No. 19-793

In the Supreme Court of the United States

INSTITUTE FOR FREE SPEECH,
Petitioner,

v.

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

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Ilya Shapiro
Counsel of Record
Trevor Burrus
James T. Knight II
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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QUESTION PRESENTED

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), and its progeny held that courts should apply narrow tailoring to violations of the freedom of association—meaning a close fit between means and ends. Has that requirement been overruled such that the right to associate privately does not enjoy the strong protective standard that applies to other First Amendment rights, which this Court has held requires narrow tailoring regardless of the level of scrutiny?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

This case concerns Cato because the right of private association is essential to liberty and must be protected against governmental intrusion. Cato is concerned that California's blanket demand for donor-identity lists creates a substantial risk of donor harassment and poses a serious threat to the rights of free speech and association by eviscerating the privacy necessary to protect them. Notably, the Cato Institute is named after the anonymously written *Cato's Letters*.

INTRODUCTION AND SUMMARY OF ARGUMENT

During the Civil Rights Era, state governments attempted to force groups like the NAACP to disclose their membership lists. This Court stepped in and subjected such attempts to "the closest scrutiny." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460–61 (1958). Violations of the freedom of association must advance

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

a compelling state interest and be narrowly tailored to that interest. The narrow-tailoring requirement prevents the government from needlessly infringing on constitutional rights when less restrictive means of achieving its goal are available. The Court requires "'a fit that . . . employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective,'" which applies "[e]ven when the Court is not applying strict scrutiny." *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). This narrow-tailoring minimum reflects decades of First Amendment precedent in cases concerning both associational and non-associational rights.

While the Civil Rights Era was unique, the right to private association is still vital. In an era of increasing political polarization, protecting associational privacy becomes even more important. When groups or individuals espouse unpopular or controversial beliefs, private association is critical. This Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). The First Amendment does not require individuals or groups to suffer threats, harassment, or violence before falling under its protection. Instead, any attempt by the state to pierce the right to associate privately must satisfy exacting scrutiny, including its crucial narrow-tailoring requirement. Unfortunately, the Ninth Circuit has consistently failed to follow this Court's direction in providing those strong protections for the freedom of association.

Despite acknowledging the "foundational" nature of *NAACP v. Alabama*, the Ninth Circuit chose to write-off as inapposite nearly every subsequent case in which the Court developed and expanded on *NAACP v. Alabama*'s rule for compelled disclosure cases. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 n.2, n.3 (9th Cir. 2015). Likely as a result of this creative editing of First Amendment doctrine, the court below erroneously declared, without support or analysis, that the narrow-tailoring requirement of exacting scrutiny is a "novel theory . . . not supported by . . . Supreme Court precedent." *Id.* at 1312.

The Court's precedents are clear: no matter the level of judicial scrutiny, state actions that infringe on First Amendment freedoms, such as the compelled disclosure of donor lists, must be narrowly tailored to the governmental interest asserted. Petitioner Institute for Free Speech has provided an opportunity for the Court to reaffirm those precedents and continue its protection of First Amendment freedoms.

REASONS FOR GRANTING THE PETITION

I. *NAACP V. ALABAMA* AND ITS PROGENY REQUIRE COURTS TO ENSURE NARROW TAILORING WHEN ASSESSING A VIOLATION OF THE FREEDOM OF ASSOCIATION

It is "beyond debate" that the freedom of association is protected by the First Amendment and is incorporated against the states by the Fourteenth Amendment. *NAACP*, 357 U.S. at 460. This freedom includes the right to associate anonymously and privately, particularly for groups espousing minority views. *Id.* at 462; *Gibson v. Fla. Leg. Investigation Comm.*, 372 U.S.

539, 543–44 (1963) (holding that it is "clear that the guarantee [of freedom of association] encompasses protection of privacy of association in organizations such as [the NAACP]"). In protecting the freedom to associate privately, the Court has treated membership and donor lists "interchangeably." *Buckley,* 424 U.S. at 66.

A constitutionally valid requirement that organizations disclose their member or donor lists must serve a compelling governmental interest and be narrowly tailored to that interest. *NAACP v. Alabama*'s "strict test" is "necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Removing any element of that test endangers First Amendment protections and represents a sharp departure from this Court's well-established precedents.

A. *NAACP v. Alabama*, *Bates*, and *Shelton* Rapidly Established a Test Requiring Compelled Disclosure Regimes to Be Narrowly Tailored to the Interest Asserted

The Court laid strong foundations for protecting associational privacy in *NAACP v. Alabama*, subjecting "state action which may have the effect of curtailing the freedom to associate" to "the closest scrutiny." 357 U.S. at 460–61. That case concerned an attempt by Alabama to compel the NAACP to produce its state membership list. *Id.* at 451–53. If Alabama were permitted to force the NAACP to disclose that list, it was "likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs" by "induc[ing] members to withdraw from the [NAACP] and dissuad[ing] others from joining it." *Id.*

at 462–63. Justifying such an infringement would require the "subordinating interest of the State" in seeking the disclosure to be "compelling," and Alabama couldn't pass that test. *Id.* at 463.

The Court returned to the question of private association two years later in *Bates v. City of Little Rock*, which also arose from an attempt to force the NAACP to disclose its members. 361 U.S. 516, 517–18 (1960). Unlike in *NAACP v. Alabama*, however, the governmental purpose asserted—the power to tax—was deemed "fundamental." *Id.* at 524–25. The Court held, however, that the disclosure requirement must also "bear[] a reasonable relationship to the achievement of the governmental purpose asserted." *Id.* at 525. Then, in *Gibson*, the Court considered whether a state could compel the production of NAACP membership lists pursuant to a legislative investigation. 372 U.S. at 541–42. It held that, when impinging on the freedom of political association, the state must "convincingly show a *substantial* relation between the information sought and a subject of overriding and compelling state interest." *Id.* at 546 (emphasis added).

In *Shelton v. Tucker*, decided the same year as *Bates*, the Court examined an Arkansas law requiring teachers to disclose, annually, any organizations they had belonged to in the previous five years.[2] 364 U.S.

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[2] The Ninth Circuit inaccurately characterized *Shelton* as "inapposite" on the grounds that it was an "as-applied challenge[] involving the NAACP (which had demonstrated that disclosure would harm its members)." *Ctr. for Competitive Politics*, 784 F.3d at 1312 n.3. *Shelton* found that the Arkansas law was *facially* unconstitutional, as Justice Harlan recognized in his dissent, which cited the facial nature of the challenge as a primary reason for his dissent. *Shelton*, 364 U.S. at 499 (Harlan, J., dissenting) ("All that

479, 480–81 (1960). As in *NAACP v. Alabama* and *Bates*, the required disclosures "impair[ed] . . . [the] 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." *Shelton*, 364 U.S. at 485–86 (citing *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Bates,* 361 U.S. at 522–23). Even when the governmental purpose is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488.

In *Shelton*, the lack of narrow tailoring was the key problem with the law. The requisite "compelling" purpose was met because the state had a right to "investigate the competence and fitness of those whom it hires to teach in its schools." *Id.* at 485. And, unlike *NAACP* and *Bates* where there was no "substantially relevant correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership lists," the court found the state's inquiry into a teacher's organizational affiliations was "relevant to the fitness and competence of its teachers." *Id.*

The problem was with the *scope* of the state's inquiry. The question was "not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships," it was "whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period." *Id.* at 487–88. The inquiry was "completely unlimited," and looked into relationships

is now here is the validity of the statute on its face, and I am unable to agree that in this posture of things the enactment can be said to be unconstitutional.").

that had "no possible bearing upon the teacher's occupational competence or fitness." *Id.* at 488. Given the "breadth of legislative abridgment," the law "must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.*

When *Shelton* was decided in 1960, narrow tailoring was hardly an unknown concept. Indeed, the *Shelton* Court noted "a series of decisions" in First Amendment cases in which the Court had instituted the same requirement. *Id. Shelton* merely recognized that associational rights are no less protected than the freedoms of speech or religious exercise. *See, e.g. Saia v. New York*; 334 U.S. 558, 560 (1948) (finding an ordinance forbidding "the use of sound amplification devices except with permission of the Chief of Police" unconstitutional because it was "not narrowly drawn"); *Martin v. Struthers*, 319 U.S. 141, 147 (1943) (striking down as overbroad an ordinance prohibiting door-to-door canvassers and solicitors from "ring[ing] the door bell, sound[ing] the door knocker," or taking similar actions to distribute materials and contrasting it with "similar statutes of narrower scope" in other states); *Cantwell v. Connecticut*, 310 U.S. 296, 304, 311 (1940) (holding that a criminal defendant could not be convicted of offenses relating to his public proselytizing "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State," and that, in the First Amendment context, a state's "power to regulate must be so exercised as not, in attaining a permissible end, unduly infringe the protected freedom").

B. The Court Continued to Apply *NAACP v. Alabama*'s Test with Its Narrow-Tailoring Requirement in the Sixties and Seventies

In the nearly two decades between *NAACP v. Alabama* and *Buckley*, the Court repeatedly upheld the *NAACP v. Alabama* test, including the crucial narrow-tailoring requirement. A year after *Shelton*, in *Louisiana ex rel. Gremillion v. NAACP*, the Court again encountered an attempt by a state, this time Louisiana, to compel the NAACP to disclose its membership list. 366 U.S. 293, 294–95 (1961). The Court reiterated that such a requirement would infringe on associational rights. *Id.* at 296. In such cases, "[w]e are in an area where, as [*Shelton*] emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment." *Id.* The *Gremillion* Court then quoted *Shelton*'s prohibition against the pursuit of even "legitimate" governmental purposes through "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.*

This language from *Shelton* proved popular. Because the narrow-tailoring requirement applies to all First Amendment rights, not just associational freedom, the Court extensively used *Shelton*'s language in a variety of First Amendment contexts in the years between *Shelton* and *Buckley*. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101, 101 n.8 (1972) (holding that "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives," and noting that "[i]n a variety of contexts" the Court has used the *Shelton* "more narrowly achieved" language and "carefully applied [this standard] when First

Amendment interests are involved."); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183–84 (1968) ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" (quoting *Shelton*, 364 U.S. at 488)); *Elfbrandt v. Russell*, 384 U.S. 11, 18–19 (1966) (quoting *Shelton*'s "more narrowly achieved" language and holding that "[a] statute touching those protected rights [of association] must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State'") (also quoting *Cantwell*, 310 U.S. at 311); *NAACP v. Alabama*, 377 U.S. 288, 307–08 (1964) (quoting *Shelton*'s "more narrowly achieved" language in a citation supporting the statement that "[t]his Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms").

Even in those associational rights cases where the Court did not use *Shelton*'s language, the Court unambiguously described the narrow-tailoring requirement in other ways. In *NAACP v. Button*, the Court held that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." 371 U.S. 415,

433 (1963).[3] Citing *Shelton*, *Gremillion*, and similar cases, the Court further wrote that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 438. The Court would go on to use *Button*, or similar language, in other cases to describe narrow tailoring. *See*, *e.g.*, *Kusper v. Pontikes*, 414 U.S. 51, 58–59 (1973) (quoting *Button* regarding "precision of regulation," and, citing *Shelton*, holding that states must opt for "less drastic way[s] of satisfying its legitimate interests" instead of means that "broadly stifle[] the exercise of fundamental personal liberties").

II. *BUCKLEY V. VALEO* AND SUBSEQUENT ELECTORAL CASES DID NOT ELIMINATE THE NARROW-TAILORING REQUIREMENT

The Ninth Circuit stripped *NAACP v. Alabama*'s test of its narrow-tailoring requirement by relying on compelled disclosure cases in the election context.[4] *Ctr. for Competitive Politics*, 784 F.3d at 1312. It relied on the "exacting scrutiny" applied in two 2010 such cases decided by this Court, *Doe v. Reed*, 561 U.S. 186 (2010), and *Citizens United v. FEC*, 558 U.S. 310 (2010). In

[3] *Button* was a free expression and free association challenge to a Virginia statute regulating the solicitation of legal business as applied to the NAACP. The Court concluded that the law violated the NAACP's (and its members') First and Fourteenth Amendment rights. *Button*, 371 U.S. at 428–29.

[4] The Ninth Circuit has since expanded on this approach in *Americans for Prosperity Foundation v. Becerra*, which challenges the same California compelled disclosure regime as the instant case. *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1008–09 (9th Cir. 2018) (petition for certiorari pending).

Doe and *Citizens United*, the Court derived its description of "exacting scrutiny" entirely from *Buckley* or later cases that themselves relied on *Buckley*. *Doe*, 561 U.S. at 187 (citing *Citizens United*, 558 U.S. at 366–67); *Davis v. FEC*, 554 U.S. 724, 744 (2008) (citing *Buckley*, 424 U.S. at 64, 68, 75)); *Citizens United*, 558 U.S. at 366–67 (citing *Buckley*, 424 U.S. at 64).

When describing *Buckley*'s "exacting scrutiny" standard, neither *Doe* nor *Citizens United* explicitly mention narrow tailoring as an element. The Ninth Circuit's interpretation of this omission appears to be that narrow tailoring is not a requirement of the *Buckley* "exacting scrutiny" standard used in *Doe* and *Citizens United*. Far from supporting this conclusion, however, *Buckley* clearly reaffirms the *NAACP v. Alabama* test, including its narrow-tailoring requirement.

Narrow tailoring was not mentioned in *Doe* and *Citizens United* because it was not necessary. In the related case *Americans for Prosperity Foundation* challenging the same California compelled disclosure regime, which also now has a cert. petition pending, the Ninth Circuit dissenters from the denial of *en banc* review would correctly note that *Buckley* held that "[b]ecause, 'in most applications,' disclosure is 'the least restrictive means of curbing the evils of campaign ignorance and corruption,' the narrow tailoring prong of the *NAACP v. Alabama* test is satisfied" in *electoral* compelled disclosure cases. *Ams. for Prosperity Found. v. Becerra*, 919 F.3d 1177, 1180 (9th Cir. 2019) (Ikuta, J., dissenting from denial of rehearing *en banc*). As discussed below, the Court's post-*Buckley* rulings reflect this point, continuing to apply narrow tailoring as a crucial requirement in both associational and non-associational First Amendment cases.

A. *Buckley* Reaffirmed *NAACP v. Alabama*'s "Strict Test" of Exacting Scrutiny with Narrow Tailoring

The *Buckley* Court wrote that because compelled disclosure constitutes a "significant encroachment on First Amendment rights," the Court subjects such requirements to the *NAACP v. Alabama* test, which is "exacting scrutiny." *Buckley*, 424 U.S. at 64. The Court saw no need to alter *NAACP v. Alabama*'s "strict test," holding that it "is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id.*

The Court then applied *NAACP v. Alabama* to compelled disclosures in the electoral context. Within this context, the Court found that "[t]he disclosure requirements, as a general matter, directly serve substantial governmental interests." *Id.* at 68. The Court examined the burden that disclosure placed on individual rights and held that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.*

Buckley discussed the narrow-tailoring rule from the *NAACP v. Alabama* line of cases twice more. First, in the context of contribution limits, the Court explained that "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and *employs means closely drawn* to avoid unnecessary abridgement of associational freedoms." *Id.* at 25 (cleaned up).

Second, when addressing a requirement that certain individuals and groups file disclosures of their

campaign contributions, the Court wrote that it "must apply the same strict standard of scrutiny" as it applied to the other disclosure requirements because it implicated the same "right of associational privacy developed in *NAACP v. Alabama*." *Id.* at 75. Applying *NAACP v. Alabama*, the Court upheld this second disclosure requirement as constitutional because it "b[ore] a sufficient relationship to a substantial governmental interest," and because it was "*narrowly limited*," with the burden on associational rights being "minimally restrictive." *Id.* at 81–82 (emphasis added).

Buckley makes clear that narrow tailoring—or "employ[ing] means closely drawn"—is an essential requirement for a government action that infringes on associational freedom. In the electoral context addressed by *Buckley*, this narrow-tailoring requirement is satisfied because compelled disclosure is the least restrictive means of addressing the governmental interest asserted. Outside of that context, however, *Buckley*'s holding reaffirms, rather than removes, the need for narrow tailoring in First Amendment cases.

B. The Court Continued to Apply Exacting Scrutiny with Narrow Tailoring in Both Associational and Non-Associational First Amendment Contexts after *Buckley*

The Court has clarified that *Buckley*'s exacting scrutiny requires narrow tailoring in a variety of First Amendment contexts. Only five months after *Buckley*, the Court held in *Elrod v. Burns* that "[i]t is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny," under which "the government must employ means closely drawn to avoid unnecessary abridgment." 427

U.S. 347, 362–63 (1976) (cleaned up). "[T]o survive constitutional challenge," the challenged state action "must further some vital government end by a means that is *least restrictive* of freedom of belief and association in achieving that end." *Id.* at 363 (emphasis added). The *Elrod* Court understood that *Buckley*'s "closely drawn" standard did not lessen the "strict test" of *NAACP v. Alabama* or its narrow-tailoring requirement, instead holding that narrow tailoring is necessary for *any* "significant impairment of First Amendment rights." *Id.* at 362–63.

Elrod's interpretation of *Buckley*'s narrow-tailoring requirement was not an isolated incident. The Court has repeatedly held that state action infringing on First Amendment freedoms must be narrowly tailored. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is *narrowly tailored* to serve an overriding state interest." (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) (emphasis added)); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781 (1988) (finding unconstitutional several regulations on charity fundraisers because they were not "narrowly tailored" as required by First Amendment exacting scrutiny).

The Court's application of *Buckley* in associational rights cases in particular has made clear that state action infringing on associational rights requires narrow tailoring. As recently as 2018, in *Janus v. AFSCME*, the Court held that the First Amendment requires narrow tailoring in the associational freedom context. 138 S. Ct. 2448 (2018). In *Janus*, the Court found that exacting scrutiny, although "a less demanding test than . . . 'strict' scrutiny," requires the law in question

to "'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 2465 (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012)).

The Court reached similar conclusions in other associational-rights cases between *Buckley* and *Janus*. *See, e.g., Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) (applying narrow tailoring to the issue of whether a public law school violated students' associational freedoms when it required student groups to accept all students as members to access school funding and facilities); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (holding that state actions infringing on associational freedom must "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *In re Primus*, 436 U.S. 412, 432 (1978) (finding that *Buckley*'s First Amendment "exacting scrutiny," including the requirement that the means employed be "closely drawn," is the test for free association cases).

These cases fit with *McCutcheon v. FEC*, where the Court held that narrow tailoring is always a requirement in First Amendment cases, regardless of the level of scrutiny. 572 U.S. at 218 ("Even when the Court is not applying strict scrutiny, we still require 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'") (quoting *Bd. of Trustees of State Univ. of N.Y.* at 480). The narrow tailoring of a law to a government interest is a constitutional

floor grounded in decades of the Court's First Amendment jurisprudence. A form of exacting scrutiny review that lacks this essential safeguard would risk eroding First Amendment protections across the board, not only for associational rights.

C. Later Cases Applying *Buckley*'s Exacting Scrutiny to Disclosure Requirements in the Electoral Context Have Not Eliminated the Narrow-Tailoring Requirement

Buckley found that the unique governmental interests in the electoral context mean that compelled disclosure requirements are the least restrictive means of achieving the governmental purposes asserted. The exception that *Buckley* left open was where a party could show a specific harm to associational rights as a result of the disclosure, generally in the form of threats or harassment. Without such a showing, however, *Buckley*'s per se rule meant that compelled disclosures, in the electoral sphere only, satisfied narrow tailoring. Notably, however, even absent threats or harassment, the *Buckley* Court considered narrow-tailoring analysis essential to evaluate the compelled disclosure. A showing of threats or harassment was a plus factor within narrow-tailoring analysis, not a prerequisite for narrow tailoring to apply. *Buckley* made clear that compelled disclosure is itself sufficient First Amendment injury to trigger narrow-tailoring analysis.

Instead of following the *Buckley* Court and applying the full *NAACP v. Alabama* test to the California compelled disclosure regime, the Ninth Circuit applied a greatly weakened version of exacting scrutiny, without narrow tailoring. In creating this lower form of scrutiny, the lower court latched onto the *Doe* Court's

statement that "[t]o withstand [exacting] scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Doe*, 561 U.S. at 196 (quoting *Davis*, 554 U.S. at 744); *Ctr. for Competitive Politics*, 784 F.3d at 1314. From this language, the court developed a version of exacting scrutiny that both lacks the necessary narrow-tailoring requirement and only takes into account "actual burden[s] on First Amendment rights" above and beyond the compelled disclosure burden itself. *Ctr. for Competitive Politics*, 784 F.3d at 1314.

The Ninth Circuit's reliance on *Doe* for a form of exacting scrutiny without narrow tailoring is misplaced. The language in *Doe* that the court relied on originally comes from a brief, eight-sentence section of *Davis*. *Davis* was not trying to break any new ground; rather, it cited to the section of *Buckley* where the Court applied narrow tailoring and determined that "disclosure requirements . . . appear to be the least restrictive means" available. *Davis*, 554 U.S. at 744 (citing *Buckley*, 424 U.S. at 68). The narrow-tailoring rule that *Davis* cited to remains the rule.

Doe omitted any explicit discussion of narrow tailoring because *Buckley* had resolved the question. What *Doe* left implicit, however, *Citizens United* addressed head-on only a few months earlier. There the Court applied *Buckley*'s exacting scrutiny and noted that it had "explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech," citing its narrow tailoring analysis in *Buckley* where it applied the "strict standard of scrutiny" for "the right of associational privacy developed in *NAACP v. Alabama*." *Citizens United*, 558 U.S. at 369 (citing *Buckley*, 424 U.S. at 75–76). Narrow tailoring

is alive and well; it is just a settled question within the narrow electoral context of *Buckley*, *Citizens United*, and *Doe*. Moreover, in case *Doe* muddied the waters, the Court's holding in *McCutcheon* four years later set the record straight: Narrow tailoring is always required. *McCutcheon*, 572 U.S. at 218.

III. IN POLARIZED POLITICAL TIMES, IT IS VITAL THAT THE COURT CONTINUE TO REQUIRE THAT COMPELLED DISCLOSURE BE NARROWLY TAILORED TO A COMPELLING GOVERNMENT INTEREST

Reducing the First Amendment right to associate and speak anonymously would have profoundly damaging chilling effects in our polarized political climate. Times of political division bring attempts to silence political opposition, whether through direct government action or through threats and harassment. During the Civil Rights Era, the NAACP was the subject of numerous attempts to force the organization to disclose its membership lists. In many cases, when individuals were discovered to be members of the NAACP, they quickly became targets of harassment, threats, and violence because of their affiliation with the group.

Unfortunately, groups advocating any number of unpopular ideas still face many of the physical, social, and economic dangers that the NAACP faced for decades. During the past several years, donors and activists across the political spectrum have faced death threats, public harassment, and economic consequences because of their political views and activities.

Opponents of President Trump have used the internet to organize boycotts of companies because they or

their officers donated to the president or other politicians who support him. *See, e.g.*, #GrabYourWallet, https://grabyourwallet.org. Congressman Joaquin Castro tweeted a list of San Antonians who donated to the president, saying it was "[s]ad to see." Paul Blest, "Here's How to Find Out Who Donated Thousands to Trump in Your Area," *Splinter News*, Aug. 7, 2019, https://bit.ly/2GUEtFj. In 2014, former Mozilla Firefox CEO Brendan Eich was forced to resign "after it was revealed that he gave $1,000 in support of a 2008 ballot initiative to ban gay marriage in California." Christian Britschgi, "Rep. Joaquin Castro's Doxxing of Trump Donors in His District Has Flipped the Campaign Finance Discourse on Its Head," *Reason*, Aug. 7, 2019, https://bit.ly/2mq8lSs. Most seriously, in October 2018 a pipe bomb was placed in the mailbox of billionaire philanthropist George Soros, who "donates frequently to Democratic candidates and progressive causes" and who is often portrayed as a "villain" by the far-right because of his donations. William K. Rashbaum, "At George Soros's Home, Pipe Bomb Was Likely Hand-Delivered, Officials Say," *N.Y. Times*, Oct. 23, 2018, https://nyti.ms/2D2hI1I.

Thankfully, petitioner Institute for Free Speech has yet to experience as close a call as Mr. Soros. Without the benefit of discovery and trial, however, IFS has also lacked the opportunity to put before the court any threats, harassment, or boycotts it, its members, or its donors have received or are likely to receive. Of course, such a showing is not required by this Court's precedents—nor should it be. The First Amendment, as incorporated against the states by the Fourteenth Amendment, protects the freedom to associate, includ-

ing the right to associate privately. Privacy in association, such as the privacy that IFS has assured its donors by sacrificing its ability to fundraise in California, protects individuals from experiencing the harassment, threats, and boycotts endured by groups such as the NAACP during the Civil Rights Era or political groups and donors today. If IFS's donors have not been the subject of threatening or harassing behavior, it may be because the organization has gone to such lengths to preserve their privacy. Compelled disclosure of donors is an infringement of the right to associate privately, and it is precisely that infringement that has the potential to expose donors to threats and harassment. For this reason, it is vital that the Court reaffirm its precedents recognizing the inherent First Amendment injury of compelled disclosure and subjecting compelled disclosure regimes to "the closest scrutiny," including the narrow-tailoring requirement.

The Ninth Circuit covers "40% of the nation's land mass and 20% of its population." Mark Brnovich & Ilya Shapiro, "Split Up the Ninth Circuit—but Not Because It's Liberal," *Wall St. J.*, Jan. 11, 2018, https://on.wsj.com/2sbpNN2. California alone had nearly 40 million people as of July 2019. QuickFacts California, U.S. Census Bureau, https://www.census.gov/quickfacts/CA (last visited Jan. 17, 2020). California's disclosure requirement and the Ninth Circuit's misapplication of First Amendment law is a dangerous combination if allowed to stand. At best, it means that a fifth of the country will enjoy less First Amendment protection. At worst, charitable giving will be chilled nationwide as charities are forced to either stop fundraising in California—giving up nearly 40 million potential donors—or disclose their Schedule

B donor lists, which include non-California donors. Given California's record for repeatedly releasing sensitive Schedule B's onto the internet and the insufficiency of current protections, few would blame donors who felt as though the compelled disclosures were "of the same order" as a requirement that they wear "identifying arm-bands," exposing them to threats, harassment, and boycotts. *NAACP*, 357 U.S. at 462.

Since the Civil Rights Era, the Court has steadfastly defended the principles of the First Amendment with strong protections like the narrow-tailoring requirement. It should continue to do so.

CONCLUSION

For the foregoing reasons, and those expressed by the petitioner, the Court should grant certiorari.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
James T. Knight II
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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