Nos. 19-251, 19-255

In the

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,
v.
XAVIER BECERRA, Attorney General of California,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
v.
XAVIER BECERRA, Attorney General of California,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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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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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF), The Center for Constitutional Jurisprudence, and the Southeastern Legal Foundation respectfully submit this brief amicus curiae in support of Petitioners.[1]

Pacific Legal Foundation advocates and litigates in defense of the ideas of a free society, including limited constitutional government, private property rights, free enterprise, and other values that, although crucial, are often politically unpopular. Founded in 1973, Pacific Legal Foundation was the nation's first public interest legal foundation devoted to such issues, and it defends those principles in state and federal courts nationwide. PLF has participated in several cases before this Court on matters affecting the public interest, including issues of free speech and association. *See, e.g.*, *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) (representing petitioners); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018); *and Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). Individual donations give PLF the ability to fulfill its mission to protect countless individuals whose liberty is threatened by burdensome laws. PLF, like many

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm 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 Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

nonprofits, is threatened by rules that would force it to disclose private donor information, in violation of the rights of its donors to make private charitable donations. The right of individuals to control their private information is inseparable from their constitutional rights to speak freely and confidentially. Thus, PLF has an interest in ensuring free association and the free flow of ideas.

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF regularly files amicus curiae briefs with and litigates before this Court. Of particular interest here, SLF represents the interests of its donors across the United States who exercise their First Amendment rights to support organizations that articulate and defend their beliefs in courthouses nationwide.

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include a robust protection of the First Amendment's freedoms of speech and association to ensure that government remains accountable to the people. The Claremont Institute is subject to the unconstitutional rule at issue in this case. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of

constitutional significance addressing the Constitution's protection of First Amendment rights, including *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *True the Vote v. Lois Lerner*, 137 S. Ct. 1068 (2017); *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016); *Center for Competitive Politics v. Harris*, 577 U.S. 975 (2015); *National Org. for Marriage, Inc. v. Geiger*, 575 U.S. 963 (2015); *Doe v. Reed*, 561 U.S. 186 (2010); and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). Of particular relevance here, the Center was also counsel for the *ProtectMarriage.com—Yes on 8* committee, which unsuccessfully sought to restrict California's further dissemination of donors to an initiative defining marriage after extensive and well-documented acts of retaliation and violence against such donors. *ProtectMarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827 (9th Cir. 2014), *cert. denied sub nom. ProtectMarriage.com—Yes on 8 v. Padilla*, 135 S. Ct. 1523 (2015). The Center also served as counsel for the National Organization for Marriage in its suit for damages against the Internal Revenue Service for the IRS's illegal disclosure of the confidential portion of its tax return containing its list of major donors. *National Org. for Marriage, Inc. v. United States*, 24 F. Supp. 3d 518 (E.D. Va. 2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized that requiring disclosure of membership in a group constitutes a substantial infringement on the freedom of expressive association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984). Accordingly, this Court has required

that government assert a sufficiently compelling interest before it may demand such a disclosure. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 463 (1958) (*NAACP v. Patterson*).

This rigorous protection of the right to anonymously associate is well-justified. From the time of the Founding, anonymous and pseudonymous speech was integral to public discourse, and both were exercised so frequently that they appear to have been the norm, rather than the exception, until well into the mid-eighteenth century. Jason A. Martin & Anthony L. Fargo, *Anonymity as a Legal Right: Where and Why It Matters*, 16 N.C. J. L. & Tech. 311, 318 (2015).

Over the last two-and-a-half centuries, the means and media used to speak and associate have changed, but the threat of harassment by private citizens and/or government agents remains as present today as it was at the Founding. Even a United States Senator maintained an anonymous Twitter account to share his opinions. Allyson Chiu, *'C'est moi': Mitt Romney admits to running secret Twitter account under the alias 'Pierre Delecto'*, Wash. Post (Oct. 21, 2019). And exposed donors face potentially severe retribution against their businesses and the interruption of valued social and familial connections.

Because anonymous speech and association remain critical for ensuring robust dialogue, this Court has carefully guarded the rights to speak and associate anonymously, requiring compelling justifications for government actions that force

disclosure of member or donor identities. In this case, the Ninth Circuit ignored this precedent, upholding California's disclosure requirement despite only general assertions of law enforcement efficiency. This Court must not "allow[] the established right to anonymous speech to be stripped away based on the flimsiest of justifications." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 276 (2003) (Thomas, J., dissenting), *overruled in part by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). This Court must reverse the Ninth Circuit and reaffirm the importance of rigorous protections for free speech, one of "the most cherished policies of our civilization." *Bridges v. Cal.*, 314 U.S. 252, 260 (1941).

ARGUMENT

Our nation's history includes a long tradition of anonymous speech and association as vital components of social discourse. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–43 (1995) (discussing the history of anonymous speech in Britain and America). At the time of the Founding of the United States, anonymous speech and association were ubiquitous and valued components of the political discourse. Accordingly, the rights to speak and associate anonymously have been recognized as encompassed within the protections of free speech and the press protected by the First Amendment. *See Talley v. Cal.*, 362 U.S. 60, 65 (1960) (recognizing right to speak anonymously); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (protecting right of association from forced disclosure of membership lists). These valuable rights are imperiled when government can force disclosure of membership or

donor lists, and doubly so when it can do so based on the type of generalized, suspicionless law-enforcement justifications such as those asserted by California—the same interests asserted by Alabama in *NAACP v. Patterson* and rejected by this Court. The First Amendment demands more.

I.
THE ABILITY TO SPEAK AND ASSOCIATE ANONYMOUSLY IS A TRADITIONAL AND IMPORTANT CONSTITUTIONAL PROTECTION THAT REMAINS VITAL IN THE MODERN AGE

A. Anonymous Speech and Association Were Widespread at the Time of the Founding

Anonymous speech and association were integral to the Founding of the United States. During the ratification process, most writing about the Constitution was published either anonymously or pseudonymously. Robert G. Natelson, *Does "The Freedom of the Press" Include a Right to Anonymity? The Original Meaning*, 9 NYU J.L. & Liberty 160, 177 (2015). This practice was consistent with most political writings of the time—attribution appears to have been the infrequent exception that establishes the rule of anonymity. *Id.* at 178–79 (detailing the prevalence of anonymous and pseudonymous writings in collections of both British and American political writings in the 18th century).

Many prominent founders—some now known, and some whose identities remain unknown—penned important works under pseudonyms such as Publius, Cato, Timoleon, Philadelphiensis, A True Friend, and

The Federal Farmer. *Id.* Given this longstanding history, this Court has recognized that the right to engage in anonymous speech is protected by the First Amendment. *Talley v. Cal.*, 362 U.S. at 65.

Anonymous association supporting this speech was also integral to many of these well-known examples. "Publius," of course, was not one individual, but the pseudonym used to represent the collaboration of three individuals—Alexander Hamilton, James Madison, and John Jay. Similarly, Thomas Paine's bestselling pamphlet, *Common Sense*, was first published anonymously as to the author *and* as to his publisher, Dr. Benjamin Rush, with whom Paine had closely collaborated. Paul F. Lambert, *Pennsylvania History: A Journal of Mid-Atlantic Studies*, Vol. 39, No. 4 (Oct. 1972), pp. 443, 450–51; Luke Wachob, *Protecting Anonymous Speech Used to be 'Common Sense'*, Institute for Free Speech, (Jan. 10, 2014).[2]

As Justice Thomas describes in his concurrence in *McIntyre*, Dr. Benjamin Rush also published an anonymous article in the Pennsylvania Packet signed "Leonidas." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring). When Elbridge Gerry moved to bring the printer of the newspaper before Congress to demand the identity of Leonidas, other members of Congress objected on the grounds that a forced disclosure would violate the freedom of the press. *Id.* at 361–62. The motion sat,

[2] https://www.ifs.org/blog/protecting-anonymous-speech-used-to-be-common-sense/.

and the printer (and therefore Dr. Rush) was never called before Congress. *Id.* at 362.

Attempts by a few Federalist newspapers to require disclosure of author identities as a condition on publication faced widespread resistance from the Anti-Federalists and a "hasty retreat" from the position. *Id.* at 364. "Solon" wrote anonymously to describe those efforts as an "attempt[] to undermine a '*freedom* and *independence* of *sentiments*' which 'should never be *checked* in a *free* country' and was 'so *essential* to the *existence* of free Governments.'" *Id.* at 366 (quoting Boston American Herald, Oct. 15, 1787, 13 *Documentary History of the Ratification of the Constitution* 316). Finally, Justice Thomas notes that the practice continued after the Ratification period, with the bulk of writers supporting both Federalist and Anti-Federalist candidates continuing to publish anonymously during the first federal elections. *Id.* at 368–69.

Also of note is the reaction to a Pennsylvania ordinance of September 12, 1776, against "seditious utterances." Henry J. Young, *Treason and Its Punishment in Revolutionary Pennsylvania*, 90 The Pa. Mag. Hist. & Biography 287, 291–92 (July 1966). The ordinance proscribed speaking or writing in an attempt to "obstruct or oppose . . . the measures carrying on by the United States of America for the defense and support of the freedom and independence of the said states." *Id.* at 291. The provincial assembly nullified the ordinance just two weeks later—and before a single prosecution had occurred—calling it "a dangerous attack on the people's liberties, and a violation of their most sacred rights." *Id.*

Voluntary private organizations also played key roles in the American Revolution and attempts to establish a republican government. Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600–2000*, *in* The Nonprofit Sector 32, 35 (W.W. Powell & R. Steinberg eds., Yale Univ. Press 2d ed. 2006). Continuing into the mid-nineteenth century, private associations remained a vital method of achieving both charitable aims and asserting political influence. *Id.* at 36. For example, after the Civil War, secret beneficial societies created by newly-freed slaves provided their members with education, vocational training, and political organization. Paul Lawrence Dunbar, *Hidden in Plain Sight: African American Secret Societies and Black Freemasonry*, 16 Journal of African American Studies 622, 629 (Dec. 2012).

The eighteenth and nineteenth century tradition of widespread anonymous speech and association reinforces that the right to anonymity is protected by the First and Fourteenth Amendment's protections of free speech and the press.

B. Forced Disclosure Remains a Substantial First Amendment Injury Today

In the eighteenth century, individuals urging independence from the Crown faced the very real prospect of severe retribution from Crown authorities if their identity—or their affiliations—was disclosed. Prior to the Founding, speaking or writing words "tending to subvert government" or of "conspiracy to levy war" were construed as acts compassing the

king's death, punishable by execution. Bradley Chapin, *Colonial and Revolutionary Origins of the American Law of Treason*, The William and Mary Quarterly, Jan. 1960, at 3. And during the revolutionary period, supporters of the Crown also faced potentially harsh punishments. Young, *supra*, at 291–92. In one instance, alleged loyalists in Philadelphia were seized from their homes and imprisoned based on—at least in part—allegations that individuals joined in singing "God Save the King" at private social gatherings. *Id.*

Though loss of anonymity today is unlikely to bring a sentence of death, individuals still face substantial potential repercussions from disclosure of their identity and associations—especially where the association is for the purposes of expressing minority viewpoints. *McIntyre*, 514 U.S. at 357 ("Anonymity is a shield from the tyranny of the majority."). Throughout history, persecuted groups have "criticize[d] oppressive practices and laws either anonymously or not at all." *Talley v. Cal.*, 362 U.S. at 64. The ability to donate to nonprofit causes remains a critical means for individuals to engage in both political commentary and advocacy. *McConnell v. Fed. Election Comm'n*, 540 U.S. at 340 (Thomas, J. dissenting).

The maintenance of anonymity can be crucial to the success of advocacy organizations. The Mattachine Society, for example—named after a medieval secret society that wore masks to preserve the anonymity and safety of critics of the French Monarchy—was one of the first national gay rights organizations within the United States. John

D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* 53–74 (1983). At the time, homosexuals faced widespread oppression from state law enforcement and the risk of personal reprisals from employers and family. *Id.* at 40–53. Accordingly, the society operated with layers of secrecy to protect individual members from exposure—indeed, most members were even unknown to each other. *Id.* at 64, 70–71. The society was nonetheless able to widely distribute information and generate financial contributions. *Id.* at 70–71. In the span of just two years, the anonymous group went from "pioneers in a hostile society" to the group that "set [the modern gay rights] movement in motion." *Id.* at 74.

Recent history has shown the continued risk that individuals face when their identity may be disclosed. The risk of "wrong" speech or affiliations leading to targeted harassment meant to cause social and economic harm to the individual has been given its own term: "cancel culture." Ligaya Mishan, *The Long and Tortured History of Cancel Culture*, The NY Times, Dec. 3, 2020.[3] Individuals subjected to "cancellation" describe a loss of employment, personal and professional connections, and a relentless mobbing that forces them to withdraw from both physical and online communities for fear of constant harassment. Barrett Wilson, *I was the Mob Until the Mob Came for Me*, Quillette (July 14, 2018).[4] Even United States Senators and former presidential

[3] https://www.nytimes.com/2020/12/03/t-magazine/cancel-culture-history.html.

[4] https://quillette.com/2018/07/14/i-was-the-mob-until-the-mob-came-for-me/.

candidates have sought the cloak of anonymity for their political speech. *See* Domenico Montanaro, *Mitt Romney, 'Pierre Delecto' And The Strategy Of Anonymously Criticizing Trump*, NPR (Oct 21, 2019).[5]

Donors have faced similar attempts to harass and intimidate based on their associations. The public disclosure of names of supporters of Proposition 8 in California led to numerous instances of community harassment, spurred by the availability of data through open records requests of donor contributions. Some opponents of the bill (which had successfully passed) created a website, Eightmaps.com, which provided detailed data of donor identities, including names, approximate location, amount donated, and—when available—employer information. Auralice Graft, et al., *Eightmaps.com: The unintended negative consequences of open data*, Open Data's Impact (Jan. 2016).[6] The Artistic Director of the California Musical Theater ultimately resigned after pressure over his $1,000 donation to "Yes on 8." *Scott Eckern Releases Statement and Announces Resignation as Artistic Director for California Musical Theatre*, broadwayworld.com (Nov. 12, 2008).[7] The director of the Los Angeles Film Festival resigned over his $1,500 donation in support of Proposition 8. Rachel Abramowitz, *Film fest director resigns*, LA Times

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[5] https://www.npr.org/2019/10/21/771873287/mitt-romney-pier re-delecto -and-the-strategy-of-anonymously-criticizing-trump.
[6] https://odimpact.org/files/case-studies-us-eightmaps.pdf.
[7] http://www.broadwayworld.com/los-angeles/article/Scott-Ecker n-Releases-Statement-and-Announces-Resignation-as-Artistic-Director-for-California-Musical-Theatre-20081112.

(Nov. 26, 2008).[8] And a manager of the El Coyote restaurant in Los Angeles was forced to take leave from work because her workplace was heavily picketed and boycotted, with activists cussing at patrons, over her $100 donation to Yes on 8. Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, Wall St. J. (Dec. 27, 2008).[9]

Nor are the risks caused by loss of anonymity limited solely to the immediate period after disclosure. *See* Farai Chideya, *Data Theft Today Poses Indefinite Threat of "Future Harm"*, The Intercept (June 12, 2015).[10] For example, the Communist Party USA underwent two separate "red scare" retaliations, first in the early 1920s and again in the 1950s, despite a period during the 1930s in which it was "the dominant voice of the American left, a force in the labor movement, and a small but significant factor in mainstream politics . . . ." Harvey Klehr & John Earl Haynes, *The Communist Party of the United States and the Committees of Correspondence*, *in The Communist Experience in America: A Political and Social History* 127 (2010). In the 1950s, individuals were blacklisted for their involvement in the Communist Party over 20 years earlier. *See* Kai Bird & Martin J. Sherwin, *American Prometheus: The Triumph and Tragedy of J. Robert Oppenheimer* (2005) (detailing 1954 hearings revoking J. Robert

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[8] http://articles.latimes.com/2008/nov/26/entertainment/et-raddonresigns26.

[9] http://www.wsj.com/articles/SB123033766467736451.

[10] https://theintercept.com/2015/06/12/data-breach-threat-of-future-harm/.

Oppenheimer's security clearance based on ties to the Communist Party during the 1930s).

Similarly, during a 2007 nomination hearing to become ambassador to Belgium, Sam Fox was questioned about donations made years earlier to Swift Boat Veterans for Truth. Merry Ann Akers, *Kerry Puts GOP Donor On Defensive*, Wash. Post (Feb. 29, 2007).[11] His interrogator was John Kerry, the subject of targeted ads by the Swift Boat Veterans group. *Id.* Fox's nomination was blocked because of the contribution. Associated Press, *Pro forma sessions block Bush*, Politico (May 24, 2008).[12] A decade later, the donation was still treated as newsworthy in articles about Fox. Travis Zimpfer, *Major GOP donor pushes others towards Hawley for Senate run*, Missouri Times (June 23, 2017) (including a mention of Fox's 2004 Swift Boat Veterans donation).[13]

Even where the disclosure is purportedly made only to government, the loss of anonymity carries substantial potential risk. Donors cannot be assured that government will effectively maintain anonymity. And to a donor who desires anonymity, it makes little difference whether disclosure occurred through third-party hacking, unintentional negligence, or intentional acts. *See* Jeffrey Stinson, *Cyberattacks on State Databases Escalate*, Stateline (Oct. 2, 2014)

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[11] https://www.washingtonpost.com/archive/politics/2007/02/28/kerry-puts-gop-donor-on-defensive/3fac9e1d-9f76-4d56-98dc-83c076284038/.

[12] https://www.politico.com/story/2008/05/pro-forma-sessions-block-bush-010596.

[13] https://themissouritimes.com/major-gop-donor-pushes-others-towards-hawley-for-senate-run/.

(detailing increasing number of state database attacks and breaches);[14] Eric Boehm, *IRS audit reveals leaks of taxpayers' private information*, Watchdog.org (Oct. 2, 2014) (audit discovers that Internal Revenue Service improperly disclosed personal information in response to Freedom of Information Act requests);[15] *and* Lachlan Markay, *Federal Judge Orders IRS to Disclose WH Requests for Taxpayer Info*, The Wash. Free Beacon (Aug. 31, 2015) (describing lawsuit probing whether the Internal Revenue Service intentionally disclosed private taxpayer information to the Obama administration).[16]

Of course, even if government never discloses donor identity to third parties, donors may still legitimately fear government abuse of the information. For example, the IRS admitted that it subjected conservative political groups applying for tax-exempt status to heightened scrutiny in 2013. Peter Overby, *IRS Apologizes for Aggressive Scrutiny of Conservative Groups*, NPR (Oct. 27, 2017).[17] Stripped of the ability to speak anonymously, many individuals may simply choose not to speak at all. Because of this risk, the government must be forced to present sufficient evidence of a compelling subordinating interest before burdening the right to

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[14] http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/02/cyberattacks-on-state-databases-escalate.

[15] http://watchdog.org/174747/irs-audit-information/.

[16] https://freebeacon.com/issues/federal-judge-orders-irs-to-disclose-wh-requests-for-taxpayer-info/.

[17] https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups.

speak and associate anonymously. *NAACP v. Patterson*, 357 U.S. at 463).

II.
INFRINGING THE RIGHT TO ANONYMOUS SPEECH AND ASSOCIATION REQUIRES A COMPELLING INTEREST, AND GENERAL INVESTIGATORY INTERESTS ARE NOT SUFFICIENT

The Ninth Circuit held that donor disclosure requirements could be evaluated under "exacting scrutiny," and declined to apply the test outlined in *NAACP v. Patterson*. *Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1004 (9th Cir. 2018), *cert. granted*, No. 19-251, 2021 WL 77240, at *1 (U.S. Jan. 8, 2021). The Ninth Circuit has misread this Court's precedent: The labels do not matter, the actual test to be applied is what matters.

This Court's opinions have at times used the terms "strict scrutiny" and "exacting scrutiny" interchangeably within the charitable donations context, such as when analyzing restrictions on solicitations of campaign funds. *Compare Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015) ("We have applied exacting scrutiny . . . ."); *with id.* at 444 ("This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny."). But regardless of name, the standard that this Court applies is identical in all respects to strict scrutiny. *Id.* at 442 (The Court will uphold speech limitations on the solicitation of charitable donations "only if they are *narrowly tailored to serve a compelling interest*." (emphasis added)).

The Ninth Circuit ignored this Court's precedent, instead holding that *nonpublic* disclosure requirements can be subjected to a lower form of scrutiny, requiring only that the government show an "important governmental interest," and that the requirement does not "impose significant First Amendment burdens." *Americans for Prosperity Found. v. Becerra*, 903 F.3d at 1019.

Important First Amendment rights must not be so easily stripped.

A. This Court's Jurisprudence Establishes the Need for a Compelling Government Interest Before Requiring Disclosure of Charitable Donations

Because requiring the disclosure of donor information infringes the rights of free speech and association, this Court has required that any "subordinating interest" of the State be a compelling one. *NAACP v. Patterson*, 357 U.S. at 463. If government cannot identify a compelling interest, the restriction on speech cannot survive. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993) (government may not "infringe certain 'fundamental' liberty interests at all . . . unless the infringement is narrowly tailored to serve a compelling state interest").

This Court's opinions have not always been clear on where a compelling interest may be found. *See, generally*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1303 (2007) (identifying three distinct "versions" of strict scrutiny). Fallon suggests that this Court has at times required government to show a restriction is

necessary to prevent "highly serious, even catastrophic harms." *Id.* In other cases, it has appeared to accept infringements so long as they can be just justified by offsetting benefits. *Id.* Finally, he identifies a version of strict scrutiny that is used to "smoke out" illicit motives. *Id.*

To be sure, in some free speech contexts, this Court has at times decided cases without subjecting the compelling interest to rigorous scrutiny, where other defects could be readily identified. *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015) (assuming "for the sake of argument" that an interest in aesthetics and traffic safety was compelling before striking down the regulation as underinclusive). At times, the Court has appeared to collapse the test itself into a form of means/end balancing. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 825 (2000) (holding that the question is whether an interest is "sufficiently compelling" to justify the scope of the restriction on speech); *see also* Fallon, *supra*, at 1325 ("As reformulated, the question essentially becomes whether there is a compelling governmental interest in achieving as much reduction in the risk or incidence of harm as a challenged regulation is likely to achieve.").

This Court has, however, crafted only one modification to the stringent strict scrutiny formulation when reviewing disclosure requirements, identifying disclosure as the narrowest means to address corruption in the context of candidate elections. *See Buckley v. Valeo*, 424 U.S. 1, 66 (1976). In *Buckley*, this Court upheld a disclosure requirement requiring the disclosure of names and

addresses of donors to candidates for federal elective office. *Id.* at 12–13. The disclosure laws upheld in *Buckley* are justified only by the compelling governmental interest in preventing quid pro quo corruption. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010). Here, too, the exception instead proves the rule: Because the governmental interest in the "free functioning of our national institutions" was of such great magnitude, disclosure requirements are treated as the *per se* least restrictive means of curbing "the evils of campaign ignorance and corruption." *Id.* at 66–68. Indeed, this Court has acknowledged the debate over the continuing validity of the looser *Buckley* standard, but has not yet had an occasion to resolve that debate. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 199 (2014) ("Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the 'closely drawn' test. We therefore need not parse the differences between the two standards in this case.").

Outside of the context of candidate elections, however, the compelling interest must be more than the simple assertion of some state law that may (or may not) be violated by the members of the organization. *NAACP v. Patterson*, 357 U.S. at 464 (an asserted interest in discovering potential violations of state law was not a sufficiently substantial interest to require disclosure). Further, the State must also show that there is a "substantial connection" between the information it seeks to obtain and the asserted interest. *Gibson v. Fla. Legislative Investigation*

Comm., 372 U.S. 539, 551 (1963).[18] California's asserted interests fail these tests.

B. California's Asserted Interest in General Law Enforcement Is Not a Compelling Interest

If the compelling interest requirement is to be meaningful, courts must not uncritically accept any purported justifications for regulation. Instead, the government must provide sufficient evidence to establish the compelling nature of its purported interests. *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 727 (2007) (holding that an interest in racial diversity in K-12 education could not be held as compelling without actual evidence of the asserted educational benefits). California provided no such evidence below.

At best, California asserts a general investigatory interest in combating fraud, but this Court has refused to endorse suspicionless monitoring in other contexts. *See, e.g.*, *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450 (2015) (finding warrantless searches of hotel guest records facially unconstitutional under the Fourth Amendment); *Sweezy v. N.H. by Wyman*, 354 U.S. 234 (1957) (holding unconstitutional a legislative inquiry into whether a professor had engaged in subversive activity). And general law-enforcement

[18] Finally, the Court has also required that any regulations be narrowly tailored to the asserted interest. *Louisiana ex rel. Gremillion v. Nat'l Ass'n for the Advancement of Colored People*, 366 U.S. 293, 296 (1961).

justifications are precisely what this Court rejected in *NAACP v. Patterson*, 357 U.S. at 464.

The Ninth Circuit, however, upheld the disclosure requirement based on nonspecific claims of "investigative efficiency" and government convenience. *Americans for Prosperity Found. v. Becerra*, 903 F.3d at 1010. It noted that requesting the donor information by mail would cause a state investigator to "wait extra days" which "would not be the best use of [her] limited resources." *Id.* But the state is not entitled to such information at all unless it first proves a compelling interest and shows that the demanded information is narrowly tailored to achieve that interest. California has shown neither. It purports to require *all* information, without any tailoring whatsoever.

Even if the state *could* ultimately establish a link between its disclosure requirement and an interest in combatting charitable fraud, it is clear that it *has not* provided that evidence to date. As this Court has repeatedly held, the "mere assertion" of such a relation is insufficient. *See Bates*, 361 U.S. at 525; *Gibson*, 372 U.S. at 554–55. At trial, California was unable to provide "a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1055 (C.D. Cal. 2016), *rev'd and vacated sub nom. Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018), *cert. granted* No. 19-251, 2021 WL 772040, at *1 (U.S. Jan. 8, 2021).

CONCLUSION

Consistent with the long history and tradition of anonymous and pseudonymous speech underlying the bedrock of this country, this Court should reverse the Ninth Circuit below and hold that all disclosure requirements must survive strict scrutiny, including a showing by government of a sufficiently compelling interest to justify the substantial First Amendment injury that disclosure represents.

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Respectfully submitted,

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