitted). It is precisely because of digital campaigns' effectiveness that websites have sprung up to "weaponize" disclosed donor information and to pressure donors to stop giving to particular causes. See *Van Hollen, Jr. v. Federal Election Comm'n*, 811 F.3d 486, 500 (D.C. Cir. 2016) ("The advent of the Internet enables prompt disclosure of expenditures, which provides political opponents with the information needed to intimidate and retaliate against their foes.") (internal quotation marks and alterations omitted).

Manufacturing companies and their employees – the NAM's constituency – have been the targets of these political-harassment campaigns from both sides of the political spectrum.

Some harassment has been the result of mandated regulatory disclosures. For example, Bristol Myers Squibb employees were targeted by an activist animal-rights group infamous for firebombing those it perceived to be connected to animal testing. John R. Lott, Jr. & Bradley Smith, Donor Disclosure Has Its Downsides, The Wall St. J., Dec. 26, 2008, https://tinyurl.com/y3efgczn; Sandra Laville & Duncan Campbell, Animal Rights Extremists in Arson Spree, The Guardian, June 24, 2005, https://tinyurl.com/jthm9ml. The organization used information acquired from mandatory disclosures to publish the employees' home addresses on the organization's website under the

heading "Now you know where to find them." See Lott & Smith, *supra*. The activists were able to obtain the employees' addresses only because of the disclosure of contributions that the employees made to political campaigns. See *id*.

When harassment and boycotts are the result not of public positions, but rather of compelled disclosures, the resulting harassment is an indirect but inevitable result of the government's policy requiring disclosure. See *Buckley v. Valeo*, 424 U.S. at 65; *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (explaining that mandated disclosure necessarily "bring[s] with it the possibility of public pressures").

Disclosure requirements commonly "enable private citizens and elected officials to implement political strategies specifically calculated to "prevent the lawful, peaceful exercise of First Amendment rights." *Van Hollen*, 811 F.3d at 500 (internal quotation marks omitted).

Part of the benefit of joining an association is to enable individuals and small businesses to speak with a collective voice on important matters of public policy. See *Heller*, 378 F.3d at 989 ("[I]ndividuals working in cooperation with groups may be concerned about readers prejudging the substance of a message by associating their names with the message."). Membership in an organization allows members to avoid being singled out for their views, while still advancing those views. As courts have repeatedly recognized, "[e]ffective advocacy of both public and private points of view, particularly

controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. at 460; *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010).

If contributions to certain groups are disclosed, the donors may be stigmatized and subjected to more harassment, which will have a chilling effect on the group's ability to advocate for themselves and their members – especially when their views are unpopular. Faced with the choice to disclose and face harassment or to not speak at all, some may choose silence.

This will be especially devastating for the 90 percent of the NAM's members that are small- and medium-sized businesses. See About the NAM, Nat'l Ass'n Mfrs., https://www.nam.org/about/. Those businesses often do not have the resources to withstand threats and boycotts, unlike larger manufacturers with corporate-security and public-relations departments.

The Court should avoid that unconstitutional result by granting the Petition and reversing the Court of Appeals' holding.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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