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 United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondent's Brief in Opposition confirms the pressing need for this Court's review. It concedes that the Ninth Circuit has jettisoned any substantive right to "privacy of association and belief guaranteed by the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*), and replaced it with a limited protection against specific threats of retaliation. Br. in Opp'n 7, 23. And while arguing that the courts of appeal apply a standard called "exacting scrutiny" in cases concerning associational liberties, it fails to refute Petitioner's contention that the phrase means different things in different places, and almost nothing in the Ninth Circuit.

I. Contrary To The Precedents Of This Court, The Ninth Circuit Has Held That Governmental Demands For Member And Donor Identities Do Not Impose Any First Amendment Harm.

Most fundamentally, this case shows how the burden of persuasion has shifted away from the government in associational privacy cases brought in the Ninth Circuit. This case was dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6). App. 23-24. The Attorney General may assert that he "uses Schedule B information to detect and investigate fraud, self-dealing, and abuse of the special tax-exempt status enjoyed by charities," Br. in Opp'n 1, but the dismissed complaint explicitly claimed otherwise and, of course, properly pled allegations in the complaint are presumed true on a motion to dismiss for failure

to state a claim. Petitioner pled that "information available on an unredacted Schedule B has never served as the basis for initiating an investigation by the Attorney General into whether a charity was in violation of California laws against self-dealing, improper loans, interested persons, or illegal or unfair business practices," nor did he use Schedule B donor information in any enforcement action. First Amended Cmplt. at 6-7, *Ctr. for Competitive Politics v. Harris*, Case No. 14-636 (E.D. Cal. Aug. 12, 2016) (ECF No. 37); *cf*. App. 66.

Furthermore, these were not manufactured assertions, but rather factual findings made by a federal court. That court found that, for at least a decade, the Attorney General had never needed donor information to accomplish his law enforcement mission and that his office "does not use the Schedule B in its day-to-day business." *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1053-1054 (C.D. Cal. 2016); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility" and must survive a motion to dismiss "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").[1]

[1] The Attorney General makes much of the fact that Schedule B donor information is provided to the Internal Revenue Service. *E.g.*, Br. in Opp'n i, 1, 22-23. But, as explained in the Petition, Pet. 6 & n.4, that information is provided to the Service under different protections and for different purposes.

If the First Amendment provides a general right to be free in one's associations from governmental surveillance absent good cause, this should have been enough to survive a motion to dismiss. But the Ninth Circuit held that "th[is] Court's foundational First Amendment privacy cases have been limited to their specific facts and their specific plaintiffs," Pet. 20; App. 34-35, n.3; *id*. 42, n.8; and are accordingly available only to "qualifying" organizations. App. 15; *see generally* Br. in Opp'n 2, 7, 13, 23-24. In other words, it "is [not] in itself a First Amendment injury"[2] for a group to be forced to disclose its supporters, unless that plaintiff is in a similar position to the NAACP at the height of the civil rights movement. App. 7; 14-15; Br. in Opp'n 23;[3] *see also id*. at 12-13 (no First Amendment harm unless plaintiff experiences "negative effect[s] on its associational interests" "similar" to those suffered by American colonists in the run-up to the Revolutionary War).

The Petition explains why this is incorrect. Pet. 16-24. And none of the cases discussed by the Attorney General is to the contrary. He correctly notes that in

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[2] Of course, the Attorney General elides the fact that his regime has chilled Petitioner, which has ceased soliciting contributions in California to protect its donors' privacy.

[3] *But see* Tr. of Oral Arg. at 51, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (Mar. 24, 2009) ("CHIEF JUSTICE ROBERTS: But that seems to me you are saying they've got to wait until the – the horse is out of the barn. You can only prove that you are reasonably subject to reprisals once you've been the victim of reprisals").

many of the civil rights era cases cited in the Petition this Court recognized additional drawbacks if the challenged disclosure regimes were permitted to stand. Br. in Opp'n 11-13; *id*. 12, n.2. These observations do not swallow those opinions' actual holdings, which all presume a freestanding First Amendment right to privacy in association. Pet. 16-24. Indeed, the Attorney General does not, because he cannot, cite to a single case from this Court or any other court holding that compelled disclosure does not itself impose First Amendment injury. Pet. 16-27.

The Attorney General's treatment of *Talley v. California*, 362 U.S. 60 (1960), is illustrative. Br. in Opp'n 12-13. That case, which relied on *NAACP v. Alabama*, 357 U.S. 449 (1958) and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), facially struck a compelled disclosure regime – *without* any allegation or proof that the compelled disclosure would impose other harms. In fact, the opinion drew a dissent bemoaning, as the Attorney General does here, that "the record is barren of any claim, much less proof that [Petitioner] will suffer any injury . . . there is neither allegation nor proof that Talley or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility.'" *Talley*, 362 U.S. at 69 (Clark, J., dissenting) (quoting *NAACP*, 357 U.S. at 462) (brackets in original); Pet. 18 (discussing *Talley*).

Respondent argues that *Talley* is *sui generis* because it noted that the disclosures at issue there "had long been used as a tool by governments to suppress dissenting voices," particularly during the American Revolution. Br. in Opp'n 12. But that just demonstrates why the First Amendment was adopted in the first place. Besides, the compelled disclosure of membership and donor information has also been a historical tool of governmental oppression. *See Bates v. City of Little Rock*, 319 S.W.2d 37, 43 (Ark. 1958), *rev'd*, *Bates*, 361 U.S. at 527 ("In the Alabama case the prime purpose of the procedure instituted by the Attorney General of Alabama was to obtain information whereby Alabama could force the NAACP out of the State").

Similarly, this Court's opinion in *Doe v. Reed*, 561 U.S. 186 (2010), does not undermine the Petition. Br. in Opp'n 10-11. There, the Court reviewed a Washington State disclosure law regarding referendum petition signatories. Accordingly, the case arose in the specific context of "States . . . implementing their own voting systems," where "the government will be afforded substantial latitude." *Id*. at 195. But even there, the Court did not pause to audit whether a constitutional right had been injured by the disclosures, but instead assumed such an infringement and immediately proceeded to analyze the State's "assert[ed] . . . interests to justify *the burdens of compelled disclosure* under the [Washington law] on First Amendment rights." *Id*. at 197 (emphasis supplied); *id*. at 194 ("The compelled

disclosure of signatory information on referendum petitions is subject to review under the First Amendment"). Petitioner asks for precisely that approach here.

The Attorney General also fails to rebut Petitioner's contention that the Second, Sixth, and Eleventh Circuits have ruled with the understanding that disclosure itself imposes a First Amendment harm. Br. in Opp'n 13-14; Pet. 24-27. He concedes that, in *Federal Election Commission v. LaRouche Campaign*, 817 F.2d 233 (2d Cir. 1987), the Second Circuit reversed the district court for requiring proof of "reprisals, harassment, or threats," and required the government to show a need for private information "beyond its mere relevance to a proper investigation." *LaRouche Campaign*, 817 F.2d at 234-235. By contrast, here the Ninth Circuit affirmed a district court for requiring such proof, and declined to require the government to make that same showing.

Similarly, the "chilling effect" in *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999) was general. *Compare* Br. in Opp'n 14. That court recognized that *any* forced disclosure of funder information was disfavored under the First Amendment, and ruled against the government when it failed to show "a 'relevant correlation' or a 'substantial relation' between the names of principal stockholders and the harmful secondary effects of adult entertainment establishments."[4] *City of Jacksonville*, 176 F.3d at 1366.

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[4] The same is true for *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), where the court explicitly began its analysis by noting

That result is in direct conflict with the opinion here, where the court declined to recognize any "'actual burden'" on Petitioner's First Amendment rights, App. 37, and upheld the government's policy based upon its mere assertion of an interest that was "not wholly without rationality." App. 44 (citation and quotation marks omitted).

In the end, the incongruity of the Ninth Circuit's position is clear from one aspect of its reasoning. While holding that compelled disclosure of donor or membership information is not a First Amendment injury that requires a substantive justification from the government, it nevertheless agrees that such demands are subject to heightened constitutional scrutiny. App. 36. But of course, no heightened scrutiny would be necessary were there no First Amendment injury. The Ninth Circuit's odd holding illustrates its incorrect reading of this Court's precedents, Pet. 16-24, and its conflict with its sister circuits. Pet. 24-27.

II. This Case Provides An Opportunity For The Court To Clarify The Standard Of Review.

Petitioner has identified a division among the circuits concerning the application of exacting scrutiny, as well as inconsistencies as to whether strict or exacting scrutiny applies in non-political cases like this one.

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the law would "be subjected to 'exacting scrutiny' because of the 'significant encroachment on First Amendment rights that compelled disclosure *imposes*.'" 356 F.3d at 671 (quoting *Buckley*, 424 U.S. at 64) (ellipses removed, emphasis supplied).

Pet. 29-37 (reviewing circuit courts of appeal); Pet. 27-29 (on strict scrutiny). The Attorney General suggests that these divisions can be stitched together, since the circuits all apply a form of review called exacting scrutiny and give some lip service to language used by this Court.[5] Br. in Opp'n 17-21. But just as "state labels cannot be dispositive of [the] degree of First Amendment protection," neither can judicial labels. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988) (describing *Bigelow v. Va.*, 421 U.S. 809 (1975)). And, contrary to the Attorney General's contention, the courts of appeal themselves describe and apply the "exacting scrutiny" test in starkly different ways.

For example, the Ninth Circuit engaged in what it called exacting scrutiny, App. 36, yet the Attorney General concedes that it "conclude[ed]" only "that the State's interests here are not 'wholly without rationality,'" Br. in Opp'n 17-18 (quoting App. 44).[6] That the

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[5] The Attorney General sees no relevant distinction between donor disclosure in the context of a political campaign and compelled membership and donor disclosure in other situations. Br. in Opp'n 15 n.3. But campaign finance disclosure is invariably public because it is justified by the government's interest in "'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010) (quoting *Buckley*, 424 U.S. at 66). No such interest is present here, both because Petitioner is barred from participation in candidate campaigns, Pet. 22 n. 18, and because the Attorney General does not claim an intention to make donor information public. Br. in Opp'n 23.

[6] The Ninth Circuit, of course, was not referring to the Government's interest in enforcing the law, but rather to its articulated need for Schedule B information. App. 44 ("The reasons that the Attorney General has asserted *for the disclosure requirement*

court of appeals still cited to *Citizens United*'s description of exacting scrutiny while it did so, as the Attorney General notes, Br. in Opp'n 6, 18, is immaterial. *Id*. The substance of the review matters, not the magic words. The Ninth Circuit's "exacting scrutiny" requires only that the Government assert an interest that passes rational basis.[7]

Conversely, the Second, Fourth, Seventh, and Tenth Circuits apply an "exacting scrutiny" that is "an intermediate level of scrutiny," *Real Truth About Abortion v. Federal Election Commission*, 681 F.3d 544, 549 (4th Cir. 2012), similar to the standard of review this Court applies in cases involving sex discrimination. Pet. 31, 36. The Sixth, Eighth, and Eleventh Circuits place exacting scrutiny of disclosure regimes within a standard of review that starts as heightened and "'possibly'" or "'may'" ratchet into strict scrutiny. Pet. 32 (quoting *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) and *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 413 (6th Cir. 2014)); *see also Calzone v. Summers*, 942 F.3d 415, 423, n.6 (8th Cir. 2019) (*en banc*) ("To be sure, there is some authority for using strict scrutiny in this [lobbying disclosure] context"); *id.* at 426 (Grasz, J., concurring op.) ("I believe the correct standard is strict scrutiny" for "laws mandating

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. . . are not wholly without rationality") (citation and internal quotation marks omitted, emphasis supplied).

[7] It cannot mean more because, as Petitioner has explained, the Ninth Circuit has held that there is no countervailing First Amendment right to be free from compelled disclosure unless a group proves an individualized risk of threats, harassment, or reprisal. Pet. 15, 20-22.

disclosure of information as the price of petitioning one's government"). The First, Third, and Fifth Circuits apply a standard of scrutiny that is neither strict, intermediate, nor rational basis. Pet. 33-34.

Yes, these disparate standards are known in those circuits as "exacting scrutiny." *See* Br. in Opp'n 20-21. Similarly, both the Army and the Navy recognize the rank of "captain," but it does not follow that an Army captain is fit to command a *Nimitz*-class aircraft carrier. Context is key. Respondent suggests these differences are merely "different adjectives to describe the exacting scrutiny standard." Br. in Opp'n 21. Those different "adjectives," such as "intermediate" or "wholly without rationality," are not mere ornament, as the facts of this case amply illustrate. They result in different recipes for "exacting scrutiny" across the Nation, with the consequence that compelled disclosure regimes are subject to more or less rigorous review depending on where the First Amendment injury takes place.

This nationwide divide on the meaning of "exacting scrutiny" merely reflects this Court's longstanding "seeming struggle with the standard by which to judge th[ese] case[s]." *Buckley*, 424 U.S. at 260 (White, J., concurring in part and dissenting in part); Pet. 34 ("This confusion is understandable. Any of these circuits can justify their approach by pointing to a decision of this Court"). While this Court may have believed that it provided the lower courts a roadmap by describing "exacting scrutiny" in strict scrutiny terms in recent campaign finance decisions, *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014),

and *Williams-Yulee v. The Florida Bar*, 575 U.S. 433 (2015), Pet. 32 n. 23; *id*. 36, the appellate courts need still clearer guidance, which only this Court is empowered to give.

III. This Case Remains The Best Vehicle To Restore This Court's Precedents And Resolve The Circuit Splits.

As Respondent has noted, when this issue first came before the Court in 2015, it was on a motion for a preliminary injunction, Br. in Opp'n 1-2, carrying with it an unsettled record and only a tentative ruling by the court of appeals. That is no longer the case.

Because this case was dismissed on a Rule 12(b)(6) motion, it presents a clear-cut, purely legal, threshold question of constitutional law. There is no need to evaluate a complex record, because the only relevant facts are alleged in the amended complaint. The only question is whether a state government may demand private membership and donor information without being required to prove its need. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden").

Moreover, the question is exceptionally important, as recent history has shown. Since the Ninth Circuit ruled against Petitioner in 2015, that court has *only* entertained as-applied requests for exceptions from the Attorney General's Schedule B collections based on specific allegations of threats, harassments, or

reprisals. *Ams. for Prosperity Found. v. Harris*, 809 F.3d 536, 538 (9th Cir. 2015) ("We are bound by our holding in *Center for Competitive Politics v. Harris* that the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional") (internal citation omitted); *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1007 (9th Cir. 2018) ("The district court first rejected the plaintiffs' facial challenges, holding they were precluded by our opinion in *Center for Competitive Politics*"). Any complaint that credibly alleges that the Government is breaching associational privacy, warehousing private membership and donor information, and doing so without a sufficiently important reason or despite more narrowly tailored alternatives, can expect similar treatment.

This case remains an ideal vehicle to address this problem because the Court need only establish that the government continues to bear the burden of proof when it demands donor or membership information, and then proceed to clarify the proper standard of review. With the Institute's case accordingly revived, any conflicts arising from the application of this Court's guidance can await a future case.

CONCLUSION

The Petition ought to be granted.

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Respectfully submitted,

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