

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*

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

This Court called for the views of the Solicitor General in *Americans for Prosperity Foundation (APF) v. Becerra*, No. 19-251, and *Thomas More Law Center (TMLC) v. Becerra*, No. 19-255, which present the question whether California's requirement that charitable organizations fundraising in the State disclose donor identities to the State violates the constitutional freedom of association on either a facial or as-applied basis. The Solicitor General ably explains why the question presented in those cases merits this Court's review.

Petitioner Institute for Free Speech (IFS) submits this supplemental brief to explain why the Court should,

in addition to granting certiorari in *APF* and *TMLC*, grant certiorari in this case as well to ensure the fullest possible consideration by this Court of the constitutional issues presented by these three related cases.

This case presents the same fundamental question; indeed, the Ninth Circuit's decision in *APF* and *TMLC* rests in large part on its earlier decision in this case. Because this petition was not yet fully briefed when the Court called for the Solicitor General's views, however, the Solicitor General's brief does not address this case. This case, unlike *APF* and *TMLC*, presents solely a facial challenge to the California requirement. The facial challenge should be squarely addressed. The Ninth Circuit has restricted foundational freedom-of-association holdings to their facts, and only this Court can address that error by granting this petition. Thus, having this case before the Court as well will facilitate the broadest consideration of the important questions presented.

ARGUMENT

1. All three cases present the same overarching question, which the Solicitor General phrases as “[w]hether California’s requirement that charitable organizations that fundraise in the State disclose to the state Attorney General’s office the identities of their substantial contributors violates the constitutional freedom of association.” U.S. Br., Nos. 19-251, 19-255, at I. The cases, however, present this question in distinct postures. *See* Pet. 5 n.2.

In 2014, IFS, then called the Center for Competitive Politics, brought a facial challenge to California’s requirement, claiming that the requirement infringed IFS’s First Amendment associational rights. The district court denied a preliminary injunction. The Ninth Circuit first

addressed California’s requirement in its 2015 decision affirming the denial of a preliminary injunction in this case. There, the Ninth Circuit held that compelled disclosure of donor identities does not “in and of itself constitute[] First Amendment injury.” Pet. App. 42; *see also* Pet. App. 34, 36. According to the court, absent “any additional harmful *state action*,” compelled disclosure requirements violate the First Amendment only “when that disclosure leads to private discrimination against those whose identities may be disclosed.” Pet. App. 35.

Applying “exacting scrutiny,” the court held that it need not accord any weight to IFS’s claimed injury from compelled disclosure. Pet. App. 36. Accordingly, because the State’s asserted interest in its compelled-disclosure requirement was, according to the court, not “wholly without rationality,” that interest prevailed in the “exacting scrutiny” test. Pet. App. 42-45 (citation omitted). The Ninth Circuit left open the possibility of an as-applied challenge. Pet. App. 45.

IFS returned to the district court and filed an amended complaint, again challenging the requirement facially. The district court dismissed the amended complaint, relying on the Ninth Circuit’s earlier decision to hold that IFS had not pleaded a “cognizable burden on [its] freedom of association.” Pet. App. 13. The Ninth Circuit summarily affirmed. Pet. App. 1.

In the meantime, APF and TMLC litigated facial and as-applied challenges to the requirement, ultimately proceeding to a bench trial. Noting the Ninth Circuit’s prior decision in this case rejecting IFS’s facial challenge, the district court focused its analysis on the plaintiffs’ as-applied challenges. *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1052-53 (C.D. Cal. 2016); *Thomas More Law Ctr. v. Harris*, Civ. No. 15-3048, 2016 WL

6781090, at *1 (C.D. Cal. Nov. 16, 2016). The district court held that the compelled-disclosure requirement violated the First Amendment as applied to the organizations and enjoined its application to them. 182 F. Supp. 3d at 1053-57; 2016 WL 6781090, at *2-5. On appeal, the Ninth Circuit rejected both the facial and as-applied challenges. *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1019-20 (9th Cir. 2018). With respect to the facial challenge, the Ninth Circuit held that it was bound by its holding in this case. *Id.* at 1020.

2. As the foregoing discussion makes clear, this case is the only one of the three presenting solely a facial challenge, and this case frames as its threshold question whether compelled disclosure in and of itself constitutes constitutional injury without any further factual showing. To decide whether IFS pleaded a valid First Amendment claim, the Court necessarily would need to confront the first question presented by IFS's petition: "[w]hether a state official's demand for all significant donors to a non-profit organization, as a precondition to engaging in constitutionally-protected speech, constitutes a First Amendment injury." Pet. i.

In a storied line of cases emerging from the civil rights era, the Court recognized a broad First Amendment right "to pursue . . . lawful private interests privately and to associate freely with others in so doing." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958). As the Court explained, "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462; *see also Talley v. California*, 362 U.S. 60, 65 (1960) ("[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas

to be publicly identified.”). State action that “threatens significantly to impinge upon constitutionally protected freedom,” *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960)—here, the freedom to associate privately—itsself causes constitutional injury. Pet. 16-25.

The Ninth Circuit found this Court’s foundational free-association cases “all inapposite,” on the ground that they were “as-applied challenges involving the NAACP” “at a time when many NAACP members experienced violence or serious threats of violence based on their membership in that organization.” Pet. App. 34 & n.3. The Ninth Circuit thus confined those cases to their historical context, construing them to hold that “compelled disclosure” of associational information infringes the First Amendment only “when that disclosure leads to private discrimination against those whose identities may be disclosed.” Pet. App. 34-35. Because IFS did not allege or produce evidence that its donors would “experience threats, harassment, or other potentially chilling conduct,” the Ninth Circuit held that California’s forced disclosure of private associational information did not cause IFS any First Amendment injury. Pet. App. 41-42.

Whether the Ninth Circuit was right to relegate this Court’s foundational free-association cases to their facts—and thus to require a showing of secondary harms flowing from compelled disclosure of donor identities to state a First Amendment claim—is a self-evidently important question, and one on which the circuits are divided. *See* Pet. 24-27. The decision below holds that compelled disclosure alone is of no constitutional moment, without some additional, separate threatened injury to those with whom IFS wishes to associate and communicate. That holding adds insult to injury: surely the First

Amendment does not perversely require speakers to disclose their reasons for wanting privacy as a precondition for asserting the right to privacy. Privacy is the default setting under the First Amendment; it need not be justified to the government. This case alone cleanly presents this pure question of law, in the uncomplicated context of a motion to dismiss.

In contrast, APF and TMLC present both facial and as-applied challenges in their petitions. Their as-applied challenges rest on evidence that the compelled-disclosure requirement will deter their donors and subject their donors to harassment and reprisals, which the Ninth Circuit deemed necessary to prove an as-applied First Amendment compelled-disclosure violation. Pet. App. 41-42, 45. The Solicitor General focuses its brief in support of certiorari on the as-applied challenges. *See* U.S. Br. 7 (“compelled disclosures that carry a reasonable probability of harassment, reprisals, and similar harms are subject to exacting scrutiny”).

If the Court rules in those petitioners’ favor on their as-applied challenges, the Court will have no need to address the broader question raised by this petition: *i.e.*, whether compelled disclosure of donor lists constitutes a First Amendment injury, whether or not accompanied by a probability of harassment or reprisals as applied to the facts of a specific case. The Court necessarily would reach that question in this case. To ensure the fullest possible consideration of the questions presented by these cases, the Court should grant certiorari in all three cases. And it should grant certiorari on both questions presented by IFS’s petition, which address (1) whether compelled disclosure itself constitutes constitutional injury, and (2) if so, what level of scrutiny governs IFS’s claim.

3. For the same reasons, the Court should not hold this case—the progenitor to the Ninth Circuit’s *APF* decision—pending a decision on the merits in *APF* and *TMLC*. Even were the Court to resolve in those cases the second question presented by IFS’s petition—the appropriate level of scrutiny to be applied to compelled-disclosure claims—there remains at least the possibility that it will not resolve the first question presented here. Only a grant of certiorari in all three cases will ensure that this Court has before it a case that requires a decision on that critical threshold question.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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