

No. 19-251

IN THE
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

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

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

**BRIEF OF *AMICUS CURIAE*
JUDICIAL WATCH, INC. IN SUPPORT
OF PETITIONER**

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INTERESTS OF THE *AMICUS CURIAE*¹

Judicial Watch, Inc. (“Judicial Watch”) is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to these goals.

Judicial Watch has an interest in this lawsuit as it is a 501(c)(3) non-profit organization that solicits donations in California and would be subject to California’s donor disclosure requirement. Judicial Watch believes that this approach is contrary to the First Amendment and would impair the associational rights of Judicial Watch members.

SUMMARY OF ARGUMENT

The Ninth Circuit’s decision to reverse the district court and uphold California’s donor-disclosure requirement could have adverse effects for all issue-oriented, educational non-profit 501(c)(3) organizations. The decision is not only wrong, in that it applied cases concerning political campaigns to groups prohibited from engaging in political electioneering or advocacy, it would also chill the

¹ Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch sought and obtained the consent of all parties to the filing of this *amicus* brief.

exercise by millions of Californians of their protected First Amendment rights.

In Judicial Watch's institutional experience, the compelled disclosure of donor names leads to intimidation, harassment, and threats. It clearly affects individuals' willingness to donate. Particularly in light of recent, widely publicized government misconduct, individuals become less willing to give to charitable organizations when they know their names and addresses will be in the government's hands.

This Court's intervention is needed.

ARGUMENT

A. Given the Risks to First Amendment Rights, the Court Has Required a Compelling Interest, Subject to Exacting Scrutiny, to Justify Forced Disclosure of Donor Records.

The rights of free speech and free association are fundamental and highly prized. *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963), citing *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Court has recognized that the "constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986), citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). "Freedom of discussion, if it would

fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). “By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information.” *Pac. Gas & Elec. Co.*, 475 U.S. at 8 (citations omitted).

Organizations play a critical role in this process by preserving the right to associate and by facilitating speech, popular or otherwise. “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (citations omitted). “The right of association” is “almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 n.80 (1982), quoting 1 A. de Tocqueville, *Democracy in America* 203 (P. Bradley ed. 1954).

“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *Button*, 371 U.S. at 433 (1963), citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940). In particular, to warrant public disclosure of an organization’s members, a government actor must “demonstrate[] so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom

which such disclosures will effect.” *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Such a “significant encroachment upon personal liberty” may only be justified by “showing a subordinating interest which is compelling.” *Id.* (citations omitted). “Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

In evaluating the burdens imposed by the forced disclosure of donor lists, the *Bates* Court noted the “harassment” and “fear of community hostility and economic reprisals” that followed “public disclosure of the membership lists,” all of which “discouraged new members from joining the organizations and induced former members to withdraw.” 361 U.S. at 524; see *Talley v. State of California*, 362 U.S. 60, 65 (1960) (fear of reprisal “might deter perfectly peaceful discussions of public matters of importance”). Even where this “repressive effect” was “in part the result of private attitudes and pressures,” it was “brought to bear only after the exercise of governmental power had threatened to force disclosure of the members’ names.” *Bates*, 361 U.S. at 524, citing *NAACP*, 357 U.S. at 463.

B. *Amicus* Knows Firsthand That a Fear of Public Disclosure and of Consequent Harassment Diminishes Individuals' Willingness to Donate to Non-Profit Organizations.

Judicial Watch is a nonpartisan, nonprofit 501(c)(3) foundation, with a conservative orientation regarding public policy issues. While Judicial Watch scrupulously avoids engaging in any type of electioneering communications or advocacy, it knows well the fear of “harassment” and “community hostility and economic reprisals” that afflicts potential donors to organizations like it. *Bates*, 361 U.S. at 524. In consequence, Judicial Watch is acutely aware of the chilling effects that expanding states’ ability to compel the disclosure of tax-exempt organizations’ donors will have on organizations’ activities.

Donors will reduce their support if there is a greater risk of a government-ordered disclosure. To begin with, donors and potential donors to Judicial Watch care about their privacy, as indicated by the fact that they routinely inquire as to whether their contributions will remain confidential. Further, both current and prospective donors routinely express concerns about possible retaliation for contributing to Judicial Watch. For example, contributors often tell its fundraisers that they “expect to be audited” for contributing to the organization.

The fear of negative consequences arising from public disclosure is not conjectural, but based on

recent, troubling events. As has been widely reported, financial support for conservative causes, when disclosed, can subject individuals and organizations to attack and retaliation from those opposed to these viewpoints. Such targeting has been carried out by both government and non-government sources.

In California, for example, citizens who supported Proposition 8 were harassed as a direct result of the state's disclosure laws. In 2008, California citizens passed a ballot initiative called Proposition 8, which defined marriage as between one man and one woman under California law. During the election campaign, however, opponents of the initiative developed an online database of the names, addresses (with maps), and places of employment of all individuals who had donated more than \$100 in support of Proposition 8.² The opponents obtained this information through the State's campaign finance disclosure laws. During the campaign, supporters were subjected to severe harassment, including intimidation, vandalism, and loss of income or employment.³ This harassment was the direct result of targeting facilitated by the State's campaign disclosure laws.

The targeting of Proposition 8 supporters even continued years after the election. In April 2014, Mozilla Chief Executive Officer Brendan Eich resigned following boycotts, protests, and intense

² Thomas M. Messner, *The Price of Prop 8*, THE HERITAGE FOUNDATION, (Dec. 31, 2016), <https://goo.gl/KV7Dbv>.

³ *Id.*

public scrutiny of Eich's 2008 financial support for Proposition 8.⁴ When Mozilla announced that Eich would become the company's new CEO in March 2014, a firestorm erupted almost immediately over Eich's six-year old \$1,000 donation.⁵

Another notorious scandal concerned the actions of staff for the Internal Revenue Service ("IRS"), who targeted conservative organizations' applications for tax-exempt status.⁶ What followed was an extremely troubling episode in which public officials used government resources to silence political opponents.

After widespread reports and Congressional inquiries regarding selective targeting of conservative organizations, the U.S. Treasury Inspector General for Tax Administration ("TIGTA") audited the unit responsible for processing applications by organizations seeking tax-exempt status under I.R.C. §§ 501(c)(3) and 501(c)(4). U.S. Treas. Insp. Gen. for Tax Admin., Ref. No. 2013-10 053, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* 3 (May 14, 2013). TIGTA's report on the matter showed that there had been a deliberate, systematic targeting of conservative groups. *Id.* at 30. The audit focused on allegations that the IRS targeted specific groups, delayed the processing of certain applications, and requested

⁴ FAQ on CEO Resignation, Mozilla.org, (April 5, 2014), <https://goo.gl/MgyaDg>.

⁵ Alistair Barr, *Mozilla CEO Brendan Eich Steps Down*, WALL ST. J., April 3, 2014, <https://goo.gl/6cevCo>.

⁶ Judicial Watch, *ABCs of IRS Mess; Justice Dept. Is Tainted Too* (last visited Dec. 29, 2016), <https://goo.gl/rtDGoS>.

unnecessary information from certain applicants. *Id.* TIGTA found that the IRS unit responsible for processing tax-exempt applications used inappropriate criteria for selecting and referring applications for additional scrutiny by the IRS. *Id.* at 5. Initially, IRS staff conducted ad hoc application reviews looking for conservative terms such as “Tea Party,” “Patriots,” “9/12,” “We the People,” or “Take Back the Country.” *Id.* A few weeks later, the IRS systematized this process, developing a formal “Be On the Look Out” list of buzzwords staff should search for to identify conservative organizations for additional scrutiny based on viewpoint. *Id.* at 6, 35. Evidence discovered through litigation shows that the IRS’s targeting was even more pervasive than TIGTA reported.⁷

As a result, conservative organizations seeking tax exempt status experienced oppressive delays in receiving final IRS determinations ranging from more than two years to over 1,000 days. *Id.* at 11, 14. These delays caused some applicants to withdraw their applications or abandon their constitutionally protected activities. *Id.*

These instances of targeting and harassing conservative donors and non-profits are nationally famous. Donors are certainly aware of these events, as shown by the fact that they have raised them with Judicial Watch’s staff. In Judicial Watch’s experience, any law or regulation that requires

⁷ See *Notice of Compliance With Court’s Order*, Ex. 2 at 1-10, *NorCal Tea Party Patriots, et al. v. I.R.S., et al.*, No. 1:13-CV-341 (S.D. Ohio May 24, 2016), ECF No. 265-2.

additional disclosure of donor data—especially to a state government that has publicly demonstrated animosity to virtually all conservative viewpoints—has the real potential to chill speech in non-electioneering contexts.

It also could influence non-profits' choice of issue advocacy. For example, Judicial Watch routinely sues California, providing pro-bono representation to private clients in cases ranging from enforcing the voter list maintenance provisions of the National Voter Registration Act, 52 U.S.C. § 20507, to lawsuits enforcing federal immigration law. Judicial Watch attorneys are currently representing private clients in four active cases against California state officials.⁸ Judicial Watch also has a settlement agreement with Los Angeles County and the California Secretary of State, over which the federal district court retained jurisdiction.⁹

⁸ See *Cerletti v. Hennessy*, No. CGC-16-556164 (Cal. Super. Ct., San Francisco Cty. Dec. 27, 2016) (taxpayer lawsuit against San Francisco Sheriff's "Sanctuary" city policy); *Crest v. Padilla*, No. 19STCV27561 (Cal. Super. Ct., LA Cty. Aug. 6, 2019) (lawsuit against California Secretary of State concerning SB826, which mandates publicly traded companies to have at least one woman on their Board of Directors); *Griffin v. Padilla*, No. 19-1477 (E.D. Cal. Aug. 1, 2019) (lawsuit seeking to enjoin enforcement of California SB 27's requirement for presidential candidates to disclose their personal tax returns to appear on the ballot); *Myers v. Smith*, No. 19-353510 (Cal. Super. Ct., Santa Clara Cty. Aug. 21, 2019) (taxpayer lawsuit challenging Santa Clara County's "Sanctuary" city policy).

⁹ See *Judicial Watch v. Logan*, No. 17-8948 (C.D. Cal. Dec. 13, 2017) (NVRA lawsuit against Los Angeles County and California Secretary of State for failure to maintain accurate voter registration lists)

In the future, other non-profits who do not have Judicial Watch's willingness to court disapproval may forgo advocacy projects in California because they do not want to be subject to the State's donor disclosure laws. California should not possess the ability to deter public-spirited inquiry in this way. If the State is left with such a power, the "[e]ffective advocacy of both public and private points of view, particularly controversial ones," will be diminished. *NAACP*, 357 U.S. at 460. The resultant public atmosphere will stifle true "[f]reedom of discussion," which "must embrace all issues about which information is needed." *Thornhill*, 310 U.S. at 102.

CONCLUSION

For the foregoing reasons, *amicus* Judicial Watch respectfully requests that the Court grant the petition for *certiorari*.

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