Nos. 19-251 & 19-255

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.

THOMAS MORE LAW CENTER,
Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether California's donor disclosure requirement violates the Assembly Clause.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund frequently represents religious people who seek to vindicate their constitutional rights against government overreach, both as individuals and in community with others. See, *e.g.*, *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012). In particular, the Becket Fund has long sought to vindicate the rights of people of all faiths to assemble for worship. See, *e.g.*, *South Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716 (2021); *Agudath Israel of Am.* v. *Cuomo*, No. 20A90, 2020 WL 6954120 (Nov. 25, 2020); *Gagliardi* v. *City of Boca Raton*, 889 F.3d 728 (11th Cir. 2018); *Islamic Ctr. of Murfreesboro* v. *Rutherford Cty.*, No. 3:12-cv-738 (M.D. Tenn., complaint filed July 18, 2012).

Becket submits this brief to explain how California's donor disclosure requirement threatens the freedom of assembly protected by the First Amendment, and the freedom of religious assembly in particular.

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[1] No counsel for a 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. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Ninth Circuit decided this case under freedom of association—a right first recognized in *NAACP* v. *Alabama ex rel. Patterson* with unclear constitutional grounding. Focusing on "expressive" association, the court concluded that "up front collection" of a charitable organization's "major" donors posed little risk of chilling association, while making law enforcement against future wrongdoing more "effective" and "efficient." AFP Pet. App. 16a. This jarring nod to blanket government surveillance of civil society, absent any connection to actual wrongdoing, is the result of decades of confusion over the textually unmoored right of free association.

The text, history, and tradition of the First Amendment anticipates the opposite: a robust freedom of private association subject to government oversight only for truly compelling reasons. But neither *Patterson*, nor the ensuing decades, have firmly rooted the right in the Amendment's text. Instead, a series of shifting justifications have sold the freedom short, limiting it with adjectives like "intimate" and "expressive," or even submerging it entirely into the distinct freedom of speech.

A right without a clear constitutional grounding inevitably leads to results like those obtained here. By leaving free association to emanate from the penumbras of other constitutional rights, depending upon how "expressive" it is, other vital aspects of association are left unprotected. Freedom of speech, freedom of religion, and freedom to petition the government can flourish only to the extent individuals can find an audience, co-believers, or a testing ground for new ideas.

And that depends first upon the freedom to assemble, especially where new ideas or beliefs are countercultural or potentially disruptive. In other words, conditioning free assembly on how "expressive" it is glosses over the fact that assemblies do not exist simply, or even primarily, for expressive purposes. Rather they exist primarily for formative ones. To be sure, the beliefs, traditions, rituals, and customs in which an assembly forms its members may ultimately be expressed in public. They may also strive to shape public life. But all that expression is downstream from what the assembly does in the first instance: form its members in a given way of life. Expressive or not, the transmission of culture, beliefs, and loyalties that happens as a member participates in an assembly provides a separate space between the individual and the state. In a free society, this is where life is fully lived.

The text, history, and tradition of the First Amendment's Assembly Clause accounts for both the formative and expressive components of association. Regrounding the freedom of association in the Assembly Clause therefore comports with the Clause's historical meaning. And as religious assembly was the foundation for the freedom of assembly, both its history and legal protection make for instructive guides in illuminating the Assembly Clause.

The Founders' experience with other pivotal examples of free assembly—including the pre-Revolution activity of the Sons of Liberty and post-founding Democratic-Republican societies—confirmed that this freedom encompasses private, anonymous assembly. Further informed by the abolition movement, this broad

understanding prevailed as the Fourteenth Amendment incorporated the right of free assembly against the States.

This history illuminates a final point. At all these critical moments, governments invoked law enforcement and public safety concerns as grounds to curtail free association, as California has here. The Assembly Clause's text, history, and tradition, however, already account for those concerns, while still ensuring a robust, principled protection for the freedom of assembly. This is reflected in the Court's early decisions under the Assembly Clause invoking heightened scrutiny. And it is underscored by the Court's experience with religious assembly. California's reliance on cases arising in the electoral context, with its distinct concerns about transparency, upends this tradition. Embracing that reliance will further confuse an already confused doctrine.

Regrounding free association in the Assembly Clause, with religious assembly as a guide, will provide civil society sure constitutional footing—and government regulation a principled basis. Modern technology only reinforces why both are desperately needed now. The Court should revive the full, authentic freedom of assembly.

ARGUMENT

I. California's disclosure requirement burdens the right of assembly.

The absence of a constitutional mooring for the freedom of association, first announced in *NAACP* v. *Alabama ex. rel. Patterson*, 357 U.S. 449 (1958), has had real-world consequences. The formative virtue at

the heart of association—the coming together of individuals to manifest a distinct mission or way of life—is completely overlooked. By analyzing this case, and others like it, in accordance with the text, history, and tradition of the Assembly Clause, the Court can bring coherence to the Constitution's protection for civil society.

A. The Court should analyze this case in accordance with the text, history, and tradition of the Assembly Clause.

The Constitution recognizes "the right of the people peaceably to assemble." U.S. Const. amend. I. Historically, this right was not defined around "expressive" association, but had a richer, deeper connection to an assembly's formative work that is prior to any "expressive" quality. See John D. Inazu, *Between Liberalism and Theocracy*, 33 Campbell L. Rev. 591, 601 (2011) (explaining that the historical understanding of "assembly" encompassed a distinct understanding of "politics," rooted in religion, and not focused necessarily on temporal concerns). As noted sociologist Robert Nisbet explained when surveying the historical role of association in our society, "the major moral and psychological influences on the individual's life have emanated from the family and local community and the church." Robert Nisbet, *The Quest for Community* 50 (1953). "This is the area of association from which the individual commonly gains his concept of the outer world," being "engendered" in how to understand "affection, friendship, prestige, recognition," as well as "work, love, prayer, and devotion to freedom and order." *Ibid.*

To be sure, the freedom of assembly was crucial in protecting the growth of founding-era political parties, and subsequently, protection for nineteenth-century

abolitionists and suffragists. John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 25-35 (2012). But protecting political expression was never the Assembly Clause's primary historical purpose. See, *e.g.*, *id.* at 157 (quoting Stephen Carter to explain that the assembly freedom "embodies a kind of politics distinct from the politics of the state," whereby one is formed in understandings of himself and others with "meanings" that can be "radically distinct from those assigned by the political sovereign"); Thomas G. West, *The Political Theory of the American Founding* 29 (2017) (freedom of assembly "is not limited to political assemblies or protests, as it is often narrowly understood today").

Unfortunately, the freedom of assembly began losing its formative core when a pair of pre-incorporation cases limited it to situations where "the purpose of the assembly was to petition the [national] government for a redress of grievances." *Presser* v. *Illinois*, 116 U.S. 252, 267 (1886) (citing *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1875)). Later cases would attempt to restore the freedom's broader scope "in the light of our constitutional tradition." *Thomas* v. *Collins*, 323 U.S. 516, 531-532 (1945); see also *De Jonge* v. *Oregon*, 299 U.S. 353, 364 (1937) (explaining that the right of peaceable assembly is not limited to petitioning, but is "cognate to those of free speech and free press and is equally fundamental"); *District of Columbia* v. *Heller*, 554 U.S. 570, 591 (2008) ("the founding period routinely grouped multiple (related) guarantees under a singular 'right,'" like the First Amendment's right to assemble and petition, but that does not make them co-extensive in meaning).

The textual freedom of assembly was supplanted by the textually unmoored right of expressive association during the mid-twentieth century. *Patterson* began the modern conditioning of free association on "expressive" values, and accordingly had trouble rooting the right in any particular constitutional provision. For example, *Patterson*'s constitutional analysis begins by suggesting that the right of expressive association is protected by a "close nexus" between free speech and free assembly. 357 U.S. at 460. Then, it suggested that free association is "an inseparable aspect of the 'liberty' assured by the Due Process Clause." *Ibid.* (citations omitted). But rather than clearly rely on the Free Speech Clause, the Assembly Clause, or the Due Process Clause, the Court simply announced two related, though apparently distinct, freedoms: "freedom to associate and privacy in one's associations," and a freedom to avoid "compelled disclosure of membership in an organization engaged in advocacy of particular beliefs." *Id.* at 462. Unsurprisingly, the Court's uncertain constitutional grounding produced immediate confusion. See Inazu, *Liberty's Refuge* 82.

Over the ensuing decades, *Patterson* resulted in a series of shifting justifications for expressive association: "first a pluralism that emphasized consensus and stability, then the penumbras of the First Amendment that linked association to privacy, and, most recently, a tenuous hierarchy of intimate and expressive association." Inazu, *Liberty's Refuge* 185. Moreover, the myopic focus on "expression" has led to confused, inconsistent protections for civil society. Compare *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 649-650 (2000)

(Boy Scouts are sufficiently "expressive" to merit associational protection) with *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 620 (1984) (Jaycees are not). The narrow focus on "expression" has, at least in certain public fora, reduced the freedom of association into a free-speech appendage. See *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 680-681 (2010) ("merg[ing]" campus group's speech and association claims into free-speech doctrine). Indeed, the emphasis on whether association is "expressive" permitted the Ninth Circuit below to conclude that nothing "is distinguishable" between the First Amendment's application to political associations and any other assembly. AFP Pet. App. 16a.

This doctrinal confusion manifests itself in real-world problems. California's disclosure requirements apply to *all* charitable organizations that register in the state. If this Court's decision is framed in terms of expressive association, then what of non-expressive associations like a women's shelter or a support center for LGBTQ youth seeking to shield the names of its donors? Or an addiction recovery group? Or a drop-in center for mentally ill adults? All these charitable associations do important and honorable work, yet donors may be rightly concerned that public affiliation will lead to targeting by hostile parties or perhaps even speculation about their personal views and individual struggles—or those of their family members. While expressive association might leave such donors unprotected, assembly would not.

The doctrinal inconsistencies underlying this case show why the freedom of assembly should be revived. The Court can do so here by regrounding freedom of association in freedom of assembly. Given the roots of

free assembly in religious assembly, the Court's corresponding treatment of religious institutions can help guide this regrounding.

B. Freedom of assembly is crucial for religious liberty.

"[T]he freedom to gather together for religious worship" was the "precursor" "for the freedom of assembly." Michael W. McConnell, *The Problem of Singling out Religion*, 50 DePaul L. Rev. 1, 16 (2000). Indeed, the word "assembly" itself derives from the Greek word "*ekklesia*," which is also the basis for "ecclesiastical," and has always contained both religious and political implications. See Inazu, 33 Campbell L. Rev. at 601 & n.44. And as the Court recently noted, "at the very heart of the First Amendment's guarantee of religious liberty" is "attending religious services[.]" *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020).

Important to this case, the "conception of community" was defined, in part, by privacy. See Larry Siedentop, *Inventing the Individual* 93-95 (2014) (explaining that hallmarks of the "new conception of community" that Christianity brought to pagan Rome included "[s]ecret meetings in private houses, burials in catacombs" and "little or no self-advertisement" due to "official hostility and even persecution"). Indeed, it was by recognizing the freedom of religious institutions to govern themselves independent of secular influence that our society "first found this norm" of a private sphere (now called "civil society"). John Courtney Murray, *We Hold These Truths* 188 (Rowman & Littlefield, Inc. 2005) (1960); see also Marc DeGirolami, *The Tragedy of Religious Freedom* 176-177 (2013).

Throughout the Republic's early days and well into the antebellum era, prominent uses of free assembly frequently reflected its roots in religious communities forming their members to manifest distinct moral visions. For example, President Jefferson reassured Ursuline nuns in New Orleans that, despite the Louisiana Purchase, "the principles of the constitution and government of the United States are a sure guarantee * * * that your institution will be permitted to govern itself according to it's [*sic*] own voluntary rules, without interference from the civil authority." *From Thomas Jefferson to Ursuline Nuns of New Orleans, 13 July 1804*, Founders Online, National Archives, https://perma.cc/L4HF-2AH3. Alexis De Tocqueville observed in the early 1830s that, by forming individuals to seek transcendent moral visions that cannot be achieved through political expression, participation in religious assemblies provided the nation a crucial bulwark against individuals succumbing to either materialism or utopianism. Alexis De Tocqueville, *Democracy in America*, 296-297, 310, 444-445, 543-544 (J.P. Mayer ed., George Lawrence trans., 2006) (1835). For abolitionists, "the core right of assembly at issue seems to [have been] the right of blacks 'to assemble peaceably on the Sabbath for the worship of [the] Creator.'" Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 245 (1998) (quoting Jacobus tenBroek, *Equal Under Law* 124-125 (1965)).

Reflecting these roots, freedom of assembly continues to be crucial for religious communities. See W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 BYU L. Rev. 421, 426 (1993) (discussing the "space and sensitive protection"

religious organizations "need" to fulfill their religious obligations—and "the generative and regenerative contribution to social life that they (and in many respect, they alone)" can make). One cannot make a minyan, perform a baptism, preach a sermon, conduct Friday *jum'ah* prayers, or take *amrit* without involving more than just one person. Similarly, in many Native American faith traditions, adherents frequently gather for prayers and rituals. See Kristen A. Carpenter, *Real Property and Peoplehood*, 27 Stan. Envtl. L.J. 313, 373 (2008) (observing that the "entire community participate[s]" in the Hopi Katsinam ceremonies).

The Court's treatment of religious assemblies likewise teaches how crucial that guarantee is to their functional autonomy—a freedom to form individuals in beliefs, rituals, customs, traditions, and ways of life—regardless of expressive potential. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 223 (1972) ("We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles."); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("The religious education and formation of students is the very reason for the existence of most private religious schools[.]"); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (explaining that the "private sphere within which religious bodies are free to govern themselves" "has often served as a shield against oppressive civil laws"); *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("[A] [religious] community represents an ongoing tradition

of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.").

Here, then, the Court's treatment of religious assemblies should guide the reinvigoration of the Assembly Clause. This is not to say that our constitutional tradition of protecting civil society and religious autonomy are identical—or that they should be treated that way. But as "[r]eligious institutions are the clearest and most firmly established examples of 'civil society' institutions," the "principles" applied by the Court for protecting religious institutions "can be borrowed as a model for others in many cases." McConnell, 50 DePaul L. Rev. at 18-23.

Indeed, relying on its religious liberty jurisprudence was the Court's approach in *Thomas*, "the high point of the Court's recognition of the right of assembly." Inazu, *Liberty's Refuge* 173; see also *e.g.*, 323 U.S. at 527-540 (citing *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), five times—more than any other single case—to explain and apply the proper standard of review). By evaluating free assembly claims "in the light of our constitutional tradition" protecting all manner of assembly—not merely the expressive—*Thomas*'s analytical approach can provide freedom of association the anchoring in text and history that it urgently needs. See *Thomas*, 323 U.S. at 531-532; see also *id.* at 530 ("[I]t is the character of the right, not of the limitation, which determines what standard governs the choice."). This has been the Court's recent approach to protecting religious assembly under the Religion Clauses. See, *e.g., Our Lady*, 140 S. Ct. at 2061 (evaluating the ministerial exception by analyzing "the 'background' against which 'the First Amendment was

adopted'" and corresponding "practices" (quoting *Hosanna-Tabor*, 565 U.S. at 183)); cf. *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (explaining that "later cases" under the Establishment Clause "take[] a more modest approach * * * and look[] to history for guidance"). *Thomas* counsels that the Court should follow a similar approach here and thereby bring coherence to the freedom of assembly.

II. Freedom of assembly, including religious assembly, protects the right to associate anonymously.

The text, history, and tradition of the Assembly Clause show that the assembly right has always included the ability of a group's members to not reveal their identities to outsiders, particularly the government. The reason is simple: If the government or outsiders know who a group's members are, they can more easily interfere with the inner workings of the group. The Founders were well aware of this common-sense proposition.

Today, technological developments enable government intrusion into the internal workings of private assemblies—including particularly religious groups—on a scale the Founders surely would have considered unimaginable. Automated mass surveillance, algorithmic data harvesting, and digital memory mean that someone is almost always watching, and that what they see will always be remembered. This is all the more reason that the Assembly Clause's right to anonymous assembly should receive robust protection.

A. The historical meaning of assembly included the ability to associate anonymously.

The founding generation's knowledge of how dissenting religious groups were historically suppressed, alongside its experience with political groups like the Sons of Liberty and the Democratic-Republican societies, informed its understanding of the right of private assembly.

During the first Congress's deliberations over the Bill of Rights, an exchange between House members Theodore Sedgwick of Massachusetts and John Page of Virginia demonstrated that the right of assembly protected private groups, including those meeting clandestinely and without government sanction. During the debates, Sedgwick rose and objected to including the right of assembly as redundant to the right of free speech: "If people freely converse together, they must assemble for that purpose; * * * it is certainly a thing that never would be called in question[.]" 1 Annals of Cong. 759 (1789) (Joseph Gales ed., 1834). He thought it beneath "the dignity of the House to descend to such minutiae." *Ibid.* Congress, he concluded, might as well declare "that a man should have a right to wear his hat if he pleased[.]" *Id.* at 760.

Echoing the non-expressive qualities of the freedom—and its religious roots—Page rebutted the idea that free assembly is simply free-speech "minutiae." He did so by invoking the infamous trial of William Penn—charged with unlawful assembly after he and his fellow Quakers attempted to meet in secret. See 1 Annals of Cong. 760.

The history was well-known to the Founders. Penn's Quaker meeting had violated England's 1664 Conventicle Act, which forbade "Nonconformists" to the Church of England from "attending a religious meeting, or assembling themselves together" in groups beyond a certain size. Inazu, *Liberty's Refuge* 24 (quoting Conventicle Act 1664, 16 Car. 2, c. 4 (Eng.)).

Quakers, of course, are not Anglicans, and a company of soldiers prevented Penn and his group from entering their meetinghouse for their unlawful conventicle. Undeterred, Penn began delivering a sermon to Quakers assembled in the street. He was arrested, taken to the courthouse, and charged with unlawful assembly. Inazu, *Liberty's Refuge* 24-25; Michael W. McConnell, *Freedom by Association: Neglect of the Full Scope of the First Amendment Diminishes our Rights,* First Things, Aug./Sep. 2012, at 39. Penn was later brought to trial in a now famous sequence of events that included a charge for contempt after he refused to remove his hat in court due to his belief that hats should only be removed before God, not men. Joseph Barker, *Life of William Penn: The Celebrated Quaker and Founder of Pennsylvania* 44 (1847); see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1471-1472 & n.320 (1990).

Page's response to Sedgwick that "a man has been obliged to pull off his hat when he appeared before the face of authority" and that "people have * * * been prevented from assembling together on their lawful occasions," thus needed no further explanation. 1 Annals of Cong. 760 (1789).

The House voted down Sedgwick's motion to strike the Assembly Clause by a "considerable majority." 1 Annals of Cong. 761.[2] This illustrates how the Founders understood the freedom of assembly to protect the peaceful assembly of dissenting individuals, even those meeting secretly with purposes diverging from state-prescribed orthodoxy.

The same was true of the Founders' experience in the run-up to the Revolutionary War. "There can be no serious doubt that this new understanding of the importance of popular assemblies in democratic politics had been shaped by the experience of the American Revolution." Ashutosh Bhagwat, *The Democratic First Amendment*, 110 Nw. U. L. Rev. 1097, 1106 (2016). "Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts." *Talley* v. *California*, 362 U.S. 60, 64-65 (1960).

Similarly, "[c]olonial governors tried to suppress the Sons of Liberty on similar legal bases" to England's attempt to prosecute Penn for unlawful assembly. McConnell, *Freedom by Association* at 41. The Sons of Liberty "played a central role in galvanizing and organizing resistance to British rule, and more broadly in the formation of the revolutionary ethos." Bhagwat, 110 Nw. U. L. Rev. at 1106. Their "public meetings were not purely spontaneous gatherings," but rather, members "planned, plotted, * * * and met over a period

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[2] The infamy of Penn's trial, and the subsequent accommodation of Quakers in multiple states, also "demonstrates that religion-specific exemptions were familiar and accepted" during the founding era. McConnell, 103 Harv. L. Rev. at 1471-1472 & n.320.

of time, often secretly, to organize them." McConnell, *Freedom by Association* at 41. Because many prominent members of the founding generation belonged to the Sons of Liberty and similar organizations, they understood from personal experience the need to the protect the anonymity of private assemblies.

After the Revolution was won, this robust understanding of the freedom of assembly faced an early test with Democratic-Republican societies. Inazu, *Liberty's Refuge* 26; McConnell, *Freedom by Association* at 41. During the 1790s, Democratic-Republican societies, consisting mainly of political opponents of the Washington administration, sprang into existence throughout the country. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* 190 (1997). They were wary of the aristocratic tendencies of the Federalists and "invariably proclaimed the right of citizens to assemble." Philip S. Foner et al., *The Democratic-Republican Societies, 1790-1800: A Documentary Sourcebook of Constitutions, Declarations, Address, Resolutions, and Toasts* 11 (1976). They held public and private meetings to discuss politics, and organized parades and demonstrations to criticize their political opponents, the Federalists. Inazu, *Liberty's Refuge* 26-27.

The Federalists, in turn, grew increasingly agitated with the rising popularity of the societies, and particularly their secretive nature, warning against "nocturnal meetings of individuals, after they have dined, where they shut their doors, pass votes in secret, and admit no members into their societies, but those of their own choosing[.]" 4 Annals of Cong. 902 (1794) (Joseph Gales ed., 1855). The Federalists urged

that the secretive and anonymous nature of Democratic-Republican societies posed a threat to the young nation's survival.

After learning that several members of the Democratic-Republican societies had participated in the 1794 Whiskey Rebellion, President Washington himself came to believe that the societies were incipient hotbeds of sedition. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. Rev. 1525, 1558-1560 (2004). In an address to Congress, he condemned the societies and asked Congress to take action against them. Inazu, *Liberty's Refuge* 26-28. Echoing other Federalists' critiques, Washington's particular charge was that the societies were "self-created," meaning they "were deliberately organized and limited to like-minded members rather than spontaneous and fully public." McConnell, *Freedom by Association* at 41; see also Inazu, *Liberty's Refuge* 28-29.

In response, the Federalist-controlled Senate quickly censured the societies. The House, however, conducted an extended debate over whether the societies had a constitutional right to exist. In the House debates, the Federalists argued the self-created societies tended to foment rebellion and revolution through their secretive meetings, and for this reason, Congress had the power to censure and even outlaw them. Chesney, 82 N.C. L. Rev. at 1564.

Democratic-Republicans responded that the country already had laws to punish illegal conduct such as treason, and that the censure merely served to restrain public opinion. Chesney, 82 N.C. L. Rev. at 1565; 4 Annals of Cong. 900 (Statement of Rep. Giles).

To censure the Democratic-Republican societies would be the day "when the people of America shall not have leave to assemble." 4 Annals of Con. 941 (statement of Rep. Carnes). James Madison argued that a House censure would have dire consequences and called Washington's condemnation of the Democratic-Republican societies "perhaps the greatest error of his political life." *Letter from James Madison to James Monroe, 4 December 1794*, 15 The Papers of James Madison (Thomas A. Mason et al. eds., 1985).

The House ultimately drafted a response that omitted any censure of the Democratic-Republican societies. 4 Annals of Cong. 947. In so doing, the House reiterated the first Congress's historical understanding of the right of assembly: with little more than mere accusations of illegal activity, government action censuring private groups—even "self-created" ones with anonymous members—violates the freedom of assembly. *Ibid.*; McConnell, *Freedom by Association* at 41.

The Framers of the Fourteenth Amendment likewise manifested a strong commitment to the freedom of assembly as a distinct right deserving broad protection, including for activities carried out in secret. They were "well aware of how slavery had resulted in the suppression of religious exercise," including direct restrictions on religious assemblies. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1146 (1994).

Particularly after the 1831 rebellion of a group of slaves led by Nat Turner—himself a preacher—that left seventy whites dead, southern governments intensified their restrictions against religious exercise by

Black Americans, supposedly to prevent such "dangerously subversive ends." Lash, 88 Nw. U. L. Rev. at 1133. Black assemblies were "heavily regulated," with "severe punishments authorized for improper religious gatherings." *Id.* at 1134. And state and local laws often focused specifically on assemblies held "at night," "in a confined or secret place," or beyond certain times. *Id.* at 1134-1136 & nn.133, 139. Laws against teaching slaves to read and write—another activity frequently done in secret—were also understood as laws against "unlawful assembly." *Id.* at 1135 & nn.137-138.

The Fourteenth Amendment's architects drafted against this "specific historical background," aiming to ensure robust freedom of religion for Black Americans. Lash, 88 Nw. U. L. Rev. at 1145-1147. Considering their direct knowledge of the important role secrecy had played in abolition efforts generally, such as in the Underground Railroad, they understood the Fourteenth Amendment as embracing formidable protection for the freedom of assembly beyond the searching eye of government.

B. Modern circumstances reinforce the need for strong protections for freedom of assembly, especially for minority or dissenting groups.

A robust protection of anonymity as part of the freedom of assembly is more necessary today than it has been at any time in our history. That is because keeping a private assembly private is much harder to do today than it was at the founding—or even just twenty years ago. Twenty years ago, 81% of Americans did not have a device in their pocket that allowed them

to film their fellow Americans at any time and to instantly distribute the video to millions of people to watch and comment. See *Mobile Fact Sheet*, Pew Research Center (June 12, 2019), https://perma.cc/TY63-CEMA. The ubiquity of smartphones means that the zone of privacy, and especially the zone of anonymity, has grown far smaller than at any time in American history. In a sense we live in a surveillance state, just one that has been crowdsourced and massively distributed. See, *e.g.*, Nick Lally, *Crowdsourced surveillance and networked data*, 48 Security Dialogue 63, 63-77 (Feb. 2017) (discussing intersection of social media algorithms and crowdsourced surveillance).

The smartphone is not the only technological development to shrink private space for assemblies and individuals. For example, mass surveillance, particularly over digital networks, is a common governmental undertaking worldwide. This surveillance is undertaken by both government and private organizations (particularly larger technology companies), but in practice governments can access most or all of the data. Most notoriously, the Chinese government uses mass surveillance techniques including millions of security cameras, facial recognition technology, artificial intelligence, and Internet tracking to closely monitor citizens. See Paul Mozur & Aaron Krolik, *A Surveillance Net Blankets China's Cities, Giving Police Vast Powers*, N.Y. Times, Dec. 17, 2019, https://perma.cc/458R-E9Z6.

In this country and others, algorithmic data harvesting allows ever greater ability to obtain information about groups and individuals, and "big data" means that everything collected is remembered. Indeed, "the Internet is forever." Thus, what the Court

once called "practical obscurity" becomes impossible to maintain. *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989). Americans—both in groups and as individuals—are now subject to a level of government knowledge about their activities unique in our history. As with the invention of the printing press, these new technologies are fundamentally altering the ground rules of society.[3]

These technological developments also have significant downstream cultural effects, including on how citizens interact with one another and how they enlist government power in their conflicts with one another. Phenomena like "cancel culture" can be viewed not so much as a fundamental change in the moral valence of Americans but as a technology-driven scaling of older human drives. For example, the *ostraka* of today are social media replies, downvotes, and comment boxes. The difference is that unlike the potsherds of the Assembly of Athens, technology makes modern ostracism almost instantaneous, scalable to millions, and thus ubiquitous. There is no modern-day Argos for the ostracized to flee to.

Cancel culture, fueled by the technological developments described above, has significant negative effects

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[3] Some governments, including California, have sought to counteract the loss of practical obscurity by protecting what has come to be known as the right to be forgotten. See California Consumer Privacy Act of 2018, Cal. Civil Code §§ 1798.100 *et seq.*; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (April 27, 2016).

for minority dissenting groups, and religious assemblies and institutions in particular. There are ever more attempts to "cancel" particular institutions in an effort to impose conformity of belief, employing ever-stronger measures against those with dissenting views. These amount to an attempt at the "[c]ompulsory unification of opinion" the Court warned of decades ago. *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 641 (1943).

Given these changes in American society, it is more important than ever that courts enforce a robust right of assembly that includes strong protections for the anonymity of members of an organization. Without such protections, technological change will empower government to intrude into the inner life of private organizations—including religious organizations—in ways that make independent existence impossible.

III. California's disclosure requirement fails strict scrutiny.

The Court has long held that infringing freedom of assembly requires strict scrutiny. See *Thomas*, 323 U.S. at 530-532; see also *De Jonge*, 299 U.S. at 364-365 ("the legislative intervention can find constitutional justification only by dealing with the abuse" of assembly, while the right itself "must not be curtailed"); *Patterson*, 357 U.S. at 461 ("abridgment" of "indispensable" free assembly right can come from "varied forms of governmental action" and requires "closest scrutiny").

Here, California requires the disclosure of names and addresses of major donors as a condition of being a recognized charitable assembly. Under *Thomas*, this

demands strict scrutiny. 323 U.S. at 530-532. And because 47 other states find it unnecessary to surveil charities in this way, California's disclosure requirement fails strict scrutiny.

A. Because the disclosure requirement inhibits its freedom of assembly, particularly religious assembly, it triggers strict scrutiny.

Strict scrutiny follows from the "preferred place" for "the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas*, 323 U.S. at 530 (citing religious liberty and free speech cases). "Only the gravest abuses, endangering paramount interests" authorize a requirement of "previous registration as a condition for exercising" one's freedom of assembly. *Id.* at 530, 540. This means that California, to survive strict scrutiny, must cite a "paramount interest[]" with "clear support in public danger, actual or impending" to force donor disclosure. *Id.* at 530; see also *De Jonge*, 299 U.S. at 364-365 (assembly "in order to incite to violence and crime" not protected, but "mere participation in a peaceable assembly" cannot be "the basis for a criminal charge"). Nor is California free to rest on "generalities" when defining its interest, but it must demonstrate a "particular" interest in compelling disclosure "in the light of our constitutional tradition." *Thomas*, 323 U.S. at 531-532. Our tradition, moreover, allows only "the narrowest range for" free assembly's "restriction." *Id.* at 530 (rejecting, expressly, a "rational connection" standard). Nothing invoked by California in this case to date comes close to meeting the strict scrutiny standard articulated in *Thomas*.

The subcategory of religious assembly explains *Thomas's* inner rationale. See, *e.g.*, *Gibson* v. *Florida*

Legis. Investigation Comm., 372 U.S. 539, 562 (1963) (Douglas, J., concurring) (explaining the Assembly Clause's guarantees with the example of "attending a church"). Religious bodies often manifest moral visions that are distinct from present majorities—and those majorities sometimes respond by trying to chill those manifestations out of existence, or at least into submission. An established purpose of strict scrutiny is to guard against these efforts. See *Yoder*, 406 U.S. at 217 (invoking strict scrutiny to protect Amish way of life from "hydraulic insistence on conformity to majoritarian standards[]"); cf. *Barnette,* 319 U.S. at 639-640 (explaining judicial role in protecting religious liberty from "expanded and strengthened governmental controls"); *Cantwell*, 310 U.S. 305 ("censorship of religion as the means of determining its right to survive" not a tool available to the government under the First Amendment); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943) ("Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.").

Several members of the Court have observed that churches upholding their religious convictions about marriage during California's Proposition 8 debate were harassed, intimidated, and threatened—with some churches even "receiv[ing] through the mail envelopes containing a white powdery substance." *Citizens United* v. *FEC*, 558 U.S. 310, 481 (2010) (Thomas J., concurring); see also *Hollingsworth* v. *Perry*, 558 U.S. 183, 185-186 (2010) (per curiam). As Justice Alito observed, the risk of such harassment cried out for as-applied judicial relief—even in the electoral context where strict scrutiny is not consistently applied. See

Doe v. *Reed*, 561 U.S. 186, 205 (2010) (Alito, J., concurring). Were it otherwise, "one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions." *Ibid.* Similarly, invasive surveillance of churches, mosques, and other religious organizations has been subjected to strict scrutiny. See Eric Rassbach, *Are Houses of Worship "House[s]" Under the Third Amendment?*, 82 Tenn. L. Rev. 611, 624-625 & n.89 (2015) (identifying "[s]everal First Amendment challenges to mosque surveillance," along with prior surveillance and infiltration of "the Southern Christian Leadership Conference," "Episcopal churches, church youth groups, and Presbyterian churches").

B. Religious assembly demonstrates the danger of the Ninth Circuit's decision to apply the "substantial relation" standard from cases addressing electoral integrity.

Religious assembly also illustrates why it was erroneous for the Ninth Circuit to apply the "less demanding" standard of "exacting scrutiny." *Janus* v. *AFSCME*, 138 S. Ct. 2448, 2465 (2018). The Ninth Circuit drew that standard from the distinct electoral integrity context. See *Buckley* v. *Valeo*, 424 U.S. 1, 64, 66-68 (1976) (modifying *Patterson* for the electoral context). There, rather than satisfy strict scrutiny's narrow tailoring, the government may insist on donor disclosure simply by demonstrating a "substantial relation between the governmental interest and the information required to be disclosed." *Id.* at 64 (internal quotation marks omitted); see also *McCutcheon* v. *FEC*, 572 U.S. 185, 218 (2014) (plurality opinion) ("'a

fit that is not necessarily perfect, but reasonable,'" will suffice) (citation omitted).

In that context, a government's goal of public transparency often makes disclosure the point. Sunshine is the best disinfectant—making compelled disclosure "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68. But even in matters of electoral politics involving "distasteful" facts, the Court has been careful not to turn the exposure of "corruption" into a talismanic interest at the First Amendment's expense. See *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372, 2375 (2016) (refusing to construe the government's "corruption" interest to "cast a pall of potential prosecution" over citizens with legitimate concerns who therefore "might shrink from participating in democratic discourse").

Nothing about the electoral integrity context justifies importing a standard less than strict scrutiny into the freedom of assembly. As a corollary, the rationale for compelling *public* disclosure in the electoral integrity context makes no sense when applied to a right that—inherently—encompasses *private* assembly.

Here, if the Ninth Circuit's defiance of *Buckley* goes uncorrected, compelled donor disclosure will become presumptively acceptable outside the electoral integrity context. This will nullify *Thomas*, chill religious exercise, and facilitate harassment of unpopular religious assemblies.

There are at least two other problems that follow from relieving governments of the burden to use only the least-restrictive means of inhibiting religious assembly. First, if governments can use more restrictive

means, civil courts risk entangling themselves with theologically-laced privacy disputes. Second, governments will be allowed to regularly monitor whether and how certain people contribute to certain religious institutions.

If donor disclosure itself becomes an acceptable means of burdening religious assembly, civil courts will eventually contend with various, theologically-loaded privacy questions. For example, mandatory donor disclosure may require courts to confront religious assemblies that are exclusive based on theologically-informed criteria. Cf. *Amos*, 483 U.S. at 330 & n.4 (explaining the "temple recommend" in The Church of Jesus Christ of Latter-day Saints). Monitoring who a religious organization considers a "donor" risks undermining, or having a civil court determine the acceptable curtailing, of private religious assemblies.

Similarly, individuals may donate to their religious assemblies in an intentionally confidential manner so to obey the Biblical injunction that one's "giving be in secret," or the Qur'an's characterization of anonymity as the "best" form of giving. See, *e.g.*, *Matthew* 6:3-4; Qur'an, *Surat Al-Baqarah* 2:271. Bankruptcy law accounts for this reality by prohibiting courts from considering either prior or ongoing tithing when evaluating whether to dismiss a bankruptcy case. See 11 U.S.C. 707(b)(1). But forcing someone to disclose whether he is a "donor" to a religious assembly necessarily gives the government the very information that a civil court cannot consider—without any guarantee that the information would be safeguarded.

More generally, the federal Privacy Act "limits the government's ability to collect, maintain, use, or dis-

seminate information on an individual's religious activity protected by the First Amendment's Religion Clauses." *Fazaga* v. *FBI*, 965 F.3d 1015, 1057 (9th Cir. 2020) (citing 5 U.S.C. 552a(e)(7)). These broad limits make sense, because "[i]n a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of" the privacy of a given member's role "in every religious tradition." *Our Lady*, 140 S. Ct. at 2066 (observing this reality in the context of "person[s] who perform[] a particular role in every religious tradition"). But if "exacting scrutiny" and its "substantial relation" test makes donor disclosure presumptively acceptable for religious assemblies, civil courts will become entangled in whether and how certain theological choices surrounding privacy and membership may be obviated.

C. The disclosure requirement fails strict scrutiny.

The disclosure requirement cannot withstand strict scrutiny for several reasons, many detailed in Petitioners' briefs. See AFP Br. 20-27; Thomas More Ctr. Br. 33-39; But one obvious reason California's donor disclosure fails strict scrutiny is the fact that 47 other states have not found it necessary to require the blanket disclosures that California has. *E.g.*, AFP Br. 2; Thomas More Ctr. Br. 3. The fact that other states are not nearly as restrictive "suggests that [California] could satisfy its [charity integrity] concerns through a means less restrictive" than its current prohibition. *Holt* v. *Hobbs*, 574 U.S. 352, 368-369 (2015). California must therefore demonstrate, not just "assume," that "a plausible, less restrictive alternative would be ineffective" when their preferred approach burdens religion.

Id. at 369; see also *Diocese of Brooklyn*, 141 S. Ct. at 67 (enjoining restrictions on religious worship in part because they are "much tighter than those adopted by many other jurisdictions"). With no effort to explain why it is right and so many other states are wrong, California automatically fails strict scrutiny.

* * *

Mandatory donor disclosure allows the government to monitor—and opponents to discover—assemblies that can then be pressured for forming congregants in ways that may be deemed to lack "forward thinking." Cf. *NIFLA* v. *Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (explaining that the California Legislature cited a "legacy of 'forward thinking'" to justify unconstitutional compelled speech notices). Properly understood, the Assembly Clause prohibits such tools outside of a demonstrable threat to public safety or another historically rooted compelling interest. "If there are any circumstances which permit an exception" to that standard, "they do not now occur to us." *Barnette*, 319 U.S. at 642.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted,

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