No. 19-251

In the
Supreme Court of the United States

AMERICANS FOR
PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA,
Attorney General of California,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

JOSHUA P. THOMPSON*
JEREMY TALCOTT
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: JThompson@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner.[1]

PLF advocates and litigates in defense of the ideas of a free society, including limited constitutional government, private property rights, free enterprise, and other values that, although crucial, are often politically unpopular. Founded in 1973, Pacific Legal Foundation was the nation's first public interest legal foundation devoted to such issues, and it defends those principles in state and federal courts nationwide. Individual donations give PLF the ability to fulfill its mission to protect countless individuals whose liberty is threatened by burdensome laws. PLF, like many nonprofits, is threatened by rules that violate the right of our donors to remain anonymous. Thus, PLF has an interest in ensuring free association and owes its donors a duty to defend their constitutional right to speak freely and confidentially.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

ARGUMENT

I

THE NINTH CIRCUIT OPINION WILL HAVE A CHILLING EFFECT ON NONPROFIT DONATIONS NATIONWIDE

As this Court has long recognized, it is "undoubtedly true" that disclosure of identity will deter some individuals from donating to organizations, and that disclosure may lead to harassment or retaliation. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). In recognition of the "not insignificant burdens on individual rights" caused by this chilling effect, this Court requires that those burdens be carefully weighed under exacting scrutiny against any government interests in seeking disclosure. *Id.* Although the exacting scrutiny standard has been articulated in various ways by this Court, it ultimately requires that any regulation of speech be supported by a compelling government interest and narrowly tailored to that interest. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."). The Ninth Circuit, however, has reduced its review of laws that require disclosure of donor identity to little more than rational basis, relieving the government of its need to narrowly tailor those laws to its asserted interest. The lower court deferred to the government's assertions, and effectively flipped the burden of unconstitutionality onto the nonprofit seeking to preserve donor

confidentiality. *Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018) (hereinafter *AFPF*). But the disclosure of an individual's identity to government creates a substantial First Amendment injury because it will always chill lawful, constitutionally protected speech and association. Narrow tailoring is especially important in the disclosure context to ensure that the government's actions do the least harm possible to those constitutionally protected rights.

The opinion below raises an important federal question of nationwide importance and is in conflict with the previous opinions of this Court. Sup. Ct. R. 10(c). Namely, whether disclosure requirements outside of the election context are subject to a narrow tailoring requirement under exacting scrutiny. This Court should grant Americans for Prosperity Foundation's petition for certiorari to reaffirm that exacting scrutiny requires narrow tailoring of laws in the disclosure context.

A. Indirect Restrictions on Speech and Association Have a Substantial Chilling Effect on the Exercise of First Amendment Rights

This Court recognized the substantial chilling effect that government policies could have on speech in the mid-twentieth century, at a time when government censored subversive speech by triggering the loss of employment or other benefits using blacklists, investigations, or "loyalty oaths." Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 396 (2004). Although the restrictions did not directly prevent individuals from speaking or associating, the Court recognized that "a chilling effect occurs when

individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity." Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. Rev. 685, 693 (1978).

The first mention of the chilling effect by the Supreme Court involved a state statute that required employees to affirm by loyalty oath that they had not been involved with any "subversive groups" within the previous five years. *Wieman v. Updegraff*, 344 U.S. 183 (1952). In his concurrence to the majority opinion, Justice Felix Frankfurter focused on the First Amendment injury created by a regulation that acted as an "inhibition of freedom of thought, and of action upon thought," noting that it would have "an unmistakeable [sic] tendency to chill" by causing "caution and timidity in [people's] associations." *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Shortly thereafter, the Court adopted Justice Frankfurter's reasoning, striking down another state law loyalty oath on First Amendment grounds. *Speiser v. Randall*, 357 U.S. 513, 529 (1958).

The Court extended this chilling effect rationale to the forced disclosure of member lists in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). In follow-up cases, the Court clarified that disclosure laws are only constitutional if they are narrowly tailored to a compelling governmental interest. *See Bates v. Little Rock*, 361 U.S. 516 (1960) (requiring a compelling interest for disclosure); *and Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) (narrow tailoring). The chilling effect of disclosure

laws was central to the Court's decisions in these cases. *Louisiana v. NAACP*, 366 U.S. at 296 (even if government has a legitimate purpose, disclosure of member lists is a means "that broadly stifle[s] fundamental personal liberties.").

With these cases that first recognized the problem with laws that "chill" protected expression, the Court found laws unconstitutional which suppressed indirectly any speech or association that government would have been prohibited from suppressing directly. Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 Vand. L. Rev. 1473, 1486 (2013) (citing *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990) ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.")). In other words, the Court looked to whether a law had an improper purpose to determine its constitutionality. These cases recognized that seemingly neutral regulations were often masking a more invidious government purpose: attempts to "single out and expose activists and dissidents, knowing that such exposure would result in private sanctions ranging from social opprobrium to lynching." *Id.* at 1489.

In later cases, however, this Court has recognized that laws that have a chilling effect are cognizable independent of insidious governmental purposes. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute . . . because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

Whatever the reasoning behind a law, a regulation that causes some individuals to refrain from saying that which they lawfully could causes both the individual harm of the "non-exercise of a constitutional right" and the more "general societal loss" when freedoms guaranteed by the First Amendment are not exercised. Schauer, *supra*, at 693. The First Amendment itself is premised on the assumption that "the uninhibited exchange of information, the active search for truth, and the open criticism of government are positive virtues." *Id.*

The opinion below raises a substantial federal question of nationwide importance. Given California's size and wealth, the disclosure requirement will chill First Amendment protected activity by nonprofits and donors across the country. The disclosure requirement enables California to require nonprofits who solicit donations in California to disclose the identity of all donors who give over $5,000. In 2013, California donations represented 13.7% of charitable donations in the United States, totaling over $27 billion. The Urban Institute, *Profiles of Individual Charitable Contributions by the State, 2013*, Feb. 10, 2016. But Schedule B forms are not limited to California donors, and disclosure may chill donations from individuals in other states that prefer anonymity. The disclosure requirement therefore has great reach outside California, coupled with the potential for substantial First Amendment injury to both donors and nonprofits.

B. Recognizing a Chilling Effect Is Necessary To Protect the Right to Anonymous Association

Engaging in anonymous speech and association was common at the time of the First Amendment's ratification. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361-67 (1995) (Thomas, J., concurring) (discussing the tradition of anonymous speech during the founding era). Consistent with this tradition, the First and Fourteenth Amendments contain an inherent right to remain anonymous when exercising one's freedom of association. *See Singleton v. Wulff*, 428 U.S. 106, 116 (1976) (examining *NAACP v. Alabama* and recognizing that requiring members to assert their own "right[] . . . to remain anonymous" would "result in nullification of the right at the very moment of its assertion").

Anonymous speech and association produce valuable social outcomes. Götz Bachmann, Michi Knecht, & Andreas Wittel, *The Social Productivity of Anonymity*, 17 Ephemera 241 (May 2017). Anonymity benefits freedom of speech by allowing speech to occur freed from the context of existing social hierarchies and power relationships. *Id.* at 243-47. It can grant the socially powerless the ability to "speak truth to power" without fear of reprisal—whether criminal or social. *Id.* at 244. Anonymity even benefits association by allowing dissimilar individuals to coalesce behind a single goal, freed of preconceived biases or existing differences. *Id.* at 245-46. Indeed, the threat of removing anonymity is regularly used as a means for powerful groups to preserve existing power structures and hierarchies by using coordinated efforts to discredit anonymous opposition. Kornelia Trytko &

Andreas Wittel, *The Exposure of Kataryna: How Polish Journalists and Bloggers Debate Online Anonymity*, 17 Ephemera 283, 291 (May 2017). Because exposure can lead to many varied forms of reprisals—whether from government agents, other members of the public, or even from friends and family—people may avoid forms of speech or associations that carry a risk of exposure.

The right to anonymous association is particularly important when a small minority holds views that might subject them to public or private retaliation. Monumental cultural shifts often start as fringe ideas. Social changes that would have been unthinkable to earlier generations become mainstream—often within the span of a single lifetime. While radical ideas may sometimes be advanced by a single brave, charismatic individual, movements more often require a slow build of underground support in the face of widespread societal resistance.

Consider the Mattachine Society—named after a medieval secret society that wore masks to preserve the anonymity and safety of critics of the French Monarchy—which was one of the first national gay rights organizations within the United States. John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* 53-74 (1983). At the time, homosexuals faced widespread oppression from state law enforcement and the risk of personal reprisals from employers and family. *Id.* at 40-53. In 1951, the Mattachine Society was formed, operating with layers of secrecy to protect individual members from exposure. *Id.* at 64. After the arrest of one of the Mattachine Society's founding members on charges of

public indecency, the society served both to widely distribute information and generate financial contributions—all while most members remained completely unknown to each other. *Id.* at 70-71. In the span of just two years, the anonymous group went from "pioneers in a hostile society" to the group that "set [the modern gay rights] movement in motion." *Id.* at 74.

C. Any Loss of Anonymity Creates a Significant Chilling Effect

Whether information is intended to be distributed widely to the electorate or maintained "confidentially" by government, the disclosure of identity beyond that desired by the individual creates a chilling effect. Both private and public action can create "chill." *See* Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 Vand. L. Rev. 1473 (Oct. 2013). But—contrary to the Ninth Circuit's opinion—this Court has long recognized that true disclosure and retaliation is unnecessary to create a chilling effect. After all, some individuals may simply place a high value on their right to anonymity. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

A substantial First Amendment injury occurs through the "initial exertion of state power" in seeking disclosure. *See Patterson*, 357 U.S. at 462. Donor concern is not limited to the risk of immediate public disclosure. Social mores and ideas may fall in and out of fashion, but privacy, once lost, is more difficult to recover. Individuals might associate with groups that are in vogue at the present time, yet face retaliation years later if those views become disfavored. History is, after all, "written by the victors." *Brewer v. Quarterman*, 550 U.S. 286, 296 (2007) (Roberts, C.J.,

dissenting). Accordingly, individuals will voluntarily forego speech or association where the future personal risk might outweigh any short-term personal gains of engaging in speech or association—even where that speech or association might have substantial social benefits.

Further, regardless of current government assurances that information will be kept confidential, donors cannot be certain that future governmental actors will act similarly. A current disclosure of donor identity to the government creates the potential for accidental or intentional disclosure years later. *See* Eric Boehm, *IRS Audit Reveals Leaks of Taxpayers' Private Information*, The News Doctors, Oct. 2, 2014 (audit discovers that Internal Revenue Service improperly disclosed personal information in response to Freedom of Information Act requests);[2] *and* Lachlan Markay, *Federal Judge Orders IRS to Disclose WH Requests for Taxpayer Info*, The Wash. Free Beacon, Aug. 31, 2015 (describing lawsuit probing whether the Internal Revenue Service intentionally disclosed private taxpayer information to the Obama administration).[3]

Regardless of government's rosy intentions, government compilation of individuals' personal information represents a lucrative target for cybercriminals. *See* Jeffrey Stinson, *Cyberattacks on State Databases Escalate,* Stateline, Oct. 2, 2014 (detailing increasing number of state database

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[2] http://thenewsdoctors.com/irs-audit-reveals-leaks-of-taxpayers-private-information/

[3] https://freebeacon.com/issues/federal-judge-orders-irs-to-disclose-wh-requests-for-taxpayer-info/

attacks and breaches).[4] The potential for abuse of stolen information represents a threat that stretches years into the future. Farai Chideya, *Data Theft Today Poses Indefinite Threat of "Future Harm"*, The Intercept, June 12, 2015.[5]

Finally, government assurances that donor lists will be kept confidential do nothing to alleviate legitimate fears of government harassment. For example, the IRS admitted to subjecting conservative political groups applying for tax-exempt status to heightened scrutiny in 2013. Peter Overby, *IRS Apologizes for Aggressive Scrutiny of Conservative Groups*, NPR, Oct. 27, 2017. The disclosure of member or donor lists to government—regardless of current motivations or intentions—creates a tool which can later be used by unscrupulous government officials who desire the suppression of disfavored viewpoints or groups.

All these legitimate fears increase the likelihood that the initial disclosure to government will chill constitutionally protected speech and association—whether or not any of the post-disclosure negative impacts actually come to pass. *See California Bankers Ass'n v. Shultz*, 416 U.S. 21, 98 (1974) (Marshall, J., dissenting) (noting that a requirement that banks compile lists of donors—regardless of actual government disclosure—"surely will chill the exercise of First Amendment rights of association on the part of those who wish to have their contributions remain anonymous"). Justice Thurgood Marshall recognized

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[4] http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/02/cyberattacks-on-state-databases-escalate

[5] https://theintercept.com/2015/06/12/data-breach-threat-of-future-harm/

that "[t]he threat of disclosure entailed in the *existence* of an easily accessible [government mandated] list of contributors may deter the exercise of First Amendment rights *as potently as disclosure [to government] itself*." *Id.* at 98-99 (Marshall, J., dissenting) (emphasis added).

The decision below effectively disregarded the injury inherent in handing lists of otherwise-anonymous donors to California officials. Rather, the Ninth Circuit completely ignored any threat of later government malfeasance, and credited fully government assertions that disclosure carried a "low risk of public disclosure." *AFPF*, 903 F.3d at 1019. Even if such lists are never disclosed to the wider public, the knowledge that such lists will be disclosed to California officials is sufficient to chill the association of donors that would otherwise prefer to remain anonymous.

CONCLUSION

The Court should grant Petitioner Americans for Prosperity Foundation's petition for certiorari.

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Respectfully submitted,

JOSHUA P. THOMPSON*
JEREMY TALCOTT
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 429-7747
E-mail: JThompson@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation