Nos. 19-251 and 19-255

IN THE
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA,
ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

BRIEF FOR THE ELECTRONIC FRONTIER FOUNDATION, THE FREEDOM TO READ FOUNDATION, THE NATIONAL COALITION AGAINST CENSORSHIP, PEOPLE UNITED FOR PRIVACY FOUNDATION, WOODHULL FREEDOM FOUNDATION, AND DEFENDING RIGHTS & DISSENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

OTHER AUTHORITIES:

INTEREST OF *AMICI CURIAE*[1]

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world, including the freedoms of speech and association. On behalf of its more than 34,000 members, EFF champions digital rights through impact litigation, policy analysis, grassroots activism, and technology development, working to ensure that rights and freedoms are enhanced and protected as our use of technology grows. Since its founding in 1990, EFF has become a leading authority on First Amendment issues, and in that role, frequently files *amicus* briefs in courts across the country, including in this Court.

The Freedom to Read Foundation is a nonprofit organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae,* its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, students, readers, and the general public. NCAC has a longstanding interest in assuring the continuance of robust First Amendment protections for those who express unpopular views and individuals who support those speakers. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

The People United for Privacy Foundation ("PUFP") is a nonprofit, nonpartisan organization that works to protect the rights of individuals to come together in support of their shared values. PUFP believes that every American has the right to support causes they believe in without fear of harassment or intimidation PUFP provides information and resources to policy makers, media, and the public about the need to protect freedom of speech and freedom of association through preserving citizen privacy.

The Woodhull Freedom Foundation is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and family diversity. The Foundation's name was inspired by the Nineteenth Century suffragette and women's rights leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education and action. Woodhull's mission is focused on affirming sexual freedom as a fundamental human right. The Foundation's advocacy has included a wide range of human rights issues, including, reproductive justice, anti-discrimination legislation, comprehensive

nonjudgmental sexuality education, and the right to define one's own family.

Defending Rights & Dissent ("DRAD") is a national not-for-profit public education and advocacy organization based in Washington, DC. The mission of the organization is to make real the promise of the Bill of Rights for everyone. DRAD was founded by activists, including civil rights activists, who were persecuted by the infamous House Un-Americans Activities Committee. As a result, while DRAD cherishes the entire Bill of Rights, DRAD devotes particular attention to protecting the right to political expression. DRAD understands the consequences of when people are compelled to disclose their political associations to state actors.

As organizations focused on protecting individual privacy, freedom of speech, and freedom of privacy, the undersigned *amici* have serious concerns about the Ninth Circuit's decision upholding the California Attorney General's policy of requiring nonprofits to disclose a list of major donors as a condition of registering with the State. The Ninth Circuit's position, if adopted by this Court, would call well-established First Amendment protections into question and could substantially chill associational activities. Amici accordingly urge the Court to reverse the decision below and to affirm that because requirements to disclose an association's membership or donor lists impose significant First Amendment burdens, they are subject to exacting judicial scrutiny and generally must be narrowly tailored to further a compelling government interest.

SUMMARY OF ARGUMENT

For more than half a century, individuals wishing to join with others to advance social movements, advocate on issues of public importance, and fight for institutional change have relied on a consistent line of Supreme Court precedent requiring the government to identify a compelling justification before it can force disclosure of organizational membership and/or donor lists. These cases recognize that forcing an organization to release such data to the State not only divulges the First Amendment activities of individual members and donors, but may also deter such activities in the first place. Individuals may legitimately fear of any number of negative consequences from disclosure, including harassment by the public, *e.g.*, *NAACP v. State of Alabama*, 357 U.S. 449, 462-63 (1958), adverse government action, *e.g.*, *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960), and reprisals by a union or employer, *e.g.*, *Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 272 (2d Cir. 1981). Or they may simply "prefer not to have their . . . affiliations . . . disclosed publicly or subjected to the possibility of disclosure." *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark. 1968), *aff'd, Roberts v. Pollard*, 393 U.S. 14 (1968). And privacy is especially important for organizations that challenge the practices and policies of the very governments that seek the identities of the group's members and supporters.

Under these decisions, the likelihood that individuals will face adverse consequences from disclosure is a factor courts consider when deciding whether or not the government's interest justifies the

First Amendment burden. *See Davis v. FEC*, 554 U.S. 724, 744 (2008). But in order to satisfy the First Amendment, *any* mandatory disclosure of individuals' donations to or membership in an organization must be justified by a compelling government interest and narrowly tailored to further that interest.

The precedent established by this case will impact the associational rights of all civil rights and civil liberties groups. Even assuming the California Attorney General intends only the most socially beneficial uses of the associational data he collects, the lack of rigorous judicial scrutiny reflected in the decision below creates an unacceptable risk that governmental authorities will receive a greenlight to compile sensitive affiliation information that could be used to chill or even suppress advocacy. Indeed, it was exactly such conduct by Alabama in the 1950s, via its attorney general, that led to this Court's landmark decision blocking the State from forcing such disclosures. *NAACP v. Alabama*, 357 U.S. 449. The risk of similar over-reaching compels the amici here—who collectively represent a wide variety of interests, ranging from digital privacy to sexual autonomy—to share their perspective about the development, meaning, and effects of the case law that limits the forced disclosure of non-profit information.

The Ninth Circuit decisions in this case worked a significant and unnecessary departure from decades of this Court's precedent, leaving organizations with no meaningful protection from compelled disclosure of their donor or member lists unless they can come forward—*before* the disclosure—with evidence showing donors or members "would experience threats, harassment, or other potentially chilling

conduct as result of [a] disclosure requirement." *Ctr. for Comparative Politics v. Harris*, 784 F.3d 1307, 1316 (9th Cir. 2015); *see id.* at 1312-1313, 1316 (asserting that "a disclosure requirement in and of itself" does not impose any "First Amendment injury"); Pet. App. (No. 19-251) at 25a-39a. If accepted, this approach risks giving the government power to compile data on its citizens' organizational affiliations to further generalized law-enforcement interests without any obligation to engage in narrow tailoring—unless particular organizations *prove* compelled disclosure would turn away potential donors or members or lead to "threats, harassment, or reprisal." *Id.*

The Ninth Circuit's approach is precarious and unworkable. Starting with its civil-rights-era decisions of the late 1950s, this Court has repeatedly recognized the dangers of providing the government with unchecked power to collect its citizens' organizational affiliations, and has therefore applied exacting scrutiny to requests for disclosure of such information even where the record does not contain evidence establishing that compelled disclosure would lead directly to threats or harassment or seeking to quantify a resulting membership drop. Those concerns are equally applicable today. In an increasingly polarized country, speaking out on contentious issues creates a very real risk of harassment and intimidation by private citizens and critically by the government itself. Furthermore, numerous contemporary issues—ranging from the Black Lives Matter movement, to gender identity, to immigration—arouse significant passion by people with many divergent beliefs. Thus, now, as much as any time in our nation's history, it is necessary for

individuals to be able to express and promote their viewpoints through associational affiliations without personally exposing themselves to a political firestorm or even governmental retaliation.

The Ninth Circuit's approach substantially under-protects this important right: legitimate concerns about compelled disclosure are not always based on concrete fears of immediate, and provable, threats or reprisals. Instead, they can also be based on trepidation about giving the government itself permanent access to one's organizational affiliations—information that the government (including a future administration) might misuse.

The importance of First Amendment scrutiny of compelled disclosure requirements is not diminished merely because the government pledges to keep sensitive associational information nonpublic. Numerous cases recognize that governments themselves are able to use organizational affiliation information in damaging ways. *E.g.*, *Shelton*, 364 U.S. at 486-87. After all, even if a given administration insists that the information it collects will only be used for socially beneficial purposes, once a database exists, it can be exploited by a future government with less benign motives.

This Court should hold that whenever the government seeks to require an organization to disclose its members or donors, it must first bear the burden of satisfying "exacting scrutiny" by identifying an interest of sufficient importance, closely connected and narrowly tailored to the disclosure, to justify the intrusion on individuals' "right to privacy" in their "political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87,

91 (1982). When there *is* evidence that disclosure would "subject [donors] to threats, harassment, or reprisal," then the government's interest must be especially compelling, and as-applied exceptions may be granted to facially valid disclosure rules. *Id.* at 98-100. But even where the chill to First Amendment interests is less immediate and dramatic, the government must *always* identify *some* compelling interest to justify forced disclosure of individuals' associational affiliations and show that the disclosure regime is a narrowly tailored means of pursuing that compelling interest.

ARGUMENT

I. The Compelled Disclosure Of An Organization's Donors Should Be Subject To Exacting First Amendment Scrutiny.

A. For More Than Fifty Years, This Court Has Emphasized The First Amendment Harms From Forced Disclosure of Organizational Affiliations.

Compelled disclosure of organizations' donors and members became an issue of national importance during the 1950s and 1960s, as governments throughout the South imposed onerous disclosure requirements on civil rights organizations as a tactic to suppress their expression and political activity, or to expel them from a given jurisdiction. In response, this Court declared that such forced disclosures impose substantial First Amendment harms, and required governments seeking to force organizations to turn over donor and membership rolls to demonstrate a compelling government interest, with a

close connection to the required disclosure. Since then, this Court has consistently affirmed the constitutional principle that organizations have a First Amendment interest in keeping associational donors and members private, and that compelled disclosure must be closely connected to a governmental interest that is sufficiently important to justify the significant First Amendment burden.

The Court's first major decision in this area came in *NAACP v. Alabama*, in which, upon a bill of complaint filed by the Attorney General of Alabama, a state court ordered the NAACP to disclose the names and addresses of all Alabama NAACP "members" and "agents" pursuant to an Alabama law regulating the activity of non-profits in the State. 357 U.S. at 453. While Alabama wrapped its actions in a "cloak of legality," the NAACP urged the Court to "view[] [them] against a background of open opposition by state officials and an atmosphere of violent hostility to [the NAACP] and its members" because the NAACP sought "the elimination of racial segregation and other barriers of race." Br. for Petitioner, 1957 WL 55387, at *17. The Court unanimously "recognized the vital relationship between freedom to associate and privacy in one's associations," writing that it "is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy" restrains freedom of association, and that "[i]nviobility of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, 357 U.S. at 462. Indeed, the Court analogized "[c]ompelled disclosure of membership in an organization engaged

in advocacy of particular beliefs" to "[a] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands." *Id.* Nowhere did the Court, or the state of Alabama, question the NAACP's concerns about harassment and retaliation, let alone suggest that it bore the burden of making some threshold showing confirming the nature or specificity of its concerns.

This Court again confronted a compelled disclosure requirement in *Shelton v. Tucker*, which addressed an Arkansas statute that compelled every teacher, as a condition of employment, to file an annual affidavit listing every organization to which she belonged or regularly contributed within the preceding five years. 364 U.S. at 480. In declaring the statute unconstitutional, the Court again recognized that compelled disclosure of a teacher's "every associational tie" necessarily "impair[s] that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Id.* at 485-86.

The next year, in *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), the Court affirmed a preliminary injunction barring Louisiana from enforcing a law requiring any state organizations to provide the Louisiana Secretary of State with their members' names and addresses. *Id.* at 295. Because the case was in a "preliminary stage," the question whether NAACP members would face reprisals if their names were disclosed was disputed. But the Court, relying on *NAACP v. Alabama* and *Shelton,* nevertheless affirmed the imposition of a preliminary injunction. *Id.* at 296-97.

Subsequently, in *Roberts v. Pollard*, this Court affirmed a decision by a three-judge district court invalidating, under the First Amendment, an Arkansas state court's investigative subpoena seeking a list of contributors to the Arkansas Republican Party. 393 U.S. at 14. The three-judge court noted that "there is no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions" to the Republican Party, but that it would be "naive not to recognize" that disclosure would subject "at least some" contributors to the "potential" for "economic or political reprisals of greater or lesser severity." 283 F. Supp. at 258. The court therefore held that, even where there was no evidence of any actual reprisals, the government must provide some justification for a compelled disclosure. *See id.* at 258-259. Concluding that Arkansas's investigatory justification was insufficient, the court barred the State from requiring disclosure of the contributions. *Id.* at 259.

The Court's more recent precedents have applied the same basic framework to disclosure laws. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court applied "exacting scrutiny" to a statute requiring disclosure of donations more than $100 per year to a candidate for office. *Id.* at 63-64. Referencing the *NAACP v. Alabama* line of cases, the Court reiterated that it "is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute." *Id.* at 68. Given this First Amendment burden, the Court held the associational interest in privacy "must be weighed carefully against the interests which Congress has sought to promote by

this legislation." *Id.* In the context of elections, the Court held that the government's interests were sufficient to justify the compelled disclosure at issue—especially since disclosure in that context is a less-speech restrictive alternative to prohibiting or limiting contributions altogether—though the Court left open the possibility for as-applied challenges. *Id.* at 67-72.[2] This Court later recognized just such an as-applied exception to a similar state disclosure regime in a case involving the Socialist Workers Party. *See Brown*, 459 U.S. at 89.

Most recently, in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), this Court again emphasized that compelled disclosure requirements are subject to close First Amendment scrutiny. In that case, individuals who signed a petition seeking a referendum to reverse the expansion of rights for same-sex domestic partners challenged a law that made their petition signatures public. The Court applied "exacting scrutiny" to the disclosure law, but, as in *Buckley*, the Court recognized that the disclosure requirements were carefully tailored to advance the government's strong interests in electoral transparency and integrity, which outweighed individual First Amendment

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[2] As AFP argues (18, 28-29), cases involving election-related disclosures are generally distinguishable from challenges to other laws compelling disclosure of donor information not only because of the strength of the government interest in promoting election-related transparency, but because public disclosure is generally "the least restrictive means" of pursuing those interests. *Buckley*, 424 U.S. at 68. By contrast, narrow tailoring cannot be assumed outside the electioneering context, as the government may have means of pursuing objectives like law enforcement and fraud prevention without mandating the disclosure of member and donor information for all non-profit associations.

interests in most cases. *Id.* at 196-200. As in *Buckley*, the Court recognized that a more limited challenge could succeed if a specific organization established that, in the context of a specific petition, threats of harassment or retaliation were particularly likely or serious. *Id.* at 201-02.

In all of these cases, from *NAACP v. Alabama* up through *Doe No. 1*, this Court has demonstrated considerable and consistent solicitude for the right to privacy in association. That solicitude does not mean that all disclosure requirements violate the First Amendment. For instance, as the Court recognized in *Buckley* and *Doe No. 1*, the government has particularly compelling interests in the election context that generally justify disclosure requirements. But compelled disclosure of an organization's members or donors is *always* a material intrusion on First Amendment rights, and it can only be justified when the State carries its burden of demonstrating that the disclosure is carefully tailored to further a weighty government interest.

B. There Is No Threshold Requirement To Show Harassment From A Particular Disclosure Requirement Before Exacting First Amendment Scrutiny Applies.

In the face of this precedent, the Ninth Circuit rejected a facial challenge to California's disclosure requirement, reasoning that compelled disclosure of donor information to the government did not impose any First Amendment harm "in and of itself," and faulting the challenger for failing to produce specific evidence that the organization's "significant donors would experience threats, harassment, or other

potentially chilling conduct as a result of the Attorney General's disclosure requirement." *Ctr. for Competitive Politics*, 785 F.3d at 1316; *see also* Pet. App. (No. 19-251) at 39a-40a (relying on *Center for Comparative Politics* to reject petitioners' facial challenge here). Although the Ninth Circuit allowed petitioners here to pursue as-applied First Amendment challenges, the court turned those challenges aside because California has promised to keep donor information confidential and petitioners did not identify donors "whose willingness to contribute *hinges*" on whether their identity "will be disclosed to the Attorney General." Pet. App. (No. 19-251) at 27a-28a (emphasis added). Thus, the Ninth Circuit found it constitutionally insignificant that petitioners' evidence "shows that some individuals who have or would support" their organizations "may be deterred from contributing" by the Attorney General's compulsory disclosure regime. *Id.* at 27a.

The Ninth Circuit's rule conditioning meaningful First Amendment scrutiny on an organization's ability to show specific harm from a particular disclosure requirement is inconsistent with the governing law and should be rejected.

1. This Court has regularly applied First Amendment scrutiny to compelled disclosure requirements even where there was no objective evidence that the disclosure would lead to "threats, harassment, or reprisal." In *Shelton*, for instance, the Court invalidated the requirement that Arkansas teachers identify their organizational affiliations because "the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy."

364 U.S. at 486. There was no evidence put forward showing that Arkansas would discriminate against those with particular organizational affiliations, and no evidence that the fear of such discrimination motivated any teacher to cease her affiliations. The Court nevertheless held that the government had failed to justify its compelled disclosure requirement with interests that were sufficiently important and sufficiently connected to the compelled disclosure at issue. *Id.* at 487-488.

The Court's affirmance in *Roberts v. Pollard* further demonstrates that the government must always justify a compelled disclosure requirement under exacting scrutiny—requiring both a compelling government interest and narrow tailoring. 283 F. Supp. at 258. The three-judge court recognized that "there [was] no evidence of record . . . that any individuals have as yet been subjected to reprisals on account of" the compelled disclosure requirement at issue. *Id.* Nevertheless, the court applied First Amendment scrutiny and barred the disclosure because it would be "naive not to recognize" the "potential" for "at least some" reprisals from the broad disclosure sought by the government. *Id.* Further, the court recognized that the disclosure at issue would chill First Amendment activity simply because "many people doubtless would prefer not to have their political party affiliations and their campaign contributions disclosed publicly." *Id.* Despite the lack of record evidence of reprisals, this Court affirmed the judgment in that case, 393 U.S. 14, and has subsequently cited *Pollard* as precedent in compelled-disclosure decisions, *e.g.*, *Buckley*, 424 U.S. at 64-65.

Finally, in *Buckley*, this Court also applied First Amendment scrutiny without requiring record evidence that the compelled disclosure at issue would lead to harassment or reprisals. This Court explained that "compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64 (emphasis added). *But see Ctr. for Comparative Politics*, 784 F.3d at 1316 (insisting, contra *Buckley*, that there is no First Amendment interest affected by disclosure "in and of itself"). This Court then considered whether the government interests sufficiently justified the disclosure requirement, despite the lack of evidence of reprisals, and, relying on considerations specific to the electoral context, held that they did. 424 U.S. at 67-72; *see* p. 11 & n.2, *supra*.

2. Numerous courts of appeals have relied on this Court's decisions to reject government arguments that the First Amendment does not impose meaningful scrutiny unless and until the plaintiff introduces concrete evidence of harassment or intimidation. For instance, in *Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969), the D.C. Circuit invalidated a requirement for the Communist Party to disclose its members, even though there was "no direct evidence in the record in this case as to the degree of harassment that one named as a member of the Communist Party may suffer as a result" of disclosure. *Id.* at 1148 & n.20.

Similarly, in an opinion in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), Judge J. Skelly Wright rejected the government's argument that no First Amendment scrutiny was necessary because there was

no evidence of a chilling effect from compelled disclosure.[3] As Judge Wright explained, "[c]hilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern." *Id.* at 1118. If there is "concrete evidence of a successful chill, the case is a stronger one, and the burden on government to justify its regulation must be heavier." *Id.* at 1118. But the absence of "concrete evidence . . . does not mandate dismissal"; instead, the court must "evaluate the likelihood of any chilling effect, and . . . determine whether the risk involved is justified in light of the purposes served by the statute." *Id.*

Like the D.C. Circuit, the Second and Third Circuits have previously rejected attempts to require plaintiffs to present specific evidence of harassment or reprisal to trigger First Amendment scrutiny for disclosure laws. In *Local 1814*, the government sought to compel disclosure of union members who had authorized payroll deductions to support the union. The government argued that the union members had not established any "impairment of protected rights" because they made no "showing that disclosure of contributors' identities would lead to economic or physical harassment." 667 F.2d at 271. Relying on *Pollard* and *Shelton*, the Second Circuit rejected that argument and explained that "a factual record of past

[3] Judge Wright wrote the opinion of the court striking down the disclosure requirement on non-First Amendment grounds, but the section of his opinion addressing First Amendment issues was not joined by a majority of judges.

harassment is not the only situation in which courts have upheld a First Amendment right of non-disclosure," because the "underlying inquiry must *always* be whether a compelling governmental interest justifies any governmental action." *Id.* at 271-272 (emphasis added). The Second Circuit applied the same analysis in *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015), involving a challenge to the government's collection of telephone metadata. In concluding that the associational plaintiffs had standing, the court recognized that "[w]hen the government collects appellants' metadata, appellants' members' interests in keeping their associations and contacts private are implicated, and any potential 'chilling effect' *is created at that point*." *Id.* at 802-03 (emphasis added); *see also Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 119-120 (3d Cir. 1987) (rejecting disclosure requirement where the government had no "legitimate interest" without first requiring objective evidence that the requirement would "chill . . . associational activities").

In short, courts have repeatedly recognized that the First Amendment imposes strict limits on a government's ability to compel disclosure of organizational affiliations. Those limits are not conditioned on an individual organization's ability to put forward objective evidence that the specific disclosure would lead to threats or harassment, or would cause a specific person to drop out of the group or refrain from donating. The government should not be allowed to compile an electronic dossier on the affiliations of anyone who cannot show they have faced threats or harassment due to the government's data collection.

C. Courts May Still Consider Evidence Of Threats Or Harassment In Determining Whether Government Interests Are Sufficient To Justify Compelled Disclosure.

As the above discussion illustrates, evidence of threats or harassment resulting from disclosure requirements is not *necessary* to establish a First Amendment violation. But it is relevant to the First Amendment inquiry.

First, evidence of threats or harassment are relevant if the government's interests are sufficient to justify a generally-applicable compelled-disclosure requirement, but a specific organization brings an as-applied challenge. Thus, in *Buckley*, after concluding that the government's interests justified the disclosure requirement as a whole, the Court separately considered whether minor and independent parties could introduce evidence showing that their contributors suffered particular First Amendment harm warranting an exception from the generally-applicable requirement. 424 U.S. at 69-72. The Court then applied that exception in *Brown*. 459 U.S. at 89. And in *Doe No. 1*, the Court held that the government's interests were sufficient to justify the disclosure requirement as a whole, but left open the possibility that a particular group must be exempted from the disclosure requirement based on particularly acute First Amendment concerns. 561 U.S. at 201-02; *see also id.* at 205-211 (Alito, J., concurring).

Second, evidence of widespread harassment and reprisal from compelled disclosure is relevant, though not necessary, in a facial challenge to a compelled disclosure requirement. For instance, while this Court

in *Shelton* invalidated the requirement that all teachers disclose their organizational affiliations without any evidence of threats or harassment, evidence that teachers *were* routinely harassed or threatened based on their disclosures would certainly have strengthened their case.

The Ninth Circuit reasoned that the relevant evidence in those scenarios must be evidence of threats, harassment, or chilling caused by the *specific* public disclosure requirement at issue. *E.g.* Pet. App. (No. 19-251) at 24a, 33a. That is incorrect. As the *Buckley* Court recognized, "unduly strict requirements of proof"—such a "[a] strict requirement that chill and harassment be directly attributable to the specific disclosure" at issue—may substantially under-protect First Amendment rights. 424 U.S. at 74. Thus, if there is evidence of "past or present harassment of members due to their associational ties, or of harassment directed against the organization itself," courts may reasonably infer that compelling disclosure of associational information will lead to threats and harassment. *Id.*

In briefing before the Ninth Circuit panel, the Attorney General contended that, under *Buckley*, courts should only apply this flexible approach to establishing First Amendment chill for "minor" or "new" parties. No. 16,44727, Respondent C.A. Br. 27-30. But that argument is both contrary to precedent and deeply problematic. As discussed above, p. 16, *supra*, the court in *Pollard* did not apply such a narrow evidentiary approach to the compelled disclosure of Republican Party donors—hardly a "minor" or "new" party, even in 1960s Arkansas. *See* 283 F. Supp. 2d at 258. More fundamentally, such a rule would be

impossible to administer—outside the context of electoral politics, there is no coherent way to determine whether a party is "new" or "minor."

Courts should therefore be able to take such background evidence into account when assessing the chilling effect of a disclosure requirement.

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In sum, although evidence that a particular public disclosure requirement will lead to threats or harassment will always bolster a First Amendment challenge, meaningful First Amendment scrutiny is not contingent on whether a challenger is able to put forward specific evidence of lost contributions or that particular members faced "threats, harassment, or reprisal." Before the government may collect its citizens' organizational affiliations, it must show that it has a compelling interest that it could not achieve in a less intrusive manner that does no impinge upon fundamental associational liberties.

II. The First Amendment Burden From Compelled Disclosure Of Donor Identity Exists Regardless Of Whether The Information Is Publicly Disclosed.

The Ninth Circuit held that the First Amendment burden imposed by the compelled disclosure of private donor information is minimal because the Attorney General is required to keep information confidential. Pet. App. (No. 19-251) at 34a-38a. But such a pledge does not eliminate the substantial chilling effect of overly broad disclosure laws because even if the promise of nondisclosure to *the public* were credible, *but see* AFP Br. 39-43, disclosure to *the government itself* may deter the exercise of associational rights

given the reasonable fear of future governmental retaliation.

At the core of the First Amendment is the right for individuals to organize to engage in dissent, challenge the government, and hold the powerful to account. "Inviolability of privacy in group association may in many circumstances be indispensable" to preserving those rights, "particularly where a group espouses dissident beliefs." *Brown*, 459 U.S. at 91 (citation omitted); *accord Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 556-57 (1963) (recognizing that "all legitimate organizations are the [b]eneficiaries" of privacy protections, but that they are "mo[st] essential" for organizations that espouse unpopular beliefs). Groups engaged in controversial expression may thus reasonably fear not only disclosure to the public, but also disclosure to the government. *See Shelton*, 364 U.S. at 486 (requiring teachers to disclose their affiliations violated their right of free association "[e]ven if there were no disclosure to the general public").

Indeed, when an organization litigates against or otherwise opposes government policies or public officials, its members may have *the most* to fear from government retaliation. Only government officials can wield the State's authority to harass an association's members, interfere with their business interests, block access to government employment, or even threaten their freedom. Far from a hypothetical or abstract fear, American history is replete with examples of governments using their investigative and coercive powers to target unpopular groups, including the infiltration of anti-war groups and the targeting and

monitoring of civil rights activists.[4] Even where the government does not actually misuse an organization's confidential disclosures to target opponents, the reasonable fear among donors and members that it *might* do so is enough to chill the exercise of speech and associational rights.

Courts have recognized the legitimacy of these concerns, and applied exacting scrutiny to compelled disclosure requirements without record evidence that the government will misuse the information it collects. For example, in *Shelton*, the Supreme Court explained that even if the teachers' information was not shared with the public or otherwise acted upon, "the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." 364 U.S. at 486. Similarly, in *Local 1814*, the Second Circuit held that a subpoena by a government commission to compel the disclosure of contributors to a union's political action committee would have an "inevitable" chilling effect on future donations, given the commission's regulatory authority over the union members. 667 F.2d at 272.

The chilling effect of disclosing sensitive

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[4] *See generally* Church Committee Reports, Book II, *Intelligence Activities and the Rights of Americans*, at 211-24 (1976), *available at* https://bit.ly/37Knjrl*; see also, e.g.*, ACLU, *Unleashed and Unaccountable: The FBI's Unchecked Abuse of Authority*, 41-43 (Sept. 2013), https://bit.ly/2NS4Hi1 ("The FBI . . . targeted political advocacy organizations with renewed vigor after 9/11, as demonstrated through ACLU FOIAs and confirmed by the 2010 Inspector General audit."); Jen Christensen, *FBI Tracked King's Every Move*, CNN (Dec. 29, 2008), https://cnn.it/2OYbU0r; Beverly Gage, *What an Uncensored Letter to M.L.K. Reveals*, N.Y. TIMES (Nov. 11, 2014), https://nyti.ms/3dDhRdE.

associational information is not mitigated by the government's assurances of good faith. *See United States v. Stevens,* 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesee oblige*."). By collecting and aggregating confidential information about an organization's donors or members, the government creates a loaded gun that a future administration might decide to fire. Any donor to an organization engaged in potentially controversial expression must consider the risk that future executive officials with access to donor lists may use those lists as a tool to enable politically motivated investigations.[5] It is easy to imagine, for example, that a Black Lives Matter organization,[6] or an organization assisting undocumented immigrants at the border,[7] would have justifiable concerns about turning their donor or membership information to the government, *regardless* of whether that information remains non-public.

In short, fear of sensitive associational information falling into government hands will likely deter membership and donations to controversial organizations, and chill the exercise of First Amendment rights. *See Pollard*, 283 F. Supp. at 258.

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[5] *Cf.* Mark Hosenball, *U.S. ethics groups say Barr uses DOJ as political tool, call for his impeachment*, REUTERS (Oct. 12, 2020), https://reut.rs/3qSWclx.

[6] *See* Michael German, *The FBI Targets a New Generation of Black Activists*, BRENNAN CENTER FOR JUSTICE (Jun. 26, 2020), https://bit.ly/2PcLmZL.

[7] Jose A. Del Real & Zolan Kanno-Youngs, *U.S. Tracked Activists and Journalists as Migrant Caravans Headed to the Border*, N.Y. TIMES (May 7, 2019), https://nyti.ms/37KakWC.

Courts must accordingly apply exacting First Amendment scrutiny to compulsory disclosure rules, even when the government promises confidentiality.

CONCLUSION

This Court should reverse the decision below and hold that the government is required to identify a compelling reason that is narrowly tailored to any requirement that an organization disclose the identity of its members and donors.

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Dated: March 1, 2021