No. 19-793

In The Supreme Court of the United States

INSTITUTE FOR FREE SPEECH,
Petitioner,

v.

XAVIER BECERRA,
Attorney General of the State of California,
Respondent.

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

BRIEF OF PROJECT FOR PRIVACY & SURVEILLANCE ACCOUNTABILITY AND PACIFIC RESEARCH INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a state official's demand for all significant donors to a nonprofit organization, as a pre-condition to engaging in constitutionally protected speech, constitutes a First Amendment injury?

2. Whether official demands for membership or donor information outside the electoral context should be reviewed under strict or exacting scrutiny?

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INTRODUCTION AND INTERESTS OF *AMICI*[*]

California requires non-profit organizations to disclose a list of the names and addresses of substantial donors—contained in IRS Form 990, Schedule B—to the California Attorney General's Office as a condition of being allowed to solicit donations in California. In upholding this disclosure requirement against a First Amendment challenge, the Ninth Circuit held that forced disclosure does not constitute a First Amendment injury at all, and hence did not engage in anything resembling heightened scrutiny. Pet. App. 1, 7, 34-36. But the Ninth Circuit was wrong.

Compelled disclosure to the State of major donors provides a convenient set of "enemies lists" to the Attorney General and other state officials and employees, better enabling them to target and harass persons who support and associate with political opponents or disfavored causes. History amply confirms that, without proper and stringent safeguards, such information inevitably will be abused by government actors seeking to suppress opposing organizations and ideas. Not surprisingly, therefore, many donors prefer to contribute anonymously or not at all rather than risk government retaliation for their associational choices.

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[*] All parties were timely notified and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

Amicus Project for Privacy & Surveillance Accountability (PPSA) is a nonprofit nonpartisan 501(c)(4) organization that advocates for greater protection of Americans' privacy and civil liberties from government surveillance programs. PPSA is concerned with a range of privacy and surveillance issues, from the monitoring and surveillance of American citizens under the guise of foreign intelligence gathering, to the monitoring and surveillance of domestic political activity and association under the guise of federal and state law enforcement. In both instances allowing the government to collect and access private information concerning political and other activities poses a tremendous danger of political abuse and should be carefully cabined both by statute and by the Constitution.

Amicus Pacific Research Institute (PRI) is a nonprofit nonpartisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free market policy solutions to the issues that impact the daily lives of all Americans. It demonstrates how free interaction among consumers, businesses, and voluntary associations is more effective than government action at providing the important results we all seek—good schools, quality health care, a clean environment, and economic growth. Founded in 1979 and based in San Francisco, PRI is supported by private contributions. Its activities include publications, public events, media commentary, invited legislative testimony, and community outreach.

Amici are not publicly traded and have no parent corporations. No publicly traded corporation owns 10% or more of either *Amici*.

Amici are interested in this case both as a matter of constitutional principle and for organizational concerns regarding the confidentiality of their own donors. PRI's Center for California Reform develops policy solutions frequently at odds with those favored by California, and accordingly many of its donors seek anonymity. Although PPSA is not currently subject to California's disclosure demands, the lax constitutional analysis by the Ninth Circuit could permit far more aggressive disclosure demands throughout the country, imposed at the whim of a current or future state attorney general. Because of the significant violence the decision below does to the First Amendment rights of non-profit organizations in the Ninth Circuit, the petition should be granted.

SUMMARY OF ARGUMENT

In California, charities must either provide the Attorney General with their donors' personal information or cease soliciting donations in California. The First Amendment forbids governments from presenting expressive associations with such a Hobson's choice. *Amici* agree with Petitioner that the Ninth Circuit's holding that compelled disclosure to the government does not constitute a First Amendment injury defies this Court's precedents and does grave harm to the First Amendment freedoms of speech and association. Pet. 16-24, 37-38. *Amici* also agree with Petitioner that the Ninth Circuit failed to apply anything resembling heightened review and that there is a pressing need for this Court to clarify the proper standards of review in disclosure cases. Pet. 29-37.

1. *Amici* write separately to note that history strongly supports the proposition that the inherent

danger of government officials abusing tax information from compelled donor disclosure, standing alone, constitutes a First Amendment injury sufficient to trigger heightened scrutiny. The histories of the United States and California are replete with examples of government officials using non-public information to identify, target, intimidate, threaten, harass, and retaliate against their political or ideological rivals. It thus is no surprise that would-be donors may simply decline to exercise core First Amendment rights rather than subject themselves to increased governmental scrutiny or abuse. The fear of backlash and the resulting risk of chilling speech are more than sufficient at the threshold to trigger full First Amendment scrutiny. This Court recognized as much in *Buckley* v. *Valeo*, 424 U.S. 1, 64, 66 (1976), where it held that "compelled disclosure imposes" "significant encroachments on First Amendment rights" and that the "strict test established by *NAACP* v. *Alabama* is necessary because compelled disclosure has the *potential* for substantially infringing the exercise of First Amendment rights." (Emphasis added.) The Ninth Circuit's failure even to recognize that inherent injury was flawed from the start and does tremendous violence to the First Amendment.

2. *Amici* further note that any appropriate level of scrutiny would require the California Attorney General to make the threshold showing that its interest is genuine and substantial, and that it has narrowly tailored its restriction to that interest. Details of individual or broadly applicable injury would only become relevant after such interests were found sufficient for the restriction to survive a facial challenge.

Furthermore, in the failure of the decisions below to recognize a threshold First Amendment encroachment and apply heightened scrutiny is particularly absurd given that there is a direct restriction on speech in this case – Petitioner was forbidden to solicit absent disclosure of donor information. Regardless whether disclosure itself poses a First Amendment injury, surely the prohibition on soliciting donations is such an injury and hence triggers heightened scrutiny.

Finally, unlike disclosure of Schedule B information to the IRS, California's disclosure regime lacks the stringent statutory safeguards surrounding IRS information, and California lacks anything remotely resembling the federal government's interest in policing the validity of large deductions claimed by the very same donors listed on such Schedule Bs. The IRS thus stands in a different position than California regarding what it might claim as its substantial interests and how its regime is narrowly tailored to such interests.

Because the decisions below do great violence to the First Amendment, the Petition should be granted.

ARGUMENT

I. Government Officials Often Abuse their Power by Targeting and Harassing Disfavored Voices and Political Rivals.

In The Federalist No. 51, James Madison recognized the seemingly obvious truism that governments are "administered" by human beings—not angels—whose "ambition" and "personal motives" are likely to

corrupt their actions.[1] Accordingly, he observed, there is a never-ending need to "control * * * abuses of government."[2] Many parts of the Constitution seek to address this concern, not the least of which is the First Amendment's protection of the freedoms of speech and association. The protection of *anonymous* speech and association plays a significant role in preventing government officials from directly and indirectly subverting those freedoms. *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995). Our history underscores the inherent danger of abuse from government collection of information on expressive or ideological activities and amply demonstrates the risk that compelled disclosure will chill core political speech and association.

A. Historical examples of government abuse of power are legion.

Anyone paying attention can hardly have missed the inevitable and repeated fact that governments have long abused their power to target and silence political enemies. While such efforts have taken a variety of forms, they generally start with compiling lists of suspected enemies or opponents and then acting to suppress such enemies both directly and indirectly.

The most obvious example of such efforts for purposes of the Petition in this case is found in this Court's foundational decision in *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958). Alabama's attorney

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[1] *The Federalist No. 51* (James Madison), *in* THE FEDERALIST PAPERS 319 (Clinton Rossiter ed., Signet Classic 2003) .

[2] *Ibid.*

general had sought "the names and addresses of all [of the NAACP's] Alabama members and agents," purportedly for legitimate purposes. *Id.* at 451. This Court was not fooled. At trial, the NAACP made the "uncontroverted showing" that when information on its members was disclosed, members experienced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. In response, the state was unable to provide a justification rationally related to the disclosure requirement. *Id.* at 464.

There are numerous other examples of governments seeking disclosure of members or supporters of expressive associations in a bid to suppress free speech and association.

- During the McCarthy Era, the government targeted supposed communists and others thought to be sympathetic to them or simply opposed to Senator McCarthy's political views. The Subversive Activities Control Act, for example, required "Communist-action organizations" to register with the Attorney General. *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 8 (1961). The government routinely sought information on the membership of such suspected organizations, and would impose significant penalties on their members. *United States* v. *Robel*, 389 U.S. 258, 260-63 (1967) (members were barred from applying for

a passport or working in any defense facility).[3] Because the statute "establishe[d] guilt by association alone," this Court correctly recognized the "inhibiting effect on the exercise of First Amendment rights." *Id.* at 265.

- An Arkansas statute once required teachers to file an annual affidavit listing, "without limitation[,] every organization to which he has belonged or regularly contributed within the preceding five years." *Shelton* v. *Tucker*, 364 U.S. 479, 480 (1960). This Court recognized that even apart from the fear of public disclosure, "the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id.* at 486. Indeed, one witness testified that he intended to gain access to the non-confidential affidavits to "eliminat[e] from the school system" all persons who supported unpopular organizations including the ACLU and the Urban League. *Id.* at 486 n.7.
- An Ohio statute requiring "every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements" was challenged by the Socialist Workers Party and struck down by this Court

[3] Ironically, resisting requested disclosure of membership information, perhaps by denying that one was a communist-action organization to begin with, was itself a factor in branding an organization as a communist action organization. *Subversive Activities Control Bd.*, 367 U.S. at 14.

> given the long history of open government hostility against the party and its members. *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88, 99-100 (1982).

These and myriad other examples illustrate the inevitable tendency for government officials to seek to identify and target potential opponents and ideological adversaries. Once having identified a list of "enemies," government officials have been endlessly creative in seeking to punish them.

Tax information, in particular, has been a favorite source for identifying and harassing opponents. President Nixon notoriously used non-public IRS information to identify and attack his enemies, which formed the basis for the second article of impeachment drafted against him. The article alleged that:

> He * * * personally and through his subordinates and agents, endeavoured to obtain from the Internal Revenue Service * * * confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.[4]

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[4] 3 Lewis Deschler, DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES ch. 14, § 15.13, *available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3-5-5-2.pdf; see also Christopher Goffard, *Archives show Nixon's targeting of foes*, LOS ANGELES TIMES (Dec. 3, 2008), *available at*

As a result of Nixon's flagrant abuses, the IRS today is subject to far more rigorous laws and restrictions designed to minimize the dangers to privacy and free association.[5] Explicitly recognizing "serious abuses of the rights of taxpayers in the past" and that "the potential for abuse *necessarily* exists in any situation in which returns and return information are disclosed," Congress created "definitive rules relating to the confidentiality of tax returns" and "strictly limit[ed] disclosure of information." S. REP. 94-938, 345, 1976 U.S.C.C.A.N. 3438, 3455, 3775 (emphasis added).

Nixon was not alone. Other examples of government officials using tax information and apparatus as a weapon abound, both before and after Watergate.

- President Franklin D. Roosevelt "may have been the originator of the concept of employing the [IRS] as a weapon of political retribution."[6]

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https://www.latimes.com/archives/la-xpm-2008-dec-03-na-nixon3-story.html.

[5] 26 U.S.C. § 6103 (governing the confidentiality of tax returns); 26 U.S.C. § 6104(d)(1)(A)(i), (3)(A); Matthew A. Melone, *A Leg to Stand On: Is There A Legal And Prudential Solution To The Problem Of Taxpayer Standing In The Federal Tax Context?*, 9 PITTS. TAX. R. 97, 146 n.282 (2012) (describing changes to the tax code "in the aftermath of the Watergate scandal"); John A. Andrew III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON 322 (2002) (describing the Tax Reform Act of 1976).

[6] Burton W. Folsom Jr., NEW DEAL OR RAW DEAL?: HOW FDR'S ECONOMIC LEGACY HAS DAMAGED AMERICA 146-47 (2014); Elliott Roosevelt and James Brough, A RENDEZVOUS WITH DESTINY: THE ROOSEVELTS OF THE WHITE HOUSE 102 (1975).

He used the IRS as needed against "his opponents and his friends" alike, famously targeting his political rival, Senator Huey Long.[7] Through Treasury Secretary Henry Morgenthau, FDR sent dozens of IRS agents into Louisiana to investigate Long up until Long's assassination in 1935.[8]

- President John F. Kennedy used the IRS to carry out political attacks against "radical right-wing organizations," enlisting his brother and other allies to retaliate against such groups and to utilize the IRS to "discredit the right and undercut its sources of support."[9]

These examples from the Nixon, Roosevelt, and Kennedy Administrations illustrate that abuse of confidential information is not a phenomenon unique to one political party. Nor, as demonstrated by President Roosevelt, is it used solely *against* members of an opposing political party.[10] The politically motivated

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[7] Roosevelt and Brough, *supra*, at 102.

[8] Folsom, *supra*, at 149-50.

[9] Andrew, Power to Destroy, *supra*, at 19, 27.

[10] Of course, the government tends to attack its perceived rivals in many ways, not just through use of tax information. For example, President Lyndon B. Johnson set up two institutes to "funnel CIA money to private detective agencies" to spy on "and sabotage whenever possible" the Barry Goldwater campaign. *LBJ's CIA*, WASHINGTON OBSERVER (Mar. 15, 1967), *available at* https://www.cia.gov/library/readingroom/docs/CIA-RDP75-00149R000400220032-2.pdf. Such additional abuses of power merely lend credence to the inherent danger from disclosure of

abuse of tax records and related powers for political ends thus is a common and rightly feared tactic used by those in power to suppress dissenting views and rivals. Such a tendency to abuse power "has been the rule, not the exception."[11]

B. California itself illustrates the dangers of abuse from the bulk collection of donor information.

While the historical examples demonstrate the inevitable and justifiable fear generated by government collection of information on the expressive and associational activities of donors with views that are or may eventually be at odds with government officials, this court need not rely solely on such examples to see the dangers of California's donor disclosure regime.

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confidential donor information to the government and the justified fear of government abuse resulting from any such donor disclosers. Donor lists in the hands of government are readily transformed into enemies lists by less-than-angelic government officials seeking to advance their own prospects and agendas.

[11] Tim Murphy, *Shocking IRS Witch Hunt? Actually, It's a Time-Honored Tradition*, MOTHER JONES (May 14, 2013), *available at* https://www.motherjones.com/politics/2013/05/irs-witch-hunts-tea-party-history-mother-jones/; see also Andrew, *Power to Destroy*, at 322; Kelly Brewington, *NAACP refuses IRS demand for documents*, THE BALTIMORE SUN (Feb. 1, 2005), *available at* https://www.baltimoresun.com/maryland/bal-te.md.naacp01feb01-story.html; Peter Overby, *IRS Apologizes For Aggressive Scrutiny Of Conservative Groups*, NPR (Oct. 27, 2017), *available at* https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups (IRS used "heightened scrutiny and inordinate delays" against conservative groups seeking tax exempt status).

1. In a parallel case before this Court, *Americans for Prosperity* v. *Becerra*, No. 19-251, there was ample evidence that the Attorney General's office has targeted its adversaries and their donors.[12] Donors to the Americans for Prosperity Foundation have reported (1) "additional government intrusiveness * * * or targeting" by California agencies; (2) investigations; or (3) increased audits because of their affiliations with AFP or the Koch network.[13] And there was some evidence presented in that case that affiliating with AFP led to increased auditing not only of one affiliated person, but also of her *family members*.[14]

Similarly, in another litigation challenging a recently passed law, the California AG's Office sought discovery of lobbying contacts against that law, which the district court correctly recognized as having no legal value other than to aid in governmental harassment. *IMDb.com, Inc.* v. *Becerra*, 257 F. Supp. 3d 1099, 1100-1102 (N.D. Cal. 2017).[15]

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[12] Brief of Pacific Research Institute and Project for Privacy and Surveillance Accountability as *Amici Curiae* in Support of Petitioner, *Americans for Prosperity Foundation* v. *Becerra*, No. 19-251, at 15.

[13] See Plaintiff's Proposed Findings of Fact and Conclusion of Law, *Americans for Prosperity Foundation* v. *Harris*, 2:14-cv-09448-R_FFM, (M.D. Cal. Mar. 14, 2016), Pacer Doc. 177-1, ¶ 405.

[14] *Id.* ¶ 376, 406.

[15] Apart from the risk of *intentional* abuse and targeting by the government itself, donors likewise face considerable risk from *public* disclosure based on the Attorney General's sheer incompetence in keeping donor information private. For example, despite allegedly protecting the information included in Schedule Bs, the

Such government actions merely provide contemporaneous examples of the inherent risk that mandatory disclosure regimes pose to First Amendment rights. Given the often unreviewable discretion vested in government investigators, agencies, and prosecutors, rational donors often will avoid giving government agents information about their potentially disfavored political leanings.[16]

Attorney General of California has in the past posted a significant number of them—including one detailing donors to Planned Parenthood—on its public Registry of Charitable Trusts. *Americans for Prosperity Foundation* v. *Harris*, 182 F. Supp. 3d 1049, 1057 (C.D. Ca. Apr. 21, 2016). While these were quickly removed, the fact that they were publicized at all is likely to chill core First Amendment rights.

[16] There are numerous other relatively recent examples from outside California of government retaliating against or harassing disfavored groups, their members, and their donors. See, *e.g.*, National Organization for Marriage, *National Organization for Marriage Demands a Federal Investigation of the Human Rights Campaign and the Internal Revenue Service* (April 5, 2012), *available at* http://www.nomblog.com/21437 (2012 leak of National Organization for Marriage's 2008 Schedule B, which was then published by both the Human Rights Campaign and the Huffington Post as a weapon in the fight over gay marriage); *Hatch Demands IRS Investigate Potential Leak of Non-Profit's Confidential Tax Information* (May 8, 2012), *available at* https://www.finance.senate.gov/ranking-members-news/hatch-demands-irs-investigate-potential-leak-of-non-profits-confidential-tax-information (same); *Nor-Cal Tea Party Patriots* v. *IRS*, No. 1:13-cv-341, 2014 WL 3547369, at *14 (S.D. Ohio, July 17, 2014) (schedule B leaked and publicized); George Joseph & Murtaza Hussain, *FBI Tracked An Activist Involved With Black Lives Matter As They Traveled Across The U.S., Documents Show*, THE

2. Given this history, *Amici* and all other expressive associations are rightly concerned by the ability of governments to target unpopular ideas by using information about organizations' donors or through direct targeting of the groups themselves. The overwhelming weight of our experience confirms a sad historical truth: Allowing government agencies to collect the donor lists of political enemies will only empower it to more deliberately and effectively target politically threatening ideas or organizations.

Even assuming, implausibly, that *all* current California officials and employees would treat collected donor information with integrity and competence, such information nonetheless would sit as an attractive nuisance tempting future, less virtuous, government officials to abuse that readily available means of targeting their enemies. And it does not require much imagination to recognize that, if the decision below stands, public officials in other States, who may have a variety of views and a variety of opponents, also will be able to collect donor information with near impunity.

INTERCEPT (Mar. 19, 2018), *available at* https://theintercept.com/2018/03/19/black-lives-matter-fbi-surveillance/; ACLU, UNLEASHED AND UNACCOUNTABLE: THE FBI'S UNCHECKED ABUSE OF AUTHORITY 36-43 (Sept. 2013), *available at* https://www.aclu.org/other/unleashed-and-unaccountable-fbis-unchecked-abuse-authority (highlighting how the FBI targets groups based on exercises of their First Amendment rights); Alan Rappeport, *In Targeting Political Groups, I.R.S. Crossed Party Lines,* NEW YORK TIMES, (Oct. 5, 2017), *available at* https://www.nytimes.com/2017/10/05/us/politics/irs-targeting-tea-party-liberals-democrats.html.

Regardless of one's politics or ideology, the protection of liberty requires recognition that jackboots come in all sizes and colors—black, red, blue, and many variations in between. At any given time, some groups will be out of favor with the current regime, and the temptation to abuse government power will always exist. Such abuses can be aimed at persons who support opponents, opposing viewpoints, or even nominally friendly rivals. And the threat of such abuses inevitably will chill speech and association by persons whose names will be handed over to government agents with the incentives and power to engage in such abuse.

Indeed, systematic data show that both speech and association will be chilled by mandatory disclosures. In a 2007 study by the Institute for Justice on a slightly different issue, a "majority of respondents" answered that they "would think twice before donating to a ballot issue campaign if their name, address and contribution amount were disclosed."[17] There is no reason to imagine that donors to potentially disfavored non-profits would be any less concerned. Indeed, as political discourse has become more polarized and technology provides new means of weaponizing private information, the likelihood that compelled disclosure

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[17] Dick M. Carpenter II, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 2 (Mar. 2007), *available at* https://ij.org/wp-content/uploads/2015/03/DisclosureCosts.pdf.

of donor information will chill protected rights is—if anything—likely to have increased.[18]

In short, it is not unreasonable paranoia but constitutional prudence to fear government collection of politically sensitive information without proper and stringent safeguards measured and tested according to strict First Amendment standards. Giving those in power weapons with which to intimidate or target those who disagree with them inevitably will cause rational speakers throughout the State simply to decline to speak at all. Because the ability to fund even unpopular ideas is directly linked to their advancement, *Buckley*, 424 U.S. at 65-66, laws that chill monetary support for speech and association cut directly against the First Amendment.

II. The Ninth Circuit Failed To Apply Anything Resembling A Properly Heightened Standard of Review.

In addition to agreeing that compelled donor disclosure to the government is an inherent First Amendment injury that triggers heightened scrutiny, *Amici* agree with Petitioner that the courts below applied nothing more than rational basis scrutiny, notwithstanding their empty claims to the contrary. See Pet. 30; Pet. App. 17, 32-33, 44. *Amici* further agree that

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[18] See Cato *Amicus* Br. 18-21 (chronicling the increased risk to associational rights in our increasingly politicized times); Nellie Bowles, *How 'Doxxing' Became a Mainstream Tool in the Culture Wars*, NEW YORK TIMES (Aug. 30, 2017) (discussing doxxing, "a slang term among hackers for obtaining and posting private documents about an individual, usually a rival or enemy," as one means of weaponizing information), *available at* https://www.nytimes.com/2017/08/30/technology/doxxing-protests.html.

regardless whether such heightened scrutiny is characterized as "strict" or "exacting," a court must look first to whether the State offers a genuine and important or compelling interest in encroaching on the First Amendment before considering whether the restriction is narrowly tailored to serve that interest, and whether it burdens more speech and association than necessary to achieve that interest. Pet. 29.[19] *Amici* add several additional observations to those shared points.

First, in a facial challenge, both the inherent First Amendment burdens and the overarching danger of chilling speech are threshold questions that can be addressed at a higher level of generality and need not be subject to plaintiff-specific proof in order to trigger the framework of First Amendment scrutiny. This Court recognized as much in *Buckley* v. *Valeo*, 424 U.S. 1, 64, 66 (1976), where it held that "compelled disclosure imposes" "significant encroachments on First Amendment rights" and that the "strict test established by *NAACP* v. *Alabama* is necessary because compelled disclosure has the *potential* for substantially infringing the exercise of First Amendment rights." (Emphasis added.)

While individualized proof of harm is obviously relevant to an as-applied challenge to an otherwise facially valid law—*i.e.*, one that can be constitutionally

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[19] *Amici* leave for another day whether such scrutiny should be strict or exacting, and what differences exist between the two. Suffice it to say that California's disclosure scheme has not been subject to any form of heightened scrutiny, and there is no indication it could survive any flavor of such scrutiny.

applied in most cases—facial challenges read more broadly and potentially can be resolved based on factors common to all cases, such as the nature of the government interest, its genuineness, and whether the challenged restriction is narrowly tailored in a manner that minimizes any unnecessary burden on speech. Cf. *Socialist Workers '74*, 459 U.S. at 91-92 ("The right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State [that is] compelling,' * * *, and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest' " (citations omitted)). If the challenged state action survives those elements of the test, then the particular magnitude of the burden on speech becomes significant. That burden could be demonstrated as a general matter in order to demonstrate overbreadth, or in as-applied challenges claiming uniquely heavy burdens on a particular group or groups. Cf. *Buckley*, 424 U.S. at 66-68 (holding that disclosure requirements in the campaign finance context "directly serve substantial governmental interests," accepting appellants' concession that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils" found by Congress, and then turning to an as-applied challenge by minor parties).

Here, the challenge is facial, the supposed government interest barely crosses the threshold of rationality much less rises to the level of important or compelling, and there is not even the pretense of narrowly tailoring the disclosure demand to any claimed interest. The magnitude of the First Amendment injury thus is irrelevant: In such circumstances *any*

threat to First Amendment freedoms is sufficient to invalidate California's collection scheme. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963) ("Broad 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.") (cleaned up). This case is thus unlike others in which parties introduced individualized evidence in support of as-applied challenges. See, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. at 462-463 (First Amendment defense to suit initiated by state against NAACP); *Buckley*, 424 U.S. at 64-74 (finding law valid in most instances but then considering as-applied challenge to minor parties and finding evidence lacking).

Second, the entire exercise by the courts below seems to miss the larger point that California actually and directly restricts protected speech by forbidding charitable solicitation if non-profits do not accede to Respondent's disclosure demands. Pet. 8, 13; Pet. App. 2, 51, 53. Dithering about whether disclosure alone causes First Amendment injury thus is a bit of a misdirect. Regardless whether compelled disclosure to the government itself creates a First Amendment injury, it certainly presents a cost or condition imposed upon unquestionably protected speech and has in fact deterred Petitioner in this case from speaking in California to solicit contributions. Pet. 13. That is a direct restriction on *Petitioner*'s speech, not simply a chilling of donor association with Petitioner. To say there is no

First Amendment injury in such circumstances and that no heightened scrutiny need apply is frivolous.[20]

Given that the courts below failed to apply anything resembling heightened scrutiny based on the false premise that there was no First Amendment injury, this Court could grant and answer the first Question Presented by explaining that conditioning the right to speech on disclosure of donors constitutes a First Amendment injury sufficient to trigger heightened scrutiny. See *Koontz* v. *St. Johns River Water Management Dist.*, 570 U.S. 595, 604 (2013) ("[T]he unconstitutional conditions doctrine * * * vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."). Or, of course, the Court could summarily reverse given that such a self-evident conclusion was

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[20] If California required Petitioner to pay $50,000 for the privilege of soliciting donations from California residents, that would undoubtedly be a sufficient First Amendment restriction to *trigger* heightened scrutiny. Cf. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250-51 (1936) (tax on publications measured by circulation had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers" and thus violated the fourteenth amendment's incorporation of freedom of the press). That the act of paying money to the State does not, in and of itself, represent First Amendment injury does not for a second mean that imposing it as a condition on speech fails to cause a First Amendment injury triggering heightened scrutiny. See also *Robel*, 389 U.S. at 263 (where adverse consequences imposed on person depends on "the exercise of an individual's right of association," First Amendment is implicated even where the adverse consequence itself may not involve loss of a fundamental right; rejecting distinction between denial of right of travel and adverse employment action based on association with disfavored group).

oddly ignored by the courts below in their efforts to avoid any meaningful First Amendment scrutiny at all.

Finally, *Amici* believe it is useful to highlight some of the distinctions between the disclosure scheme in California and the IRS's own Schedule B filing requirement. To start, the IRS actually has at least a plausible interest in such information—protecting federal tax revenue by cross-checking large claimed deductions with the corresponding contributions to tax deductible entities. And given that individuals claiming such deductions have already identified their donation to the IRS in their own filings, there is limited additional burden to providing the IRS the same tax information in a different form. California's claimed interests are not remotely comparable, and there is no suggestion that California already has access to the same donor information.

Furthermore, the IRS is subject to a strict regime of laws and penalties relating to inappropriate use and disclosure of tax information, even within government. See *supra* at 10 & n. 5. Those legislative safeguards exist precisely because history has demonstrated the abuses that can arise from access to such information. While the current safeguards may not be perfect, they are certainly evidence of an attempt to narrowly tailor federal disclosure requirements to the valid purposes for which they are sought, to deter and punish any potential abuse, and to minimize the impact on taxpayer privacy and First Amendment interests.

California has no comparably stringent legislative safeguards, gives broad discretion to Respondent on

how to handle confidential tax information, and Respondent has shown no inclination to adopt or enforce anything resembling the protections and restrictions applicable to IRS tax information. Requiring California to defend its disclosure scheme under appropriately heightened First Amendment scrutiny thus does not speak to whether the more narrow requirements and greater protections for disclosure to the IRS would likewise be problematic under the First Amendment.

CONCLUSION

The history of the United States provides countless examples of governments abusing non-public information against unpopular speakers or political rivals. Mandatory donor-disclosure regimes—which provide governments with more non-public information—only increase the risk of continued abuse. By ignoring outright the First Amendment injury, the Ninth Circuit failed to subject the mandatory disclosures to the appropriate scrutiny. The Petition should be granted.

Respectfully submitted,

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