No. 19-793

IN THE

Supreme Court of the United States

INSTITUTE FOR FREE SPEECH,

PETITIONER,

V.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,

RESPONDENT.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether strict or exacting scrutiny should apply to laws that abridge the freedoms of speech and association recognized in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

2. Whether the government or the private association should initially bear the burden of proof in such cases.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center (LJC) is particularly interested in this case because of its respect for privacy as a core aspect of the right to freely associate. LJC President Patrick J. Hughes has written previously on disclosure, saying, "Anonymity protects people from harassment and intimidation. And by extension, it protects our right to hear and consider the widest variety of ideas and viewpoints[, r]egardless of whether those viewpoints come from the left or the right." Patrick J. Hughes, "Illinois Opportunity Project Responds to SunTimes Misinformation," March 23, 2017, https://illinoisopportunity.org.

LJC is also counsel for plaintiff in four challenges to disclosure regulations. *Illinois Opportunity Project v. Bullock*, 6:19-cv-00056-CCL (D.Mont.); *Illinois Opportunity Project v. Holden*, 3:19-cv-17912-BRM (D.N.J.); *Gaspee Project et al. v. Mederos et al.*, 1:19-cv-00609-MSM-LDA (D.R.I.); *Rio Grande Foundation et al v. Toulouse Oliver*, 1:19-cv-01174-JAP-JFR (D.N.M.).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amici funded its preparation or submission. Counsel timely provided notice to all parties of their intention to file this brief and counsel for each party consented.

SUMMARY OF ARGUMENT AND INTRODUCTION

Political polarization is not inherently wrong and often stems from impassioned beliefs in political ideals. However, today's polarization has an ugly underbelly: harassment. As people become increasingly invested in the policy battles of our times, they sometimes manifest their disagreement in aggressive, intimidating, and even illegal harassment of others. The growth of social media increases the geographic scope, the timeliness, and the volume of this harassment.

This sort of harassment has a real impact on our politics. Not only does it coarsen our discourse, but it can force people out of the public square. When the costs of civic participation to family, career, and reputation rise too high, many make the entirely rational and justifiable decision to step back. The bullies win.

The First Amendment has a solution to this dilemma, however, that allows our society to enjoy a vigorous debate about ideas without the possibility of harassment: anonymity. By protecting the identities of people who make financial gifts to social-welfare and nonprofit organizations, the First Amendment ensures a robust civil society while protecting citizens who support certain ideas from the ugly reality of confrontation and retaliation that otherwise characterize our modern politics. This is not a disease unique to our own age; the founders of this nation lived in an era of sometimes scurrilous politics as well, and they frequently utilized anonymity to ensure that the focus stayed on their arguments rather than on the authors' identities. In the *Federalist Papers*, for example, Alexander Hamilton,

John Jay, and James Madison wrote in favor of the adoption of the U.S. Constitution under the anonymous pseudonym "Publius."

In contrast, the Attorney General of the State of California undermines anonymity and exposes donor information to government bureaucrats by requiring the filing of Schedule B donor information with his office. To meet the First Amendment expectations for that information, he must demonstrate a compelling interest and narrow tailoring. This he cannot do. The Court should take this case to clarify the standards applicable to associational-privacy claims. It should also take this case because harassment is not a historical artifact but a present reality for many who choose to associate around issues and ideas. Finally, though the State of California promises to keep the information confidential, history teaches that such promises often go unrealized. Rather, history's lesson is clear: government cannot be trusted to keep data confidential, especially when it is politically sensitive. Whether leaked or hacked, once exposed, donor data will lead to harassment and retaliation.

ARGUMENT

I. The Government bears the burden to establish its need for this information, subject to strict scrutiny.

This Court should take this case to clarify two important points: the level of scrutiny to be used in freedom-of-association claims and the locus of the burden for proving one's case.

A. This Court should clarify that strict scrutiny applies.

The Court itself has not been clear on whether "strict scrutiny" and "exacting scrutiny" are interchangeable, *see, e.g., Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest."), but lower courts perceive there to be a difference, and they do not know which one to apply in these cases.

Some courts say that strict scrutiny is appropriate. *See, e.g., Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985); *Fed. Election Com. v. Fla. for Kennedy Comm.*, 681 F.2d 1281, 1294 n.7. (11th Cir. 1982) ("In *NAACP v. Alabama*, the Supreme Court made clear that any state action infringing upon associational rights was subject to strict scrutiny."); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1172 (5th Cir. 1979); *Barker v. Wis. Ethics Bd.*, 815 F. Supp. 1216, 1221 (W.D. Wis. 1993); *Korenyi v. Dep't of Sanitation*, 699 F. Supp. 388, 394 (E.D.N.Y. 1988); *Boyd v. Bulala*, 647 F. Supp. 781, 787 (W.D. Va. 1986). *See also Vannatta v. Keisling*, 899 F. Supp. 488, 496 n.8 (D. Or. 1995).

Others use exacting scrutiny as the standard. *See, e.g., Ams. For Prosperity Found. v. Harris,* 809 F.3d 536, 538 (9th Cir. 2015); *St. German v. United States*, 840 F.2d 1087, 1094 (2d Cir. 1988); *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987); *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 119 (3rd Cir. 1987); *Marshall v. Stevens People & Friends*

for Freedom, 669 F.2d 171, 177 (4th Cir. 1981); *Familias Unidas v. Briscoe*, 619 F.2d 391, 399 (5th Cir. 1980). *See also Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 60-61 (D.D.C. 2008).

Much of this confusion stems from the Court's statement in *Buckley v. Valeo*: "Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." 424 U.S. 1, 64 (1976). Yet there is no such standard employed in *NAACP v. Alabama*—this is a gloss put on the case almost two decades after the decision. *NAACP* itself never uses the terms "strict scrutiny" or "exacting scrutiny" but rather promises that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). The Court's footnote to this claim in *Buckley* cites three additional NAACP cases. 424 U.S. at 64, n.73. The first calls for "a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). The second requires a "compelling interest" and says that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The third calls for a compelling interest. *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). None of the four cases use the phrase "exacting scrutiny," which did not enter the Court's First Amendment lexicon until its use in *Buckley*, and all but *Gibson* lack language suggesting any level of scrutiny lower than "strict scrutiny."

Not only the cases in the *Buckley* footnote, but the Court's other membership disclosure cases also speak of a "compelling interest" standard. *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959) (in a Communist Party membership information case); *Barenblatt v. United States*, 360 U.S. 109, 127 (1959) (same). This interest must be truly compelling: a number of the cases speak to it as requiring evidence of criminal misconduct. *NAACP*, 357 U.S. at 465 (The Court's previous decision upholding a statute requiring disclosure of Ku Klux Klan membership lists, *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), was justified only because of "the particular character of the Klan's activities, involving acts of unlawful intimidation and violence."); *Uphaus*, 360 U.S. at 80 (disclosure of list of speakers and supporters for a Communist-front group "undertaken in the interest of self-preservation, the ultimate value of any society."); *Barenblatt*, 360 U.S. at 128 ("this Court has recognized the close nexus between the Communist Party and violent overthrow of government"); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 52 (1961); *La. ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("criminal conduct … cannot have shelter in the First Amendment."); *Baird v. State Bar of Ariz.*, 401 U.S. 1, 9 (1971) (Stewart, J., concurring) ("knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals."); *Familias Unidas*, 619 F.2d at 401 ("The disclosure requirements in *Communist Party* and *Zimmerman* attached only to organizations either having a demonstrated track record of illicit conduct or explicitly embracing, as doctrine, plainly unlawful means and ends."). *See Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter,

J., concurring) (application of this principle in Racketeer Influenced and Corrupt Organizations Act prosecutions); *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (application of this principle in prosecutions against members of the Aryan Brotherhood).

The Court's associational cases from this era also refer to an expectation that government rules granting access to private membership information must be narrowly drawn. *See NAACP v. Alabama*, 377 U.S. 288, 307-08 (1964) (in a different NAACP association case, government's "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved," quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)); *Gremillion*, 366 U.S. at 296-97 ("narrowly drawn," citing *Talley v. California*, 362 U.S. 60 (1960)). *Accord Button*, 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

Taken together, the NAACP cases and the Communist Party cases add up to what we today call strict scrutiny, and language to the contrary from *Buckley* should be clarified to avoid continued confusion over the appropriate standard.

B. This Court should clarify that the burden of meeting strict scrutiny falls on the government.

After establishing the standard, the Court should emphasize that it is the government's burden to show its need for private information meets this test. Some

courts assume transparency before the government as a baseline and read the NAACP cases to create only "a right to an *exemption* from otherwise valid disclosure requirements on the part of someone who could show a reasonable probability that the compelled disclosure would result in threats, harassment, or reprisals from either Government officials or private parties." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting) (emphasis in original). *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99 (1982); *Nat'l Ass'n of Mfrs.*, 549 F. Supp. 2d at 60. In this view, transparency and disclosure are the presumption, and it is the responsibility of the organization to demonstrate that its legitimate fears should shield it from the usual rule before the question of scrutiny even arises (whether the government has a compelling interest in the information even given the reasonable probability of retaliation).

Other courts recognize the right to associational privacy but believe that it must be balanced against the government's interest. In this reading, the association must show the likelihood and severity of harassment and retaliation created by exposure; the government must show its need for the information; and the courts must weigh the two against one another. Thus, for instance, the D.C. Circuit stated,

> When facing a constitutional challenge to a disclosure requirement, courts therefore balance the burdens imposed on individuals and associations against the significance of the government interest in disclosure and consider the degree to which the government has tailored the

> disclosure requirement to serve its interests. Where a political group demonstrates that the risk of retaliation and harassment is likely to affect adversely the ability of the group and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, for instance, the government may justify the disclosure requirement only by demonstrating that it directly serves a compelling state interest. In contrast, where the burden on associational rights is insubstantial, we have upheld a disclosure requirement that provided the only sure means of achieving a government interest that was, though valid, not of the highest importance.

AFL-CIO v. FEC, 333 F.3d 168, 176 (D.C. Cir. 2003) (internal citations and quotations omitted). *Accord Konigsberg*, 366 U.S. at 51 ("Whenever, in such a context, these constitutional protections are asserted against the exercise of a valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved."). This balancing test puts just as much burden on the association to show its need for privacy as it puts on the government to show its need for the information.

The Court should reject both these views and place the burden squarely where it belongs in every case when a government in a free society seeks to insert itself into

the private affairs of its citizens and their private associations: on the government. *Baird,* 401 U.S. at 6-7 ("When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary…"); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974); *id.* at 98 (Marshall, J., dissenting) ("The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure."). *See McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). After all, the First Amendment protects all associations equally, regardless of whether they are popular or unpopular. *Gibson*, 372 U.S. at 556-57. *Accord id.* at 569-70 (Douglas, J., concurring) ("Unpopular groups like popular ones are protected. Unpopular groups if forced to disclose their membership lists may suffer reprisals or other forms of public hostility. But whether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter.").

In a free society, privacy is the presumption, and the burden is on the government to show its need, not on the organization to show the likely victimization of its members if their names are exposed. *See Shelton*, 364 U.S. at 487-88. Statements about retaliation and harassment in *NAACP v. Alabama* illustrate the need for and importance of privacy; they do not create a required showing in order to be granted privacy. Rather, the government must bear the burden to show its compelling need to access private information.

II. Harassment is an unfortunate reality in today's highly polarized politics.

Though proof of a reasonable likelihood of harassment should not be necessary to win an association privacy case, the reality of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" for many people today shows the importance of this Court granting this case. *See NAACP*, 357 U.S. at 462-63.

A. Economic Reprisal

Labor unions, for instance, have made an art form of using economic pressure to bring employers to heel, whether on organizing campaigns or collective bargaining negotiations. There is an entire federal agency dedicated to hearing complaints of unfair labor practices, many of which are union activities that cross legal lines. *See* Nat. Labor Relations Bd., "Charges and Complaints," www.NLRB.gov (reporting over 18,000 unfair labor practice complaints in FY2018). Picketing, leafleting, and boycotting are all time-honored tools for unions, and within certain time, place, and manner restrictions, they can be legitimate exercises of First Amendment rights. Yet in the politically charged world in which we live, one cannot even enjoy a beer or a slice of pizza anymore without worrying about whether it's subject to a boycott. Stephen J. Pytak, "Unions call for Yuengling boycott after owner's support of right-to-work law," Pottsville Republican & Herald, Aug. 30, 2013; "Boycott List," AFL-CIO, https://aflcio.org (listing Palermo brand pizza, "Classics" brand pizza and Costco's Kirkland brand pizza).

But just as unions engaged in legitimate exercises of their First Amendment rights, others enjoy equally imperative First Amendment rights to associate in opposition to union interests. Economic reprisal is a reality for many who exercise their freedom to make charitable donations to issue-oriented non-profit groups. Americans for Prosperity Foundation, for instance, has received substantial donations from people connected to Koch Industries, which has led unions to ask their members to boycott Koch companies. *See, e.g.,* "Stand with Labor: Boycott Koch Industries!," SEIU Local 521, May 23, 2013, www.seiu51.org. This even though Koch Industries has good working relationships with the unions representing its employees. Ben Smith, "Labor harmony at a Koch company," Politico, March 30, 2011.

Similarly, a union-backed group in Washington State has targeted the businesses of board members for the Evergreen Freedom Foundation. *See, e.g.,* "Will your next home purchase support the extremist right-wing movement in the Northwest? A shocking look at the dark side of Conner Homes," Northwest Accountability Project, May 24, 2018, https://nwaccountabilityproject.com. The same group encourages union members to take pictures of Freedom Foundation employees. The project then finds any information available online about the employees and posts the pictures and personal data, such as birthday and previous employment or education, all on a website, https://freedomfoundationscanvassers.com/. Their rationale? "The Freedom Foundation has demonstrated disregard for public workers' safety. It's in the public interest that these canvassers are made known."

Economic reprisal is also leveled against those who make publicly disclosed political donations. During the massive fight over the Act 10 collective-bargaining reforms in Wisconsin, campaign donors to Governor Scott Walker were subject to union retaliation. Lindsay Beyerstein, "Massive Protest in Wisconsin Shows Walker's Overreach," Huffington Post, May 25, 2011 (union encourages members to withdraw funds from a local bank, many of whose executives were past campaign donors to the governor). Other local businesses were told that if they did not display a "Workers Rights" sign showing solidarity with the unions against the governor, they would be subject to boycott. Don Walker, "WSEU circulating boycott letters," Milwaukee J. Sentinel, March 30, 2011.

B. Loss of Employment

In 2008, Brendan Eich gave $1,000 to support Proposition 8, the successful California ballot initiative designed to overturn a court decision allowing same-sex marriage. Six years later, Eich, a California resident, faced a massive backlash that pushed him out from his job as CEO of the foundation behind internet browser Mozilla. Joel Gehrke, "Mozilla CEO Brendan Eich forced to resign for supporting traditional marriage laws," Wash. Examiner, April 3, 2014. His story shows the importance of anonymity not only for those who face retaliation in the moment but for those instances when social views shift such that a majority position at the time may become a minority position later on.

Eich was not the only one to lose his job for putting his money behind a proposition supported by a majority of

Californians. *See, e.g.*, Jesse McKinley, "Theater Director Resigns Amid Gay-Rights Ire," N.Y. Times, Nov. 12, 2008 ("The artistic director of the California Musical Theater, a major nonprofit producing company here in the state's capital, resigned on Wednesday. . . [He] came under fire recently after it became known that he contributed $1,000 to support Proposition 8."); Gregg Goldstein, "Richard Raddon resigns post," Associated Press, Nov. 25, 2008 ("In the wake of harsh industry criticism over his $1,500 donation in support of Proposition 8, the California initiative that banned same-sex marriage, Richard Raddon has resigned as director of the Los Angeles Film Festival."); Steve Lopez, "Prop. 8 stance upends her life," L.A. Times, Dec. 14, 2008 (waitress loses job after her restaurant was picketed and boycotted because she was on a publicized list of donors to Proposition 8; she gave $100).

C. Threats of Physical Coercion

Last year Liberty Justice Center Senior Fellow Mark Janus met with agents from the Federal Bureau of Investigation. Mark was the named plaintiff in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). As part of the news media coverage of that case, Mr. Janus has been featured on numerous television programs and in newspapers and magazines nationwide. He met with the FBI, though, because that high profile has led to death threats. "how is Mark Janus still alive? He lives in Illinois. Execute him." read one social media post. "That guy should be shot," a caller said in a voicemail on the Center's office line.

During the protests over Act 10 in Wisconsin, Governor Scott Walker endured similar death threats amid

massive protests organized by the unions. One angry writer threatened to "gut [First Lady Tonette Walker] like a deer" while another promised to follow his children to school. Tal Kopan, "Gov. Walker writes of family threats," Politico, Nov. 13, 2013.

In the cases of Mr. Janus and Governor Walker, thankfully, these threats have not materialized into physical violence thus far. But tragically, sometimes it doesn't end with words. Congressman Steve Scalise; Congresswoman Gabby Giffords; Leo Johnson, front-desk security officer at the Family Research Council; George Tiller of the Women's Health Center, who provided women in Kansas with late-term abortions; and the employees at the Planned Parenthood Clinic in Colorado Springs all were targeted for violence and nearly lost their lives because of their public association with political views.

When Mayor Mitch Landrieu of New Orleans made the decision to take down the City's four Confederate monuments, he found himself blacklisted among construction companies. When he finally did secure a crane, opponents poured sand in the gas tank. In another instance protestors used air drones to interfere with the crane's operation. According to the Mayor, "We were successful, but only because we took extraordinary security measures to safeguard equipment and workers, and we agreed to conceal their identities." Mitch Landrieu, IN THE SHADOW OF STATUTES: A WHITE SOUTHERN CONFRONTS HISTORY 2-3 (2018). The owner of a contracting company that had agreed to remove monuments and his wife received death threats, and his car was set ablaze in the parking lot of his office. *Id*. at 187. Receptionists at the Mayor's Office were

inundated with angry and profane calls, a "swell of hostilities [that] created a siege mentality." *Id*. at 190. The City had to keep secret the identities of the companies that bid on the work and promised law enforcement protection to the winners. *Id*. at 192.

D. Public Hostility

In other instances, union organizing tactics stop short of physical violence but still cross legal and social lines from legitimate protest into illegitimate harassment. For instance, consider this from the U.S. Court of Appeals for the Seventh Circuit's accounting of a strike against a hotel:

> The conduct alleged in this case is not satisfactorily described as either picketing or handbilling. . . . Many of the Union's other activities are disturbingly similar to trespass and harassment. According to the Hotel and deposition testimony, the Union delegates entered business offices through locked doors, and repeatedly entered office or store space without permission, in one case even after police were called. In the case of the IHA, they further threatened that they would trespass onto busses or the trade show. Jessica Lawlor went so far as to register for ATI's tango festival, thus corroborating Roldan's testimony that the Union threatened to ruin that event. Union representatives called targets at home, and repeatedly visited affiliates of

> targeted neutrals at their places of businesses even after they were clearly informed that their targets were unpersuaded.

520 S. Mich. Ave. Assocs. v. Unite Here Local 1, 760 F.3d 708, 720-21 (7th Cir. 2014). *Accord Wal-Mart Stores, Inc. v. United Food & Commercial Workers Internat. Union*, 248 Cal. App. 4th 908, 923 (2016) (employees report "union activity made them feel intimidated, embarrassed, upset, or fearful there would be violence").

Sometimes, the public hostility is manifested as property crimes such as graffiti. *See, e.g.,* Savannah Pointer, "Man Arrested After Allegedly Vandalizing Chick-fil-A with Political Messages," Western J., Oct. 3, 2018; Anna Almendrala, "Chick-Fil-A In Torrance, Calif., Graffitied With 'Tastes Like Hate,'" Huffington Post, Aug. 4, 2012. Sometimes, property crime is more destructive, such as arson or bombing. Kimberly Hutcherson, "A brief history of anti-abortion violence," CNN, Dec. 1, 2015; William K. Rashbaum, "At George Soros's Home, Pipe Bomb Was Likely Hand-Delivered, Officials Say," N.Y. Times (Oct. 23, 2018).

Some of this behavior, such as boycotts, can be entirely legal. Other times it is very much illegal, but happens anyway. Either way, it imposes a real cost to the target. But that cost could be avoided: you shouldn't have to risk being the victim of a hate crime just to engage in free speech. Anonymity provides the protection necessary to allow for free speech without the threat of reprisal or even criminal assault.

III. Experience shows government cannot be trusted to keep sensitive data confidential.

The California Attorney General promises to safeguard the confidentiality of the donor information he acquires under this policy. *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016). Unfortunately, but perhaps not unsurprisingly, those promises did not bear out in practice, as one similarly situated organization learned: "During the course of this litigation, AFP conducted a search of the Attorney General's public website and discovered over 1,400 publically available Schedule Bs." *Id.* The trial court in AFP's case concluded, "The pervasive, recurring pattern of uncontained Schedule B disclosures—a pattern that has persisted even during this trial—is irreconcilable with the Attorney General's assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry." *Id.* The experience of these thousand-plus charities whose donor information was exposed, contrary to promises of confidentiality, is just one more data privacy breach in a decade rife with such disappointments.

The federal Office of Personnel Management is a constant target for hackers. "Despite that pervading threat, OPM effectively left the door to its records unlocked by repeatedly failing to take basic, known, and available steps to secure the trove of sensitive information in its hands. Information Security Act audits by OPM's Inspector General repeatedly warned OPM about material deficiencies in its information security systems." *AFGE v. OPM (In re United States OPM Data Sec. Breach Litig.),* 928 F.3d 42, 63 (D.C. Cir. 2019). Yet OPM did not take these steps, and in 2014

hackers stole the "birth dates, Social Security numbers, addresses, and even fingerprint records" of a staggering number of past, present, and prospective government workers. All told, the data breaches affected more than twenty-one million people." *Id*. at 49.

The federal government faced another class-action lawsuit when it lost a laptop that had the "names, dates of birth and Social Security numbers of about 26.5 million active duty troops and veterans." Terry Frieden, "VA will pay $20 million to settle lawsuit over stolen laptop's data," CNN.com, Jan. 27, 2009. In another instance, the VA lost a laptop with the personal information on 7,400 residents at a VA medical facility. *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017). In yet another example, a car break-in led to the compromise of "personal information and medical records concerning 4.7 million members of the U.S. military (and their families) who were enrolled in TRICARE health care." *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 19 (D.D.C. 2014).

State governments are hardly immune from these data breaches. Virginia's Department of Health Professions was hacked by a ransom-demanding criminal who accessed the prescription drug files of 8 million patients. Brian Krebs, "Hackers Break Into Virginia Health Professions Database, Demand Ransom," Washington Post, May 4, 2009. Texas's attorney general accidentally handed over the Social Security numbers of 13 million Lone Star State voters during discovery in a voting-rights case. Peggy Fikac, "Texas AG releases voters' Social Security numbers in mix-up," Houston Chron., April 25, 2012. In another example

from Texas, "Social Security numbers and other personal information for 3.5 million people were inadvertently disclosed on a publicly accessible state computer server for a year or longer" by the Comptroller's Office. Kelley Shannon, "Breach in Texas comptroller's office exposes 3.5 million Social Security numbers, birth dates," Dallas Morning News, April 11, 2011. In the so-called "Peach Breach," Georgia's Secretary of State sent out its statewide voter file with the name, address, race, gender, birth dates, driver's license number, and Social Security number for 6.1 million voters to a dozen media and political organizations. Max Blau, "Behind the #PeachBreach: How the Secretary of State's office compromised the personal data of Georgia's voters," Atlanta Magazine, Dec. 15, 2015. In another instance, "Approximately 3.6 million Social Security numbers and 387,000 credit and debit card numbers belonging to South Carolina taxpayers were exposed after a server at the state's Department of Revenue was breached by an international hacker." Lucian Constantin, "South Carolina reveals massive data breach of Social Security Numbers, credit cards," InfoWorld, Oct. 29, 2012. In short, state governments are not particularly reliable regarding data privacy.

The State of California has hardly been exempt from breaches of its data security. In one instance, the California Department of Rehabilitation accidentally exposed Social Security Numbers for nearly 2,000 employees. Theo Douglas, "Department of Rehabilitation Will Offer Training, Credit Monitoring After 'Data Security Incident,'" TechWire, Feb. 5, 2019. In another, a contractor for UC-San Diego's health system suffered a third-party data breach that exposed personal identification and clinical information. "Third-Party Data

Breach Affects Hundreds of UC San Diego Health Patients," NBC-7, June 28, 2018. In fact, California law mandates one of the most thorough data-breach reporting regulatory schemes, and includes state agencies in its requirements. Thus, we know that the California Community Colleges, San Diego State University, California State University East Bay, the California Department of Public Health, California State University Fresno, the California Department of Fish and Wildlife, the California Department of Corrections and Rehabilitation, University of California-Los Angeles, and the University of California-Davis Health System have all experienced data breaches since 2017. Calif. Office of the Atty. Gen., https://oag.ca.gov/privacy/databreach/list. Of most direct interest in this case, the California Office of the Attorney General admitted that it turned over to a journalist a list containing the name, date of birth, and driver's license number for over 3,400 certified firearms instructors. Perry Chiaramonte, "California snafu releases personal info of nearly 4,000 gun safety instructors," FoxNews.com, Jan. 18, 2017.

The breaches above stemmed from many sources: staff carelessness, greedy hackers, laptop theft. But for the donors on the Institute's Schedule B, another reality looms large: leaking and hacking as political acts. From the Pentagon Papers to Edward Snowden, recent American history is littered with examples of when supposedly confidential government information was leaked to press and public to accelerate a political agenda. *See* Peter Grier, "Why government leakers leak," Christian Science Monitor, June 7, 2017. Snowden's case also illustrates the reality that even when

senior government officials, such as the California Attorney General, say the right things or adopt appropriate best practices, one low-level employee with a political agenda can still betray every confidence of the state. And we now live in an era where so-called "hacktivists" put their firewall breaching skills to work to score political points by publicly exposing politically charged information. Jenni Bergal, "Hacktivists launch more cyberattacks against local, state governments," PBS News Hour, Jan. 10, 2017.

Moreover, government broadly and government officials specifically do not have the same disincentives regarding data privacy breaches that others must face. For one thing, government is entitled to sovereign immunity, and is only subject to financial consequences for its mismanagement of data in the limited circumstances it chooses to permit. A. Michael Froomkin, *Government Data Breaches*, 24 BERKELEY TECH. L.J. 1019, 1028-29 (2009). And its employees rarely face actual job discipline for their mistakes; "training," not firing, is the order of the day. *See, e.g.,* Casey Chaffin, "Massive DHS data breach raises questions about Oregon's cybersecurity protocols," The Oregonian, June 24, 2019 ("[I]nstead of disciplining employees at fault, state officials say they focus on training. Unfortunately for consumers, training doesn't prevent mistakes that can bring a lifetime of hassle.").

As has been demonstrated in the petition for certiorari, the State of California cannot meet the correct First Amendment test to collect this information in this first place. And the State cannot achieve a narrower tailoring of its regulatory scheme by promising confidentiality for the Schedule B information. The

State of California is saying, "Trust us." Governments generally, and the State of California in particular, have a track record of failing to live up to that promise of real data security. Even if we believe that senior government official genuinely wanted and tried to keep certain documents secure, they cannot guarantee it. Hackers can hack even well-secured servers, one individual employee can go against protocol or the wishes of his superiors, and there is zero disincentive for government employees since they almost certainly will not be punished for anything short of a willful breach.

CONCLUSION

After explaining why he needed to extend privacy and police protection to the contractors charged with taking down the Confederate statues, New Orleans Mayor Mitch Landrieu ends, "It shouldn't have to be that way." IN THE SHADOW OF STATUES at 3.

He's right. But in Landrieu's experience, concealment of identities for the contractors doing the work was crucial to getting the work done safely. The same is true in other settings. Though sad to say, privacy can be an essential safeguard for people willing to engage on controversial topics like race relations, abortion, or workers' rights. And this Court should grant this petition to set a high bar to protect their privacy. And in a free society, that standard should place the burden on the government to prove its compelling need for information, not on the citizens' association to prove its need for its privacy.

Respectfully submitted,

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